

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP(IB)No.420/7/HDB/2018
Under Section 7 of the Insolvency and Bankruptcy
Code, 2016, Read with Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority)
Rules, 2016.

In the matter of:-

Axis Bank Limited,
Trishul, 3rd Floor, Opp. Samrtheshwar Temple,
Law garden, Ellis Bridge,
Ahmedabad – 380006.

... Financial Creditor

Vs

Lanco Amrkantak Power Limited,
Plot No.4, Software Units Layout,
HITEC City, Madhapur,
Hyderabad – 500081, India.

...Corporate Debtor

Order pronounced on: 05.09.2019

**Coram: Shri. K. ANANTHA PADMANABHA SWAMY, MEMBER JUDICIAL
Dr. BINOD KUMAR SINHA, MEMBER TECHNICAL**

Parties/Counsel Present:

For the Financial Creditor:

Mr. Bishwajit Dubey, Advocate
Mr. Animesh Bisht, Advocate

For the Corporate Debtor:

Mr. S. Ravi, senior counsel along with Mr. Rajat Malhotra,
Advocate



Per: Dr.Binod Kumar Sinha, Technical Member

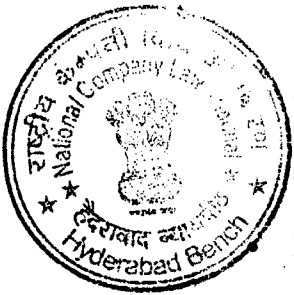
ORDER

1. The present petition is filed by 'Axis Bank Limited' (hereinafter referred to as 'Financial Creditor') under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. Lanco Amarkantak Power Limited(hereinafter referred to as 'Corporate Debtor').
2. Brief facts of the present Petition are as under:
3. The learned counsel appearing for Petitioner/Financial Creditor stated that they had granted certain term loan and working capital facilities to the Corporate Debtor. The Financial Creditor has granted (i) a term loan facility aggregating INR 500,00,00,000 with a LC facility sub-limit of INR 400,00,00,000 vide a term loan agreement dated March 25, 2011 together with an Addendum No.1 dated May 15, 2013 ("Original Facility Agreement") (ii) an additional debt aggregating to INR 260,32,00,000 and bank guarantee facility aggregating to INR 85,00,00,000 vide a facility agreement dated March 31, 2015 ("Additional Facility Agreement") (iii) a sub-debt facility aggregating to INR 81,00,00,000 vide a sub-debt facility agreement dated February 23, 2017 read with the accession deed dated April 27, 2017 ("Sub-Debt Facility Agreement"). It is clarified that the Corporate Debtor has not availed the LC facility and all amounts under the TL-2 Facility have been disbursed as a term loan.
4. It is stated that the total principal amount of debt disbursed under the aforementioned Facilities was INR 8,617,475,062.45. Pursuant to the letter of recall dated May 16, 2018, the Facilities have been fully recalled and the amount in default under the Facilities as on May 31, 2018 is INR



9,743,162,549.32. The first date of default under the Facilities which has not been cured until the date of this application is August 31, 2017.

5. The particulars of the security interest created in favour of the Financial Creditor, with respect to the Facility have been detailed in Part V of the Application (page no. 7 to 17 of Volume- I).
6. The total amount claimed to be in default by the Financial Creditor in the present Petition as on 31.05.2018 is Rs. 974,31,62,549.32/-.
7. In support of his contention, the learned counsel for the Petitioner relied on the following documents:-
 - Copies of the facility agreement dated 25.03.2011 read with addendum no.1 dated 15.05.2013 to the facility agreement dated 25.03.2011 (Original Facility Agreement) read with the facility agreement dated 31.03.2015 (Additional Facility Agreement) and the sub-debt facility agreement dated 23.02.2017 read with the accession deed dated 27.04.2017 (Sub-Debt Facility Agreement) and the signed sanction letter dated 17.04.2017.
 - Dates and details of all disbursements of the Facilities.
 - Computations of sum in default and interest thereon.
 - Copies of certificates of registration of charges.
 - Copy of the report of TransUnion CIBIL dated 29.05.2018.
 - Copies of entries in the banker's book in accordance with the Bankers Books Evidence Act, 1891.
 - Copy of recall notice executed by Axis Bank Limited dated 16.05.2018.
 - Independent Auditor's Report for the financial Year ending 31.03.2017.

