

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH.

CP No.1790/I&BC/NCLT/MB/MAH/2017

Under Section 7 of the Insolvency and
Bankruptcy Code 2016 r.w. Rule 4 of the
Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016

In the matter of

State Bank of India

... Petitioner/Financial Creditors

V/s

Ushdev International Limited

... Respondent/Corporate Debtor

Order delivered on 14.05.2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner (s) : (1) Mr. Animesh Bismt, Advocate
(2) Mr. Anush Mathkar, Advocate
(3) Mis. Surbhi Pareek, Advocate

For the Respondent (s) : Mr. Shyam Kapadia, Advocate a/w. Mr. Cheryl Fernandez
i/b AZB & Partners

Per : M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition has been filed under Section 7 of the I&B Code, 2016 (Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) on 20.12.2017 by **State Bank of India** in the capacity of 'Financial Creditor' against the 'Corporate Debtor' **M/s. Ushdev International Ltd.**, New Parleela House, 6th Floormint Road, Mumbai-400001, Maharashtra, India pertaining to a debt-in-default of ₹859,10,05,425/-, the bifurcation existed as on 16/10.2017, reproduced from the Form 1 Part IV (2) was as under :-

1	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	1. In respect of Cash Credit Facility, the amount in default us INR 853,42,35,251.77 (Rupees Eight Hundred Fifty Three Crore Forty Two Lakhs Thirty Five Thousand Two Hundred Fifty One and Paise Seventy Seven) of which : a) INR 229,43,21,455.38 (Rupees Two Hundred Twenty Nine Crores Forty Three Lakhs Twenty One Thousand Four Hundred Fifty Five and Paise Thirty Eight) related to SBI.



	<p><i>The initial date of default with respect to SBI CC Facility is July 5, 2016.</i></p> <p>b) <i>INR 163,02,92,875.11 (Rupees One Hundred Sixty Three Crore Two Lakhs Ninety Two Thousand Eight Hundred Seventy Five and Paise Eleven Only).</i></p> <p><i>The initial date of default in relation to SBI CC Facility is September 30, 2016.</i></p> <p>c) <i>INR 157,89,21,443.35 (Rupees One Hundred Fifty Seven Crore Eighty Nine Lakhs Twenty One Thousand Four Hundred Forty Three and Paise Thirty Five Only).</i></p> <p><i>The initial date of default in relation to SBI CC Facility is September 7, 2016.</i></p> <p>d) <i>INR 145,90,44,668.69 (One Hundred Forty Five Crores Ninety Lakhs Forty Four Thousand Six Hundred sixty Eight and Paise Sixty Nine Only).</i></p> <p><i>The initial date of default in relation to SBI CC Facility is October 20, 2016.</i></p> <p>e) <i>INR 157,16,54,809.24 (Rupees One Hundred Fifty Seven Crore Sixteen Lakhs Fifty Four Thousand Eight Hundred Nine and Paise Twenty Four Only).</i></p> <p><i>The initial date of default in relation to SBI CC Facility is July 13, 2016.</i></p> <p>2. <i>In respect of Term Loan Facility, the total amount in default is INR 5,67,70,173.77 (Rupees Five Crore Sixty Seven Lakhs Seventy Thousand One Hundred Seventy Three and Paise Seventy Seven Only).</i></p> <p><i>The initial date of default in relation to SBI Term Loan Facility is December 1, 2016.</i></p>
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2. **BUSINESS OF THE CORPORATE DEBTOR/ RESPONDENT** : - Facts of the case have revealed that the Corporate Debtor is a Trader of Ferrous and Non-Ferrous metals, in private sector in India and outside India. It is informed that owing to the globalised nature of the business; the company had entered into various contracts across the globe. The claim of the Debtor Company is that it's returns and Revenue generation were one of the largest traders in India, such as Metals and Minerals Trading Corporation of India or MSTC Ltd etc. It is also informed that being the largest forex trader in India, it is recognised by Foreign Exchange Dealers Association of India. One more fact is informed that the substantial forex business is routed through State Bank of India and yielded a return of around 24% during the year ending March 2015. The debtor company had good financial standing always in the past in ferrous and non-ferrous segment. All the banks, including the Petitioner Bank, had always supported even the customers of the Respondent Company by sanctioning substantial amount of finances. The business of the company is based upon granting credit facilities to

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its customers after entering into a transaction. The Respondent had supplied materials to its customers on credit basis and the banks have also extended credit facility not only to the Debtor Company but also extended credit facilities to its customers. **The respondent had always enjoyed working capital limit with its bankers for past over 20 years.** There was no instances in the past where the Debtor Company had delayed in servicing of the debts to any of the Banks. The State Bank of India is the lead bank of the Consortium and the financial need of the respondent company was always met by SBI and the Consortium.

