

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SIGNLE BENCH, CHENNAI**

CP/62/ (IB)/CB/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

Vijay R. Vakharia & 6 Ors.

... Financial Creditors

Vs.

M/s. Rayala Corporation Private Limited

... Corporate Debtor

Order delivered on 12th of October, 2018

CORAM:

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

*For Financial Creditor(s) : Mr.P.H.Arvinth Pandian, Sr. Counsel
for M/s. Harishankar Mani &
Mr.M.RoshanAtiq, Counsels.*

*For Corporate Debtor(s) : Mr.Murari, Sr. Counsel
for Mr. George Cheriyan &
Ms. Maithili ShaanKatari Libby, Counsels.*

ORDER

Per: CH. MOHD SHARIEF TARIQ, MEMBER (J):

1. Under adjudication is an Application that has been filed by Mr.Vijay R. Vakharia & 6 Ors.(hereinafter referred to as 'Financial Creditors') 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, against M/s. Rayala Corporation Private Limited, (hereinafter referred to as 'Corporate Debtor'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP) under the Insolvency and Bankruptcy Code, 2016 (I&B Code).

The 1st Financial Creditor has stated that he is filing the Affidavit on his own behalf and also on behalf of the Financial Creditor Nos. 2 to 5 based on the Power of Attorney executed on various dates in his favour. It is further stated that the 1st Financial Creditor is also authorised by the Board of Directors of Financial Creditor Nos. 6 and 7 to file the Affidavit on behalf of them. Hence, all the 7 Financial Creditors jointly filed this common Application under the provisions of Section 7 of I&B Code, 2016 against the Common Corporate Debtor viz., M/s. Rayala

Corporation Private Limited. However, the Power of Attorney filed on behalf of Applicant No.5 [Smt. V.Vakharia] is found to be general in nature, therefore, a fresh Power of Attorney was directed to be filed and the same has been filed, which is taken on record.

2. Heard the Learned Senior Counsels for Financial Creditors and the Corporate Debtor, perused the pleadings and written submissions placed on the case file.

3. The Financial Creditors have claimed an amount to the tune of Rs.4,46,08,990.28p as on 31.10.2017. The particulars of the outstanding debt owed to the Financial Creditors by the Corporate Debtor have been mentioned in the document placed at pages 250 to 253 of the typed set filed with the Application.

4. The case of the Financial Creditors is that they are in the business of providing financial assistance for the consideration of time value of money. In the course of business, the Financial Creditors have lent money to

the Corporate Debtor through several transactions on the basis of several contractual documents right from the year 2005, and in return, the Corporate Debtor has been paying interest so accrued.

5. It is stated that after the year 2013, the Corporate Debtor refused to pay the outstanding amounts and even after repeated requests and reminders made by the Financial Creditors for payment, the Corporate Debtor is stated to have dodged the Financial Creditors by making false promises and excuses. It is further stated that to the shock and surprise of the Financial Creditors, in the year 2016 the Corporate Debtor paid a minimal part of the outstanding dues stating that it would not pay the remaining dues to the Financial Creditors without any reason whatsoever. It is stated that even though the Corporate Debtor has admitted its liability towards the Financial Debt on many instances, the Corporate Debtor has wilfully refused to pay the outstanding debt.

6. The Financial Creditors have referred to a mail sent by the Corporate Debtor to the Financial Creditors on 08.01.2013, wherein the Corporate Debtor has acknowledged the dues and categorically stated that the Corporate Debtor is working to procure a loan from the Kotak Mahindra Bank and in the event of the loan being availed, the Corporate Debtor would pay the dues of the Financial Creditors.

7. It is stated that the Corporate Debtor issued two Cheques on 05.02.2013 for Rs.3,00,00,000/- and Rs.1,00,00,000/-, 11 Cheques on 20.08.2014 totalling to Rs.7,56,10,250/-, 11 Cheques on 17.11.2014 for Rs.7,56,10,250/-, 11 Cheques on 14.02.2015 for a sum of Rs.6,56,10,250/-, 18 Cheques on 21.12.2015 for a sum of Rs.9,14,00,000/- and 6 Cheques on 18.03.2016 to 23.03.2016 for a total sum of Rs.4,85,20,000/-, in favour of Financial Creditors for the payment of the outstanding dues with the instruction that the Financial Creditors shall present the cheques issued after seeking the approval of the Corporate Debtor.