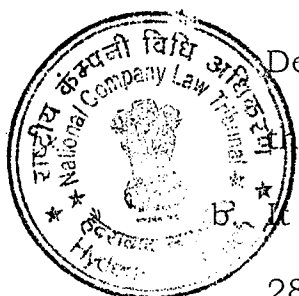


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- Copy of the status classification report of the Corporate Debtor issued by Central Repository of Information on Large Credits (CRILC Report) dated 29.05.2018.
- Copy of the balance confirmation certificate issued by the Corporate Debtor dated 30.09.2017.
- Form AA of the proposed IRP, his credentials, Affidavit and certificate of registration.

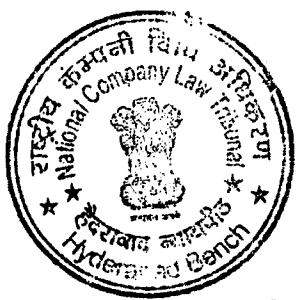
8. The learned counsel for the Corporate Debtor filed counter and written submissions inter alia stating as under:-

- a. That the present Petition does not satisfy any of the elements of Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC). Neither has the debt fallen due till date nor has any default occurred for the Code to be triggered and CIRP be initiated against the Corporate Debtor. It is further stated that, the Financial Creditor has taken recourse to recovery proceedings before Debt Recovery Tribunal -II, Delhi. Recovery being antithetical to the concept of resolution under the Code, the present application ought not to succeed.



b. It is stated that the Corporate Debtor's lenders in JLF Meeting dated 28.11.2017 decided to convert the SDR scheme of the Corporate Debtor to OSDR (Outside SDR scheme) through change in ownership of the Corporate Debtor. The OSDR scheme was set in motion by JLF meeting dated 28.11.2017 and the date of the meeting was fixed as 'Reference Date'. Consideration of all the issues viz. difficulty in commissioning the project, demobilization by EPC Contractor, no visibility on equity infusion, expected increase in project cost, the "JLF decided to effect change in ownership of the borrowing entities i.e. LAPL Outside SDR (OSDR) for resolution of the issues being faced by the company and in order to improve the economic value of the asset and the prospects for recovery of dues."

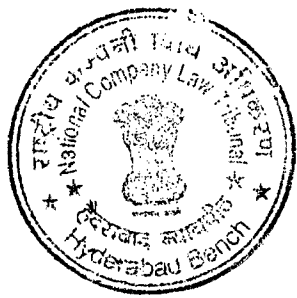
- c. It is stated that the OSDR scheme for the Corporate Debtor was adverted to by the JLF in pursuance of RBI Circulars dated 24.09.2015 and 08.06.2015. However, pending further implementation of the scheme, RBI came up with a circular dated 12.02.2018 which repealed various earlier circulars of RBI including the ones governing the OSDR mechanism (08.06.2015 and 24.09.2015) and the RBI Circular dated 05.05.2017.
- d. It is stated that the Corporate Debtor in light of RBI Circular dated 12.02.2018 being declared *ultra vires* by the Hon'ble Supreme Court in the Judgement of Dharani Sugar and Chemicals Ltd. v/s Union of India and Ors. (2019) 5 SCC 480, dated 02.04.2019, has removed the eclipse on earlier RBI Circulars dated 08.06.2015 and 24.09.2015 governing change in ownership through OSDR mechanism and the actions agreed upon and/or initiated in pursuance thereof by Corporate Debtor's lenders. The OSDR Scheme for the Corporate Debtor as set in motion by JLF Minutes dated 28.11.2017 thereby stood revived as if in continued operation despite RBI Circular of 12.02.2018.
- e. Therefore, all lenders including the Financial Creditor stood bound by the decision reached by and between the Consortium of Lenders in JLF Meeting dated 28.11.2017.
- f. Applying the law as stated hereinabove to the facts of the present case - with the eclipse cast by RBI Circular dated 12.02.2018 being removed by Dharani Sugars (supra), the approved OSDR Mechanism approved by JLF viz the Corporate Debtor continued in operation as on the date of filing of the Petition.
- g. From the above submissions, it emerged that the present application, which was preferred before this Adjudicating Authority