3. The explanation about the reason of default in repayment of the huge outstanding debt is that during past two years the commodity market in general and the metal market in particular across the world have faced downturn in prices. Due to global meltdown of the business all the companies, doing such type of business, have been affected adversely. It is contended that in spite of adverse market conditions the debtor company had de-risked business model and thus continued the business in last one year to meet all business commitments including the servicing of the loan facilities availed form the Banks. However later on the metal **market had collapsed.** Unfortunately, The Debtor Company had suffered damages, as well as huge losses, in domestic and export market. Payments have been delayed by the customers. In turn, the terms of repayment of instalments of loans have badly effected. At that juncture the Respondent had either to stop conducting the business, but the huge payment was outstanding in the market, or to continue supplying with the hope of recovery is due course of business. The Debtor Company had made several offers to the JLF for revival of the business so that the loans could be serviced In due course of time. All these points have been vehemently pleaded before me.

4. **DESCRIPTION OF LOANS & DEFAULTS :-** A voluminous compilation has been filed by the Petitioner. The compilation consists various sanctioned letters, documents describing nature of mortgage, particulars of security and the evidence of creating charge over the immovable properties by the Corporate Debtor and Mortgagor in favour of the Lenders. The sanctions given time to time and the facilities availed, mainly **"Working Capital facility" and "Term Loan facility";** in brief are described as under (reproduced from Part IV (1) of Form 1) :-



1. TOTAL AMOUNT OF DEBT GRANTED	(a) The Financial Creditor (including the Associate Banks) had granted certain working capital facilities to the Corporate Debtor on the terms and conditions set out in the Eighth Supplemental Working Capital Consortium Agreement dated June 1, 2015 ("WC Agreement") read together with the following :-
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- (i) SBI Sanction Letter dated September 15, 2014 bearing reference number IFBM/2014-15/AMT-III/MR/2660 and Sanction Letter dated May 12, 2015 bearing reference number IFBM/2015-16/AMT-III/MR/172 ("SBI Sanction Letters")
- (ii) SBBJ Sanction Letter dated December 2, 2014 bearing reference number CNW/AMT-1/3134 ("SBBJ Sanction Letters")
- (iii) SBM Sanction Letter dated December 10, 2014 bearing reference number AMT-3/UIL/renewal/2014-15/005 ("SBM Sanction Letters")
- (iv) SBT Sanction Letter dated November 15, 2014 bearing reference number CNW/CFB/WMTIII/191 ("SBT Sanction Letter") read together the WC Agreement;
- (v) SBH Sanction Letter dated March 14, 2015 bearing reference number F/ADV/AMT-III/2927 ("SBH Sanction Letter", Together with SBI Sanction letter, SBBJ Sanction Letter, SBM Sanction Letter and SBT Sanction Letter referred to as "WC Sanction Letters").
- (b) SBT had granted the Corporate Debtor term loan facilities on the terms and conditions set out in the Sanction Letter dated November 25, 2010 bearing reference number CNW/WMTIII/1793 ("SBT Sanction Letter-II") read together with the Term Loan Agreement dated December 6, 2010 ("Term Loan Agreement").

Copies of the WC Agreement, SBI Sanction Letters, SBBJ Sanction Letter, SBM Sanction Letter, SBT Sanction Letter, SBH Sanction Letter, SBT Sanction Letter-II and Term Loan Agreement have been annexed hereto as Exhibit - "4".

The Financial Creditor's exposure to the Corporate Debtor is as follows :

Working Capital Facilities

The credit facilities granted under the WC Agreement comprise of the following :

- (a) Cash credit aggregating to INR 177,50,00,000 (Rupees One Hundred Seventy Seven Crores Fifty Lakhs Only) details of which are set out in the First Schedule of the WC Agreement and WC Sanction Letters ("Cash Credit Facility") of which :
- (i) INR 45,00,00,000 (Rupees Forty Five Crores) related to SBI, with a further sub-limit for EPC/PSC/EBD/EBN aggregating to INR 45,00,00,000 (Rupees Forty Five Crores) ("SBI CC Facility");
- (ii) INR 37,50,00,000 (Rupees Thirty Seven Crores Fifty Lakhs Only) relates to SBBJ, with a further sub-limit for EPC/PSC/PCFC/EBR of INR 37,50,00,000 (Rupees Thirty Seven Crores Fifty Lakhs Only) ("SBBJ CC Facility");
- (iii) INR 35,00,00,000 (Rupees Thirty Five Crores Only) relates to SBM, with a further sub-limit for PC/PCFC/DBPF/UBD of INR 35,00,00,000 (Rupees Thirty Five Crores Only) ("SBM CC Facility");
- (iv) INR 30,00,00,000 (Rupees Thirty Crores Only) relates to SBT, with a further sub-limit for EPC/PCFC of INR 35,00,00,000 (Rupees Thirty Five Crores Only) ("SBT CC Facility");
- (v) INR 35,00,00,000 (Rupees Thirty Five Crores Only) relates to SBH ("SBH CC Facility").
- (b) Letter of credit facility aggregating to INR 685,00,00,000 (Rupees Six Hundred Eighty Five Crores Only) ("LC Facility") details of which are set out in the First Schedule of the WC Agreement and WC Sanction Letter of which :
- (i) INR 180,00,00,000 (Rupees One Hundred Eighty Crores) relates to SBI, with a sub-limit for bank guarantee ("BG") of INR 40,00,00,000 (Rupees Forty Crores Only), LOC/LOU to avail buyer's credit of INR 180,00,00,000 (Rupees One Hundred Eighty Crores Only) and Merchanting LC of INR 18,00,00,000 (Rupees Eighteen Crores Only) ("SBI LC Facility");
- (ii) INR 150,00,00,000 (Rupees One Hundred Fifty Crores Only) relates to SBBJ with a further sub-limit for BG of INR 20,00,00,000 (Rupees Twenty Crores Only) and buyer's credit / supplier's credit of INR