8. The Financial Creditors have referred to the mails sent by the Corporate Debtor to them on 08.01.2013, 25.06.2013, 05.02.2014, 10.02.2014, 06.11.2014, 24.11.2014, 29.01.2015, 11.08.2015, 30.12.2015, 11.01.2016, 04.02.2016, 15.03.2016, 24.03.2016, 26.04.2016 and 17.04.2017, assuring the payment of pending dues owed to the Financial Creditors and categorically asked the Financial Creditors to procure the money on higher rates of interest, from other sources, since the Financial Creditors were in dire need of the money and admitted the liability to pay such higher interest to the Financial Creditors.

9. The details of the Financial Debt owed by the Corporate Debtor to the Financial Creditors are as under:-

Sl.No.	Name of the Financial Creditor	Financial Debt
1	Vijay R. Vakharia	Rs.8,15,80,040.61
2	Vijay R. Vakharia and Ajay R.Vakharia	Rs.17,93,55,210.84
3	Vijaykumar HUF	Rs.1,89,96,437.71
4	Late Ramanlal N. Vakharia represented by his legal heir Vijay V. Vakharia	Rs.54,84,575.25

5	Smt. V.Vakharia	Rs.6,71,323.49
6	Aasman Financial Services Private Limited	Rs.14,48,856.06
7	Zeal Warehouse Private Limited	Rs.1,48,27,755.91
	Total	Rs.30,23,64,199/-

10. The Corporate Debtor has filed the reply on 06.02.2018 wherein it has denied the claim of the Financial Creditors and has taken multiple pleas. Before dealing with the multiple pleas taken by the Corporate Debtor and rebuttal given by the Financial Creditors, it is necessary to place on record the factual matrix as ~~is~~ contained in the reply filed by the Corporate Debtor.

11. Under Para 9 A 3(v), the Corporate Debtor has submitted that the Promissory Note for Rs.2,00,00,000/-(Rupees Two Crores Only) as on 15.05.2015 executed by it would demonstrate that there was no other outstanding on this account towards any other amount relating to Financial Debt defaulted by it on this account prior to the execution of the renewed Promissory Note. It has further been submitted by the Corporate Debtor that the claim of

the 1st Financial Creditor in the Financial Creditors' computation sheet reflects a sum of Rs.3,70,81,127.72p as being the amount outstanding on the date of issue of the renewed Promissory Note, is without any basis whatsoever.

12. The Corporate Debtor would submit that it had issued Promissory Note to the 1st Financial Creditor only for a sum of Rs.2,00,00,000/- and there is no reason as to why the 1st Financial Creditor should then advance a further sum of Rs.1,00,00,000/- (Rupees One Crore Only) in that case. The Corporate Debtor claims that it has repaid to the 1st Financial Creditor a sum of Rs.2,35,00,000/- vide Cheque No.029419 dated 18.03.2016 which includes the principal outstanding of Rs.1,20,20,000/- as on 18.03.2016 under the mortgage account as reflected in the statement duly acknowledged by the 1st Financial Creditor (page 275 of the Application) and the amount outstanding of Rs.1,15,00,000/- in the third loan account as on 18.03.2016. The Corporate Debtor would further state that as per the One Time

Settlement (OTS) mutually agreed upon, a sum of Rs.1,15,00,000/- was paid on the instructions of the 1st Financial Creditor to the 3rd Financial Creditor, with whom the Corporate Debtor has no business transaction, for settlement of OTS of interest in respect of all Financial Creditors vide Cheque No. 029439 dated 29.03.2016.

13. During the course of arguments, a specific question has been put to the Learned Senior Counsel representing the Corporate Debtor that if the outstanding debt has been paid, then, why 'No Dues Certificate', (NDC) has not been obtained by the Corporate Debtor from the 1st Financial Creditor. The Learned Senior Counsel has reluctantly replied that due to mutual trust and faith that the parties had on each other, the NDC was not necessitated.