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on 22.06.2018, is premature as no debt was due as of 22.06.2018 for the following reasons:

- i) The repayment date for servicing the debt had been shifted to 15.07.2018 by the Financial Creditor, and hence no cause arose for either recalling the loan or filing the present petition before the date as above;
- ii) The SCOD - which stood shifted to 30.11.2017 in April 2017 - was rendered irrelevant by unanimous agreement among consortium of lenders by restructuring of the loan through OSDR Mechanism vide JLF Minutes dated 28.11.2018 (fixed as "Reference Date"). It must be noted that the loan therefore stood restructured (as opposed to being recalled) prior to initially impending SCOD (30.11.2018);
- iii) The OSDR Scheme of the Corporate Debtor was in operation and all consortium lenders including the Financial Creditor were bound by the same. The loan could not have been recalled by the Financial Creditor in the midst of restructuring. The two concepts (recall and restructuring) being antithetical are mutually exclusive of one another and the Financial Creditor having agreed to restructure the loan (JLF Minutes of 28.11.2017) was estopped in law to act otherwise.



- h. Thus, it wasn't optional for the Financial Creditor or Corporate Debtor to follow the RBI circular dated 24.09.2015 supported by JLF minute dated 28.11.2017, but mandatory to the measure of a statutorily binding force of law. Hence, to initiate the present case u/s. 7 IBC, 2016 is wholly void and unlawful.

i. DEMAND -RECALL NOTICE NOT VALID

It is stated that the Demand-recall notice dated 16.05.2019 has no bearing in the eyes of law at all. As per the letter dated 07.04.2017,

the repayment start date was extended to July 2018. Hence, there arose no cause in law at all for sending a demand-recall notice on 16.05.2018 prior to the date when the default as per the agreed to Rules begin. Further, even on an understanding of law, the Financial Creditor is estopped on recalling the debt prior to a date already agreed upon.

j. In fact the Demand-Recall notice further states that the Corporate Debtor did not achieve SCOD as on the stipulated date. The said notice is wholly misconceived as it conveniently eclipses the fact that JLF Minute dated 28.11.2017 had already set in the process of initiating OSDR mechanism and the same is binding in light of the said JLF being in pursuance of RBI circular dated 24.09.2015 and the JLF has binding value in light of RBI Circular dated 05.05.2017. That both the circulars (24.09.2015 and 05.05.2017 are in pursuance of section 21 r/w/s 35A of the RBI Act).

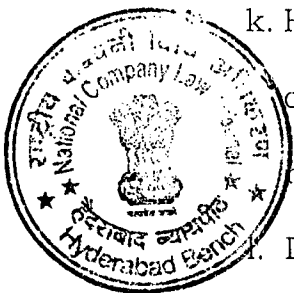
k. Hence, neither does debt become nor default can be said to have occurred during the SCOD nor as on 16.05.2018, when the demand recall notice was issued.

1. DEFAULT IN CASE OF PROJECT CONSTRUCTION

It is stated that, any default in case of a project construction can be said to have occurred only when the construction has been completed. The project, though for the purpose of brick and mortar construction is divided into 3 phases, is one whole unit for the purpose of the debt. In fact, the debt is sanctioned against the whole project and not in phases.

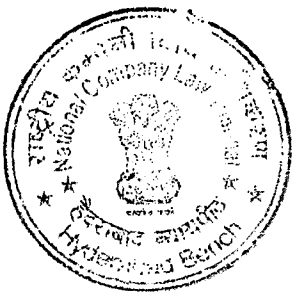
m. DEBT AMOUNT SERVICED

It is stated that in spite of several roadblocks faced by the corporate Debtor due to macro-economic factors of the power sector and being a front runner as an Independent Power Producer (IPP), Phase - I of



the project was completed successfully and commercial operations commenced. It is also pertinent to mention that revenue out of Phase- I is being received and utilised towards repayment of the Phase-I lenders. INR 588 crores have been repaid during the last 1 year.