	<p>150,00,00,000 (Rupees One Hundred Fifty Crores Only) ("SBBJ LC Facility");</p> <p>(iii) INR 115,00,00,000 (Rupees One Hundred Fifteen Crores Only) relates to SBM with a further sub-limit for BG of INR 10,00,00,000 (Rupees Ten Crores Only) and Merchanting LC of INR 10,00,00,000 (Rupees Ten Crores Only) ("SBM LC Facility");</p> <p>(iv) INR 120,00,00,000 (Rupees One Hundred Twenty Crores) relates to SBT ("SBT LC Facility");</p> <p>(v) INR 120,00,00,000 (Rupees One Hundred Twenty Crores) relates to SBH, with a further sub-limit for BG of INR 12,00,00,000 (Rupees Twelve Crores) ("SBH LC Facility");</p> <p>(c) Forward contract limit aggregating to INR 53,41,00,000 (Rupees Fifty Three Forty One Lakhs Only) ("Forward Contract Facility") details of which are set out in the First Schedule of WC Agreement and WC Sanction Letters of which:</p> <p>(i) INR 31,85,00,000 (Rupees Thirty One Crores Eighty Five Lakhs Only) relates to SBI ("SBI FC Facility");</p> <p>(ii) INR 8,36,00,000 (Rupees Eight Crores Thirty Six Lakhs Only) relates to SBBJ ("SBBJ FC Facility");</p> <p>(iii) INR 9,20,00,000 (Rupees Nine Crores Twenty Lakhs Only) relates to SBM ("SBM FC Facility");</p> <p>(iv) INR 4,00,00,000 (Rupees Four Crores Only) relates to SBT ("SBT FC Facility").</p> <p>The above mentioned working capital facilities granted to the Corporate Debtor by the Financial Creditor are collectively referred to as the "Working Capital Facilities".</p> <p><u>Term Loan Facility</u></p> <p>Pursuant to the Term Loan Agreement entered between the Corporate Debtor and SBT, the Corporate Debtor was provided with rupee term loan of INR 36,50,00,000 (Rupee Thirty Six Crores Fifty Lakhs Only) ("SBT Term Loan Facility").</p> <p>Working Capital Facilities and the Term Loan Facility are collectively referred to as "Facilities".</p>
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5. Placed on record a Consortium Agreement, titled as Eight Supplemental Working Capital '**Consortium Agreement**' dated 01.06.2015, wherein the Borrower M/s. Ushdev International Ltd. is party of the "First Part" and on the other hand, the following banks are party of the "Second Part" signed in the capacity of SBI Consortium or Lenders:-

- 1) State Bank of India
- 2) Indian Overseas Bank
- 3) Oriental bank of Commerce
- 4) ICICI Bank Limited
- 5) IDBI Bank Limited
- 6) State Bank of Bikaner & Jaipur
- 7) State Bank of Mysore
- 8) State Bank of Travancore
- 9) Dena Bank
- 10) UCO Bank
- 11) Central Bank of India
- 12) Andhra Bank



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- 13) Bank of Baroda
 14) Bank of Maharashtra
 15) State Bank of Hyderabad

5.1 In the said agreement there was a party as "Third Part" i.e. SBICAP Trusty Company Ltd. signed in the capacity as Security Trustee acting on behalf of and for the benefit of the aforementioned Banks. In the said Consortium Agreement there was a reference, in detail, about the various Agreements executed in the past and also references of several Supplemental Consortium Agreements. It is worth to make a remark before proceeding further that inspite of failure on the part of the Debtor to clear the outstanding debt, at the request of the Borrower, some of the member- banks of the Reconstituted Consortium have not only renewed but also enhanced the Working Capital facility by granting additional loans which resulted into enhancement of limit to ₹100 crores on one occasion. This was not the one occasion but in the said Consortium Agreement several such instances have been narrated. For a ready reference and to demonstrate the manner in which loans have been sanctioned Para 14 of the said Agreement is reproduced below :-

"14. Thereafter at the request of the Borrower, some of the members of Fourth Reconstituted Consortium viz. DB and UCO renewed/enhanced/revise their working capital facilities by granting to the Borrower the additional working capital facilities aggregating to Rs.39.00 Crores (Rupees Thirty Nine Crores only) thereby enhancing the Fourth Reconstituted Consortium's credit facilities to the Borrower from Rs.1425.20 Crores to 1464.20 Crores (Rupees One Thousand Four Hundred Sixty Four Crores and Twenty Lakhs Only) on the terms and conditions contained in their respective sanction/arrangement letters and also as contained in the Fourth Supplemental Working Capital Consortium Agreement dated 2nd May 2013 entered into by and between the Borrower, the Fourth Reconstituted Consortium and the Security Trustee (hereinafter referred to as "the Fourth Supplemental Consortium Agreement")"