14. The 1st Financial Creditor's computation sheet placed at pages 273 to 276 of the typed set filed with the Application goes to show that on 09.12.2014 an amount of Rs.1,00,00,000/- was received by the 1st

Financial Creditor and the balance amount is Rs.3,40,78,177.03.03p. Thereafter, from 16.05.2015 to 30.05.2015, an amount of Rs.1,00,00,000/- has been paid to the Corporate Debtor in four equal tranche.^s It also reflects from computation sheet at page 276 that on 24.03.2016, the 1st Financial Creditor has received Rs.2,35,20,000/- and the balance is Rs.3,07,09,706.42p, whereas, on 31.10.2017, the total balance outstanding is shown as Rs.4,46,08,990.28p in relation to the 1st transaction. Similar are the facts relating to 2nd and 3rd transactions and the total outstanding is shown as Rs.8,15,80,040/-.

15. The Corporate Debtor, on the one hand is questioning the Financial Creditors' computation sheet and on the other hand, relying upon the said document for proving the payments which it has made to the 1st Financial Creditor. Further, it appears that the Corporate Debtor is seriously objecting to the rate of interest which has been calculated by the 1st

Financial Creditor @ 24% per annum on the outstanding debt, which will be dealt with in succeeding paras. However, there does not appear any doubt that the 1st Financial Creditor and the Corporate Debtor were continuing the business relationship and the 1st Financial Creditor has advanced the loan to the Corporate Debtor of which a part payment has been made by the Corporate Debtor.

16. The Corporate Debtor under Para B 6, at page 27 of its reply has stated that the relationship between the 2nd Financial Creditor and the Corporate Debtor is that of a seller and a purchaser which is abundantly clear from the transaction which envisaged that the margin money provided to the Corporate Debtor by the Financial Creditors was free of interest as provided under the Memorandum of Agreements (for short MoAs) dated 01.11.2010 and 01.12.2010 placed at pages 312 to 324 of typed set filed with the Application. It has been admitted by the Corporate Debtor that it has received only a sum of Rs. 2.20

Crores from the 2nd Financial Creditor. However, it reveals from the 2nd Financial Creditors' computation sheet placed at pages 326 and 327 of the typed set filed with the Application that the Corporate Debtor has received a sum of Rs. 3,00,00,000/- in cash on 25.11.2010 which is not acknowledged by the Corporate Debtor. Under clause 6 of the Memorandum of Agreements dated 01.11.2010 which is placed at pages 312 to 317 of the typed set filed with the Application, it has been covenanted that *"the Corporate Debtor further agree and undertake that if, for some reason their agreement with MBDL and Baba Enterprises fails or does not materialize as envisaged under the settlement reached with MBDL, the Corporate Debtor shall repay the sum of Rs. 2.50 Crores to the 2nd Financial Creditor within a period of ten days from the expiry of the 6th month from the date of the agreement and in such an eventuality, the Corporate Debtor shall pay interest at the rate of 24% per annum to the 2nd Financial Creditor calculated from the commencement of the fourth month from the date of the agreement till the*

date of refund.” Thus, it is established that the admitted amount is disbursed by the 2nd Financial Creditor to the corporate debtor against the consideration for time value of money which has the commercial effect of borrowing.

17. Similar are the terms and conditions contained in the Memorandum of Agreement dated 01.12.2010 entered into between the 2nd Financial Creditor with the Corporate Debtor which is placed at pages 318 to 324 of the typed set filed with the Application.

18. The transactions that took place between the 2nd Financial Creditor and the Corporate Debtor are reflecting from the computation sheet placed at pages 326 and 327 and the balance outstanding as on 31.10.2017 is shown as Rs.1,79,355,210.84.