- n. It is stated that in light of the regular payments made by the Corporate Debtor to its lenders of Phase - I, the corporate insolvency resolution process so initiated will adversely affect the rights of the Phase - I lenders of the Corporate Debtor and will not be in public interest. The entire business of the Corporate Debtor shall be put in jeopardy by one Financial Creditor and will be detrimental to all other lenders who are regularly being serviced.
- o. It is stated that the objective of IBC is to maximise the value of asset and the same is not to be used to guise a recovery proceeding. In the instant case, the Financial Creditor having initiated recovery proceedings before the DRT - II, Delhi thereby rendering otiose its present application before this Hon'ble Tribunal. The Hon'ble Supreme Court in **Transmission Corporation of Andhra Pradesh Limited Vs Equipment Conductors And Cables Limited (CA No.9597/2018)** has highlighted the fact that proceedings under IBC cannot be used to disguise recovery proceedings. The intent of the Financial Creditor being to seek recovery in guise of resolution, the present application cannot be permitted to succeed.
- p. **FORCE MAJEURE EVENTS THAT HINDERED THE PROGRESS OF THE PROJECT**
 - i. The Corporate Debtor stated that certain force majeure events which were outside the control of the Corporate Debtor were responsible for hindering the progress of the project.



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- ii. The facts that were responsible include land clearance issues such as delay in clearances. Further factors include delay in reengineering of packages, change in mega power policy, etc.
- q. It is pertinent to mention that in the JLF minutes of 18.07.2017, it is clearly stated that "all the consortium members present in the meeting informed that the loan accounts of LAPL is standard asset as on 30.06.2017 in their books". Further, the said accounts of the Corporate Debtor continued to remain under the category "Standard" even during November 2017 i.e., towards the end and on which basis the OSDR was approved and set in motion. Therefore, it is pertinent to mention that the loan accounts of Corporate Debtor was classified as the 'standard asset' till the end of 2017. Further, by setting in motion the OSDR scheme for the corporate Debtor on 28.11.2017, the account of the Corporate Debtor continued to be classified as 'Standard' by virtue of RBI Circular dated 24.09.2015 read with earlier RBI Circular dated 08.06.2015.
- r. It is stated that, the Financial Creditor chose to ignore and not to place on record, the letter dated 17.04.2017 confirming deferment of repayment start date to 15.07.2018(Pages 877 – 896 of List of Documents). Thus, the repayment start date having been deferred and the project construction not complete, there arises no case for default at all. Ignoring this vital document could have changed the course of the present Application, if not for the Corporate Debtor, who brought out the same in a separate List of Documents. In fact, this would show that the Recall notice dated 16.05.2018 was premature and the entire Application has no standing in law at all.

9. Reiterating above, the counsel for the Respondent prayed to dismiss the Application.



10. The present Petition was filed on 22.06.2018 and after scrutiny by the Registry, the matter was first listed on 09.08.2018 and the Petitioner was directed to issue notice of date of hearing to the respondent and matter was posted to 05.09.2018.
11. During the hearing held on 05.09.2018, the counsel for the Respondent filed vakalat and prayed time for filing counter and the matter was adjourned to 25.09.2018.
12. During the hearing held on 25.09.2018, the Respondent filed a memo referring to the order of the Hon'ble Supreme Court in TP (C) No.'s 1283-1288/2018, Writ Petition (C) No.1086/2018. For reply submissions, matter was adjourned upon request to various dates i.e., 08.10.2018, 26.10.2018,
13. During the hearing held on 26.10.2018, matter was heard in relation to the objection raised for hearing main CP in view of the order passed by Hon'ble Supreme Court and the matter was reserved for orders.
14. During the hearing held on 18.12.2018, the matter was re-opened for clarification with regard to the matter pending before the Hon'ble Supreme Court and at request of both sides, matter was adjourned to 25.01.2019.
15. During the hearing held on 25.01.2019, counsel for the Corporate Debtor stated that the Respondent is the member of IPPAI Association who is a party in the proceedings before Hon'ble Supreme Court, wherein status-quo orders are pending. In view of the submissions and stage of the proceedings before the Hon'ble Supreme Court, matter was adjourned to 20.02.2019, 12.03.2019, 25.03.2019, 10.04.2019.
16. During the hearing held on 10.04.2019, the counsel for the Petitioner filed an affidavit and counsel for the Respondent prayed time to give reply in relation to the affidavit filed by the Financial Creditor in relation



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to the Judgement of Hon'ble Supreme Court in the matter of Dharani Sugars and the matter was adjourned to 15.04.2019.