5.2 Further, on the same lines the loan facilities were enhanced and extended as is evidence from Para 23 of that Agreement, reproduced for reference :-

"23. Further, at the request of the Borrower, some of the members of the Seventh Reconstituted Consortium renewed/enhanced/revise their working capital facilities as under:

- (i) IOB, AB, OBC, ICICI, DB, UCO and SBT renewed their credit facilities sanctioned to the Borrower with no enhancement to the existing sanctioned limits;
- (ii) SBI, SBM, SBBJ, CBoI, and IDBI enhanced their working capital facilities by granted to the Borrower additional working capital facilities aggregating to Rs.200.83 Crores (fund based facility by Rs.40.00 Crores and non-fund based facility by Rs.160.83 Crores).

thereby Seventh Reconstituted Consortium granted additional working capital facilities aggregating to Rs. 350.83 Crores (Rupees Three Hundred Fifty Crores and Eighty Three Lakhs only), thereby enhancing the Seventh Reconstituted Consortium's credit facilities sanctioned to the Borrower from Rs. 2049.58 Crores to Rs. 2404.41 (Rupees Two Thousand Four Hundred and Four Crores and Forty One Lakhs Only) (hereinafter referred to as the "Existing Working Capital Facilities") on the terms and conditions contained in their respective sanction/arrangement letters and also as contained in the Seventh Supplemental Working Capital Consortium Agreement dated 22nd January 2015 entered into by and between the Borrower, Seventh Reconstituted Consortium and the Security Trustee (hereinafter referred to as "the Seventh Supplemental Consortium Agreement"), on the terms and conditions contained therein."

5.3 As far as the loans granted and disbursed by the Petitioner i.e. State Bank of India is concerned, the default in tabular form to give a bird's eye view is summarised as under :-

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TOTAL AMOUNT OF DEFAULT AND NUMBER OF DAYS IN DEFAULT**(A) Cash Credit Facility (as on October 16, 2017)***

Sr. No.	Facility	Total Overdue in crores (INR)				Initial Date of Default	Days of Default
		Principal Overdue**	Interest Overdue	Penal/Default Interest	Total Overdue		
1.	SBI CC Facility [Account No. 000003030 9723846]	194,13,96,550.03	27,52,72,441.13	7,56,52,464.22	229,43,21,455.38	05.07.2016	467
2.	SBI CC Facility [Account No. 0000006111 3474764]	143,62,31,039.73	16,15,93,056.12	4,38,14,822.03	163,02,92,875.11	30.09.2016	381
3.	SBI CC Facility [Account No. 0000006406 1141740]	138,79,68,156.29	15,26,72,594.10	3,82,80,692.96	157,89,21,443.35	07.09.2016	405
4.	SBI CC Facility [Account No. 0000006713 8867356]	129,71,61,378.73	13,02,03,364.4	3,16,79,925.26	145,90,44,668.69	20.10.2016	361
5.	SBI CC Facility [Account No. 62410663450 and 0000006242 6085185]	137,64,94,020.91	16,37,72,765.13	3,13,88,023.20	157,16,54,809.24	13.07.2016	461
	Total	744,12,51,145.69	88,35,14,220.88	27,08,15,927.97	853,42,35,251.77		

* The amount in default is calculated as on the date of issuance of the Recall Notice dated October 16, 2017. However, pursuant to the issuance of the Recall Notice, the aggregate default amount has been reduced on account of appropriation of cash margin aggregating to INR 17,66,00,000 available as security and the current outstanding amount in relation to the Cash Credit Facility is INR 853,42,35,251.77.

** The Principal overdue is inclusive of the Letters of Credit for the Financial Creditor (including Associates Banks) that have devolved and crystallized in their respective Cash Credit Account.

(B) Term Loan Facility**Total Amount of Default and Days of Default (as on October 16, 2017)***

Sr. No.	Facility	Total Overdue in crores (INR)				Initial Date of Default	Days of Default
		Principal Overdue	Interest Overdue	Penal/Default Interest	Total Overdue		
3.	SBI Term Loan Facility [Account No. 6713570249 8]	3,53,00,000	2,14,70,173.77	-	5,67,70,173.77	01.12.2016	320
	Total	3,53,00,000	2,14,70,173.77	-	5,67,70,173.77	-	-

* The amount in default is calculated as on the date of issuance of the Recall Notice dated October 6, 2017. However, pursuant to the issuance of the Recall Notice, the entire amount outstanding under the Term Loan Facility aggregating to INR 15,62,14,951 (i.e. outstanding principal amount) has become due and payable, and which amounts have not been paid by the Corporate Debtor."

6. On 16.10.2017 a "Recall Notice" was issued by SBI stated therein that the Industrial Finance Branch of Mumbai had granted several loan to the Borrower M/s. Ushdev International Ltd., and the Guarantors were, as named therein, (i) M/s. Ushdev Mercantile Pvt. Ltd. (ii) Pratik Gupta and (iii) Suman Gupta. The letter contained that the Credit Facilities had become irregular, therefore the debt was classified as Non-Performing Assets (NPA) on 02.10.2016. The letter also contained that the Borrower had acknowledged the subsistence of the liability. In the said letter it has also been mentioned that the Borrower had executed



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confirmation of balance outstanding from time to time. Despite repeated requests/ reminders the Borrower had failed to repay the dues.

7. **SUBMISSIONS OF FINANCIAL CREDITORS :-** Ld. Counsel appearing on behalf of the Petitioner has vehemently pleaded that it is a clear case of existence of undisputed 'Financial Debt'. The Borrower had not denied the existence of the Financial Debt. Rather time and again acknowledged in writing the existence of the Financial Debt. Further, it has also been pleaded that it is also a clear case where the 'Default' has also been undisputedly established. Therefore, it is urged that since the statutory requirements, as prescribed under Section 7 of the Insolvency & Bankruptcy Code, were complied with, so as to initiate Insolvency Proceedings, the Petition deserves 'Admission'.

8. **SUBMISSIONS OF CORPORATE DEBTOR :-** From the side of the Respondent-Debtor the Ld. Counsel has not raised any argument about the existence of the Debt or existence of the Default. He has raised a new issue, can be said to be interesting, that the Corporate Debtor had made attempts in the past to restructure and thereupon to settle the debt with the Consortium of Banks, therefore, without reaching to finality the filing of this Insolvency Petition is against the natural justice. According to him it is unfortunate that instead of accepting the restructuring plan offered by the Company, who had always been a good borrower in past twenty years, the Banks have opted to invoke Insolvency action. According to Ld. Representative it is not a sound and positive decision. Declaring every defaulter is not a healthy trend for the banking sector. In the present case, according to him, it was the development of only last two years when the market got crashed globally. Now the market is reviving hence the Company in the hope of revival made certain suggestion in the form of revival plans but without examining economic solution the Consortium had opted for Insolvency which is not a beneficial decision, he added. It has also been narrated that the worldwide position of the Steel Industry was in bad shape due to which the Borrower had suffered financial losses resulted into default in repayment. An Affidavit in Reply is submitted wherein narrated the attempts made by the Borrower, relevant portion is as under :-

"A. TECHNO – ECONOMIC VIABILITY STUDY

- a) *In the Joint Lenders' Forum ("JLF") meeting held on February 13, 2017, it was decided that a Techno Economic Viability ("TEV") study should be undertaken on the revival plan submitted by the Respondent, for which one of the 'Big 4' accountancy firms would be appointed. The monitoring committee, consisting of six banks viz. Bank of India (the Petitioner herein), IDBI Bank, Central bank of India, Bank of Maharashtra, Oriental Bank of Commerce and Andhra Bank ("Monitoring Committee"), which was formed at the JLF meeting held on October 4, 2016, was authorised to decide the scope of the TEV study. The JLF also decided to appoint a Concurrent Auditor at the Respondent's office. The minutes of meeting dated October 4, 2016 and February 13, 2017 are annexed hereto as Exhibit "A" and Exhibit "B".*

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- b) *The meeting of the Monitoring Committee held on 10th March 2017 and 15th March 2017 were called for finalizing the agency/firm for conducting the TEV study. E&Y informed that they will be unable to participate in the TEV study due to certain internal constraints. The representatives of Deloitte informed that they would also be checking the realisability of debtors on a test-check basis, however, the Monitoring Committee insisted that all the receivables in excess of Rs. 1 crore should be certified. Since this involved changing the estimated timelines for completion of the TEV, Deloitte informed that they would revert at a later date. At the meeting held on March 15, 2017, Deloitte and PWC made presentations before the Monitoring Committee. The minutes of meeting dated March 10, 2017 and March 15, 2017 are annexed hereto as Exhibit "C" and Exhibit "D".*
- c) *Further, in the JLF meeting held on April 25, 2017, it was inter alia agreed that the TEV study should be undertaken on the revival plan submitted by the Respondent. Accordingly, it was decided that the Monitoring Committee should meet at the earliest to finalise the scope and agency for earliest completion of the TEV study. The minutes of meeting dated April 25, 2017 is annexed hereto as Exhibit "E".*
- d) *The request of the Respondent along with other matters such as finalizing the agency and scope for the TEV study was discussed at the Monitoring Committee meeting held on May 6, 2017. As it was decided in the JLF meeting of April 25, 2017 that the Monitoring Committee should also explore getting the TEV study done from agencies such as M/s. Dun and Bradstreet ("D&B"), D&B was also called for the meeting. After the presentation from the agencies it was decided that the Monitoring Committee would finalize the agency and scope at the earliest. I crave leave to refer to and rely upon the minutes of meeting dated May 6, 2017.*
- e) *In the subsequent JLF meeting held on June 8, 2017, in spite of the Respondent's requests to initiate and complete the TEV study at the earliest to enable it to proceed with a long term revival plan, it was decided by the members of the consortium that an Economic Viability instead of TEV study will be taken up and that too only after the infusion of funds of INR 100 crores by the promoter of the Respondent, which was contrary to the previous undertaking between the Respondent and the Petitioner when no such pre-condition was stipulated. In any event, by this time the promoter had already infused part of the funds for recommencement of the operations of the company. The minutes of meeting dated June 8, 2017 is annexed hereto as Exhibit "F".*
- f) *It is submitted that the Respondent had constantly pursued the JLF to conduct the TEV study. The Monitoring Committee was handed over the responsibility to finalise the scope and agency for the TEV study. However, the Monitoring Committee, where the Petitioner is also a member, did not act as per the directions of the JLF to conduct the TEV study.*
- g) *Finalising the scope and agency for the TEV study would enable the Respondent to present a restructuring plan to the JLF and in turn enable the Respondent to repay the debts owed to the Petitioner. The Respondent repeats and reiterates that it is committed to revive its business and its lenders and is willing to cooperate and extend necessary expertise for continuing the business of the Respondent as a going concern to achieve the same, which is also evident from the fact that the promoters have already infused around INR 13 crores to enable restart of the Operation. It was only on account of such infusion of funds by the promoter that the Respondent was able to enter into contracts with customers and suppliers.*
- h) *Since the Agency and Scope of the TEV study was never finalized by the Monitoring Committee, the Restructuring Plans submitted by the Company were not even taken up for appraisal by any of the lenders including the Petitioner, who was the lead bank of the consortium and the JLF."*