17. During the hearing held on 15.04.2019, submissions in relation to the affidavit dated 09.04.2019 were heard and the matter was adjourned for filing written submissions to 25.04.2019 and further to 14.05.2019 and matter was reserved for orders.

18. During the hearing held on 17.07.2019, the orders were pronounced in open court regarding applicability of RBI circular dated 12.02.2018 to the present case and it was held that the said circular of RBI was not applicable in the present case and parties were directed to proceed with the matter and make submissions. The matter was adjourned to 24.07.2019.

19. During the hearing held on 24.07.2019, counsel for the respondent requested time for filing counter and at request, time was enlarged. The matter was adjourned to 06.08.2019.

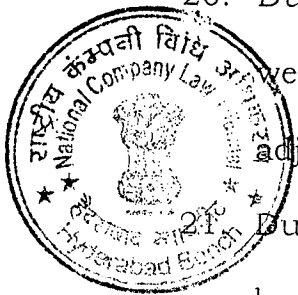
20. During the hearing held on 06.08.2019, submissions from both sides were heard extensively and for filing written submissions matter was adjourned to 20.08.2019.

During the hearing held on 20.08.2019, written submissions were filed by both parties and the matter was reserved for orders.

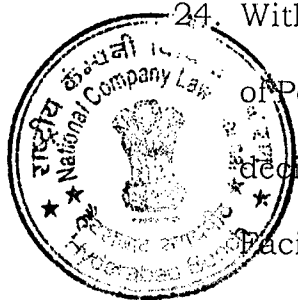
22. Heard both the sides and perused the records.

23. It is the case of the Financial Creditor that it provided Loan facilities, Fund Based Limit (OCC) and Bank Guarantee facilities to the Corporate Debtor for which the Corporate Debtor was liable to repay and has defaulted in repayment of the same. The Corporate Debtor in its counter inter-alia has raised the following objections:

- (i) That the Financial Creditor has filed this Petition without referring to the unanimous decision taken by the Joint Lenders Forum on 28.11.2017.



- (ii) That, since the RBI circular dated 12.02.2018 was set aside by the Hon'ble Supreme Court of India, the debt restructuring made on the basis of earlier circulars dated 05.05.2017, 27.09.2015 and 08.06.2015 issued by the RBI has been revived. The guidelines in these circulars were all mandatory and since the Financial Creditor was a part of the JLF of the Corporate Debtor, it is also bound by the restructuring circulars and the decision to allow the Corporate Debtor to join the OSDR mechanism. It is submitted by the Corporate Debtor that under the RBI restructuring circulars all the JLF members lose their identity and therefore, the Financial Creditor could not have acted independently and could not have filed this Company Petition.
- (iii) That, vide its letter dated 17.04.2017, the Financial Creditor had agreed to extend the repayment date to begin from 15.07.2018. Therefore, this Company Petition which was filed on 22.06.2018 has been prematurely filed and has no bearing in law.



24. With regard to the contention of the Corporate Debtor, regarding filing of Petition by the Financial Creditor without referring to the unanimous decision of CoC, it is pertinent to note here that though the Financial Facilities were made available by the Consortium of Banks, Section 7 of IBC, 2016 provides for independent right to every Financial Creditor either by itself or jointly to file an Application for initiation of CIRP against the Corporate Debtor. Thus the said contention of Corporate Debtor is not maintainable.
25. With regard to the contention of the Corporate Debtor based on the premise that the RBI circulars having a mandatory effect on the members of the JLF will override the provisions of IB Code, it is appropriate here to refer to Section 238 of the Code, which reads as under:-

Adopt

“Provisions of this Code to override other laws. –

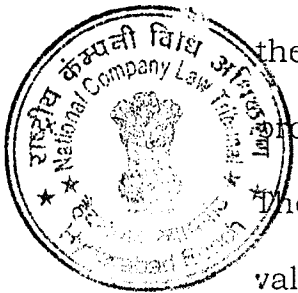
The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

26. In view of the overriding effect of the provisions of IB Code, 2016, over other laws, the Code will override the RBI circulars issued under the Banking Regulation Act. Thus, the said contention of the Respondent is not maintainable.