8.1 Ld. Counsel has also drawn attention on an event that the Borrower had offered "One Time Settlement" on 12.07.2017 in a meeting held between the Promoters and the Representatives of the Banks. A JLF Meeting was held on 13.07.2017 wherein it was agreed that the Corporate Debtor should submit a concrete plan of OTS. Thereafter, on 09.10.2017, the OTS Proposal along with Trust Investment Advisors Pvt. Ltd., a consultant firm, a meeting was held and the minutes of the meeting are annexed in the compilation. It is informed that meanwhile the SBI issued Recall- Notice dated 16.10.2017 (discussed supra) cancelling the facilities and recalling the entire outstanding amount of ₹788,90,74,884/- as on August 31, 2017, together with accrued and unrealized



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interest of ₹88,42,26,910/-. On 21.11.2017 a letter was issued for OTS and in the said letter it was intimated as under :-

"We understand from our meeting with Bank that ₹284.63 crores provided as margin money for LCs and as offered to the banks as collateral security has been already appropriated by the banks under bankers' general lien. Accordingly, after considering the waiver of the penalties/penal interest which we had earlier requested and adjustment of the aforesaid deposits against our dues and our outstanding correspondingly reduced."

8.2 In the said letter the Debtor had narrated few more fact that a huge recovery of "Trade Receivables" are pending and only the Debtor Company is in a position to recover from the market if time be granted. The relevant portion of the letter is worth reproduction :-

"Recovery of Trade Receivables : We have examined the top 34 debtors which constitute over 96% of the debtors of the Company and the prospects of their recoveries and comment as under :

- a. **Debtors which are currently under NCLT or are NPA's (Rs. 506.40 crores).** These include Miglani Grop, Topworth Grop, Gupta Coal, Windworld, etc. The Company/Promoters had over 24 years relationship with Miglani Group, over 19 years with Topworth Group, over 20 years with Windworld and over 5 years with Gupta coal. However, the overall economic downturn has resulted in these accounts turning NPAs.
- b. **Debtors where legal suits have been initiated domestically and internationally (Rs. 1181 crores).** WE have initiated legal action against such companies where there are no disputes and these entities have confirmed the balances due to the company. As the legal cases in India normally take around 8-10 years for the final verdict, the prospects of recovery through a civil suit does not seem immediate.
- c. **Debtor who have lodged counter-claims/contractual dispute (Rs. 1047.67 crores) :** The Company normally enters into long term contracts for supply of materials with its customers, which has also been acknowledged in the assessment note for renewal/sanction of working capital limits of the company. The Company has been transacting with these companies over several years and they have acknowledged all the debts and have advised that if the company revives the contractual obligation so to supply the contracted materials, they would release payments and ensure that the total outstanding level does not increase. However, since such revival is not possible, we are unsure how much recovery we can make through persuasion. Only recourse now looks like going legal which would normally take around 8-10 years for the final verdict and hence the prospects of recovery through a civil suit does not seem immediate.
- d. **Other Debtors (excluding those specially towards Gunvor) (Rs. 327.51 crores) :** These debtors have been asking for extended time of over 5-7 years towards repayments due to present poor market conditions and limited liquidity."

8.3 According to the respondent it was persisted with the bank authorities to grant elongated working capital cycle to cover up the delay in receiving the payments from the customers. Those proposals would result into substantial recovery of Debt and favours the Banks. It is pleaded, instead the Bank had filed this Insolvency petition which may cause a heavy hair-cut to Banks. To demonstrate the bonafide of the Debtor Company has voluntarily suggested for the audit of the stock as his evident from the following facts, reproduced from the reply :-

"In the meantime, the Stock Audit was completed and the auditor submitted its report dated march 16, 2017 to the Petitioner. It confirmed that confirmations from debtors both domestic and international have been received in excess of 90% of what was stated. Further, the genuineness of the transactions with the Debtors was also certified by them. Similarly, It is understood that even D&B had received confirmations from debtors in excess of 80% of those stated. Copy of the Stock Audit report dated March, 16, 2017 is annexed hereto as Exhibit "KK". The D & B Report was never shared with the Respondent for reasons best known to the Petitioner."



8.4 All the efforts of the Debtor Company have been elaborately described in its reply to demonstrate that the Petitioner is surprised to receive Insolvency Petition of the Bank while the process of restructuring was under discussion with the JLF. One more point has been pleaded that this is not a case where an allegation of siphoning of the funds has been raised by any authority. All the borrowed money had been precisely utilised only for the purposes of the business after due diligence. It was unfortunate for the Debtor Company that business crashed globally resulted into losses and bad recovery of Trade Receivable. The Debtor Company in the reply has thus finally concluded as under :-

"I submit that the above clearly demonstrates the *bona fides* of the Respondent. The above facts also demonstrate that the Petitioner herein had not recognised the timely financial needs or the flexibility required for smooth operations of the Respondent, which adversely and gravely affected the business of the Respondent. I submit that there is a strong likelihood and capability of revival of the Respondent pursuant to a viable restructuring plan. I submit that the Respondent has the necessary expertise in carrying on the business and is willing to co-operate and lend its expertise to revive and restructure the Respondent for continuing the business of the Respondent as a going concern. The Respondent is committed to revive its business and support in that regard, to ultimately resolve the debt of the Respondent and to satisfy the dues of its creditors. In any event, the Respondent and the management of the Respondent will provide all necessary assistance and cooperation as may be required by the interim resolution professional and the resolution professional, as the case may be."

9. **REJOINDER :-** In rejoinder argument an order of the Hon'ble Bombay High is placed on record namely Jayaswal Neco Industries Limited Vs. (1) Reserve Bank of India, (2) State Bank of India etc. (Writ Petition (Lodging) No.56/2018 Order date 05.03.2018) for the purpose that in that case a Writ was filed by the Corporate Debtor on the ground that if Restructuring proposal is pending or the One Time Proposal is not denied, then it is against the natural justice to move Insolvency. However, that Writ was rejected and the Hon'ble court had not intervened in the Insolvency proceedings. Following paragraph is reproduced, to look in to the nature of controversy, from Hon'ble High Court Judgment :-

"The policy framed earlier by the RBI, in respect of the resolution of stressed assets, has been completely revised. It is the contention of the Petitioner that since the MRA has been implemented, the revised policy guidelines dated 12 February 2018, would not apply. The contentions raised by the Petitioners are devoid of substance. All the three conditionalities prescribed by the RBI have not been fulfilled by the Petitioners, those are (i) the required credit opinions (ICE) for the resolution plans available from two CRAs. It must be noted that the CRAs appointed by the RBI, in terms of its policy has not certified residual debt of the company to be investment grade. The RBI has not accepted the credit rating by SMERA. The decision of the RBI, which is a Banking Regulatory Authority having expertise, cannot be a matter of review under the writ jurisdiction, firstly because the decision making process involves a specialized expertise and secondly, the satisfaction arrived at by the regulatory bank, need not be substituted by the opinion of the Court (ii) the MRA has admittedly been not signed by all the parties. It is the contention of the Petitioner that since the creditors more than 92% in value and more than 50% in numbers have signed the MRA, the same shall be accepted. The directives issued by the RBI prescribe that MRA shall be signed by all the parties. In the instant matter, two lending banks have admittedly not signed the MRA. In the event, any bank refuses to sign, must exit in accordance with the policy. In the instant matter, two non-signing lending banks have not exited in accordance with the procedure. The contention of petitioners that the non-signing banks have voted in favour of the CAP in the meeting of JLF, in itself does not



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amount to compliance of the directives of the RBI. (iii) the third and most important requirements relating to bringing promoter's contribution upfront and personal guarantees to be provided by the promoters, has not been complied with by the Petitioners. It is a matter of record that the Petitioner upfront contribution was only to the extent of Rs.15 Crores out of Rs.100 crores. The Petitioner did not bring in, the promoters contribution before the deadline prescribed by the RBI i.e. before 13 December 2017. The minutes of the meeting of the JLF held on 12 December 2017, clearly record that the promoter's contribution was not complete, even as late as, 12 December 2017, the conversion of Rs.42.38 crores of unsecured debt of the promoters to the equity, was only agreed as on such date and was not implemented. Thus, the Petitioner has failed to fulfill the precondition of bringing in promoter's contribution to finalize the resolution plan by 13 December 17. It is vehemently contended by the Petitioner that the restructuring package has not been implemented. It shall be noted that by virtue of Clause 24.2(i) of Circular dated 25 February 2016, all the restructuring packages will be required to be implemented in a time bound manner and within 90 days from the date of the approval. In Para 3 of the letter dated 28 August 2017 of the RBI informs that, in the event a viable resolution plan is not finalized and implemented before 13 December 2017, insolvency proceedings under the provisions of IBC may be initiated before 31 December 2017 unless already initiated. In the instant matter, on 12 December 2017, the MRA was signed by 10 out of 12 lenders for implementing the debt restructuring scheme. The remaining two lenders did not exercise their right to exit in accordance with circular dated 25 February 2016. The restructuring package has not come into operation much less, it has not been implemented."