27. With regard to the contention of the Corporate Debtor as to the extension of repayment date to 15.07.2018, the Financial Creditor has clarified that neither the project was completed in all aspects nor the COD had been achieved by the Respondent on or before 30.11.2017 which is an event of default under the original Facility Agreement which enables the Financial Creditor to accelerate the recovery of the entire loan. Since the COD was not achieved by 30.11.2017, the revision of the repayment schedule also got invalidated in the light of the provisions of the Facility Agreements entered into between the parties.

Therefore, the said contention of the Respondent does not form any valid ground for rejection of the instant Petition.

28. As regards the debt and default, the Financial Creditor has pointed out that there is a balance confirmation certificate dated 31.10.2017 issued by the Corporate Debtor to the Financial Creditor which is placed as Exhibit – 17A at page 2166 (A) of the instant Petition. This certificate authenticates the debt in clear terms, for which the Corporate Debtor was liable to repay but no evidence has been brought on record that the said debt has been repaid. It is also seen from copy of CRILC report placed as Ex-17 at pg.2158-2166 of the Petition that the debt to the Financial Creditor had been classified as ‘Doubtful 2’ as on 31.03.2018



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in Quarterly CRILC Main Return (available at Pg.2165 of the Petition), which indicates default on the part of the Corporate Debtor.

29. Hon'ble Supreme Court in the case of M/s. *INNOVENTIVE INDUSTRIES LTD. Vs. ICICI BANK & ANR.*, was pleased to hold that;

".....The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

30. Further, the Petitioner has proved its case by placing documentary evidences which establish that the default has occurred for which the present Corporate Debtor was liable to pay. In these circumstances, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/Financial Creditor. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code, in the present Company Petition and has also proposed the name of IRP after obtaining the written consent in Form-AA. In view of the above, we are inclined to admit this petition.

31. The instant petition is hereby admitted and this Adjudicating Authority Orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed as per the timelines stipulated in section 12 of the IB Code, 2016, reckoning from the day this order is passed.

32. This Adjudicating Authority hereby appoint Mr.Saurabh K.Tikmani, as IRP as the name proposed by the Financial Creditor and his name is reflected in IBBI website. He has also filed his written consent in Form -

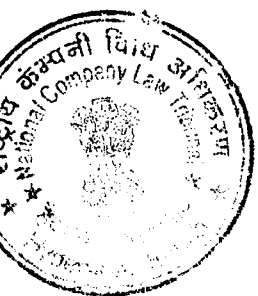
AA. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I&B Code, 2016 within three days from the date of this order, and call for submissions of claim in the manner as prescribed.

33. This Adjudicating Authority hereby declares the moratorium which shall have effect from the date of this Order till the completion of corporate insolvency resolution process for the purposes referred to in Section 14 of the I&B Code, 2016. We order to prohibit all of the following, namely:

- 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 (54 of 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.*

34. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

35. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with



the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.

36. The Petitioner/FC as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.

37. The Registry is also directed to communicate this Order to the Financial Creditor and the Corporate Debtor.


38. The address details of the IRP are as follows:-

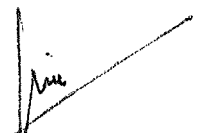


Reg. No.: IBBI/IPA-001/IP-P00559/2017-2018/10989


Mr. Saurabh K. Tikmani,
Lodna Excelus, 5th Floor,
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N.M. Joshi Marg,
Mahalaxmi, Mumbai - 400 011.
Email :- saurabhtikmani@bsraffiliates.com

39. The present Petition is hereby admitted.


05/09/19
Dr. BINOD KUMAR SINHA
MEMBER (TECHNICAL)


K. ANANTHA PADMANABAHA SWAMY
MEMBER (JUDICIAL)

Alekhya


Dy. Regr./Asst. Regr. Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER.....CP(IB)NO. 420/7/HDB/2018.
निर्णय का तारीख
DATE OF JUDGEMENT.....5/9/19
प्रति तैयार किया गया तारीख
COPY MADE READY ON.....12/9/19.