- 9.1 The Hon'ble Court is of the view that the very object of the IBC is to protect and preserve the assets of a Debtor Company. The interest of JLF and even the execution of MRA can be taken care of if the proceedings are initiated by the Adjudicating Authority. Referring the directions of RBI, an observation is made, that the directives issued by the RBI are binding on all the Members of the JLF. Further, another observation is made that the Hon'ble High Court is aware of the fact that the RBI had withdrawn all the schemes relating to the Financial Restructuring by declaring new financial policy on 12.02.2018. After recording all these reason, the Hon'ble Court had held that the Writ Petition of the Corporate Debtor was devoid of substance, therefore, dismissed.

FINDINGS

10. In the light of the above discussion and on due perusal of the documents annexed, the Debt is to be qualified as "Financial Debt" defined under section 5(8) of Insolvency & Bankruptcy Code 2016. Number of Loan Agreements; Guarantors Agreements and Consortium Agreement have undisputedly established the existence of 'Financial Debt'. Further, Section 7 of IBC puts a pre-condition, before initiation, the existence of 'Default'. That too is not denied. Evidences such as declaration of loans as 'NPA' or issuances of 'Re-Call Notice' are the evidences confirming the 'Default'. Thus both the conditions as prescribed U/s 7 of The Code i.e. 'Financial Debt' and 'Default' are satisfied in the impugned Petition. As a result, the Financial Creditor being a lead bank (SBI) of consortium, has filed this

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Application for initiation of 'Corporate Insolvency Resolution Process' against the Corporate Debtor.

11. Since this is a Petition of "Financial Creditor", therefore, the Insolvency Process shall commence as prescribed under Section 7 of IBC 2016. The occurrence of "default" is established. Even on service of Notices, the amount in question remained unpaid by the "Financial Debtor". The Petition under consideration deserves to be "Admitted". Ordered accordingly.

12. The Petitioner has proposed the name of the **Interim Resolution Professional**, Mr. Subodh Kumar Agrawal, 1, GC Avenue, 3rd Floor, R.N-301, Kolkata-700013. Email : subodhka@yahoo.com, Registration No. IBBI/IPA-001/IP-P00087/2017-18/10183. On due consideration the appointment is hereby confirmed.

13. Since the Petition is Admitted, hence the 'Moratorium' shall commence as prescribed under section 14 of the I&B Code as under :-
 - (I) (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);
 - (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.
 - (II) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - (III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - (IV) That the order of Moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.



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(V) That the public announcement of the corporate insolvency resolution process shall be acted upon immediately as specified under section 13 of the Code.

14. Thus, this Bench hereby appoints, Mr. Subodh Kumar Agrawal as Interim Resolution Professional (IRP) to carry out the functions as mentioned under Insolvency & Bankruptcy Code. The so appointed Ld. IRP shall perform the duties as assigned under Section 18 and under section 15 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
15. The citation of the order of the Hon'ble High Court, Mumbai, since placed before this Bench, has to be taken into account and due cognizance is required. In the said cited decision, the Bank is a Financial Creditor, as is in the case of the present Petition now under consideration. In the cited decision the Corporate Debtor had taken steps for restructuring and settlement of the outstanding Financial Debt and for that purpose made a proposal before the JLF. Identically in this case, as well, the Financial Debtor had made efforts for restructuring of the debt which was undisputedly under consideration by Consortium. During the pendency of the decision on the proposal made by the Corporate Debtor, RBI had issued certain guidelines on 12.02.2018, hence, this Petition under IBC filed by the State Bank of India. It is informed that the said order of the Hon'ble High Court is challenged before Hon'ble Apex Court which is stated to be admitted for admission. It is also informed that the hearing in the said case is yet to take place before the Apex Court. The outcome of the decision of the Hon'ble Apex Court shall definitely has impact on the Petition under consideration. Otherwise also an order of the Hon'ble Apex Court is a law of the land. It is a trite position of interpretation of a precedent that a law laid down by the Hon'ble Apex Court is to apply as if it existed as on the date when a Statute came into operation i.e. since inception of a Statute the position of law ought to be as held by the Apex Court. Being fully aware of the judicial process, since in the said cited case an Appeal has been filed before Hon'ble Supreme Court, but no stay is granted, and that the Hon'ble Jurisdictional High Court has not intervened in the commencement of the IBC proceedings, this Petition can be disposed of as per applicable law. As a consequence, since a decision on identical situation had already been taken by territorial jurisdiction of Hon'ble High Court, which has not yet been stayed, therefore is in operation and to be followed by subordinate judicial authority. Applying the direction of the Hon'ble



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High Court on this Petition as well, this Adjudicating Authority has no option but to proceed with the commencement of Insolvency. In any case, since an order is yet to be pronounced on almost identical circumstance, therefore the outcome of the order of the Hon'ble Supreme Court having bearing on the Petition in hand, can be mentioned, if deem fit and if permissible under law.

16. Accordingly, this CP 1790/I & BC/NCLT/MAH/2017 stood "Admitted".
17. The Corporate Insolvency Resolution Process is commenced from the date of this order.

M.K. Shrawat

M.K.SHRAWAT
Member (Judicial)

Date : 14.05.2018
Suresh



Certified True Copy
Copy issued "free of cost"
on 17/5/2018

[Signature]

Assistant Registrar
National Company Law Tribunal Mumbai Bench