19. It has been noted that a letter dated 01.06.2015 has been written by the Corporate Debtor to the 2nd Financial Creditor, copy of which is placed at page 325 of the typed set filed with the Application which reveals

that the Corporate Debtor has failed to fulfil the obligations as per the Memorandum of Agreements dated 01.11.2010 and 01.12.2010 and assured the 2nd Financial Creditor that the Corporate Debtor expect the mortgage to be released in next 6/8 months' time and thereafter, it will make arrangement for registration of its area in terms of the said agreement. In other words, the Corporate Debtor till the date of the above mentioned letter did not make compliance with the terms and conditions of the Memorandum of Agreements. Therefore, Corporate Debtor is liable to make payments of the money advanced along with 24% of interest as agreed in the Memorandum of Agreements.

20. The Corporate Debtor in its reply at page 31 has submitted that an amount of Rs. 1.15 Crores was paid by the Corporate Debtor vide Cheque No. 029439 dated 29.03.2016 drawn on Bank of India, Adyar Branch, Chennai – 600 020 to the 3rd Financial Creditors in lieu of interest to the other Financial Creditors and the 3rd Financial Creditor has created a

record to falsely claim, i.e., the amount was advanced by the 3rd Financial Creditor to the Corporate Debtor in the year 2012. However, it is noted that the amount has been advanced to the Corporate Debtor by the 3rd Financial Creditor on various dates during 2010 and 2012 as reflects from computation sheets placed at pages 353 to 354 of the typed set filed with the Application. The repayment of Rs. 1.15 Crores dated 29.03.2016 is being reflected from the said sheet, whereas the balance outstanding as on 31.10.2017 is shown as Rs. 1,89,96,437.71p. In support of the ^{computation} ~~Working~~ Sheet, the Promissory Notes executed during 2012 by the Corporate Debtor in favour of the 3rd Financial Creditor are placed at pages 328 to 340 of the typed set filed with the Application which were renewed by the Corporate Debtor on 15.05.2015 as placed at pages 341 to 352 of the typed set filed with the Application, which reflect that the amount is to be repaid with interest @ 24% per annum for the money/loan received by the Corporate Debtor from the Financial Creditors. The factum of the execution of

the Promissory Notes has been admitted by the Corporate Debtor under para 9 of its sur-rejoinder which reads as follows: -

“I state that the Respondent has paid each of the Applicants the full principal amount in terms of the renewed Promissory Notes dated 15.05.2015 together with the OTS towards the interest and there is no outstanding financial debt owing due and payable and not paid by the Respondent.”

21. From the above extract, it is an admitted fact that the Corporate Debtor has executed renewed Promissory Notes in relation to each of the Financial Creditors on 15.05.2015. If, no advance has been made by the 3rd Financial Creditor, then, there was no requirement on the part of the Corporate Debtor to renew the Promissory Note in favour of the 3rd Financial Creditor and to pay Rs.1.15 Crores to the 3rd Financial Creditor. The Corporate Debtor has not placed any document on record pertaining to the OTS and the instructions which it claims to have been received from the other Financial Creditors to pay Rs.

1.15 Crores to 3rd Financial Creditor. The plea taken by the Corporate Debtor that it has not received any advance from the 3rd Financial Creditor is *per se* contradictory and devoid of merits.

22. The Corporate Debtor in its reply at page 33 has admitted that the renewed Promissory Note dated 15.05.2015 would show that the Promissory Note is for the outstanding principal amount of Rs. 20 Lakhs and there is no interest quantified and added in the renewed Promissory Note. The Corporate Debtor further states that it has paid a sum of Rs. 20 Lakhs vide cheque No. 029433 dated 23.03.2016 drawn on Bank of India in favour of 4th Financial Creditor which has not been reflected in the 4th Financial Creditor's computation sheet placed at pages 358 to 360 of the typed set filed with the Application. The Corporate Debtor goes to explain that in terms of OTS and on the instructions of the 1st Financial Creditor, the said amount was paid to the 1st Financial Creditor since the father of 4th Financial Creditor had passed away. It is noted that the 4th Financial Creditor is the legal heir of

late Mr. Ramanlal Vakaria. The Corporate Debtor has also raised an objection that the 4th Financial Creditor has not placed on record any succession certificate. This issue is being dealt with separately in succeeding paragraphs. If the computation sheet is taken into consideration, which has been placed at pages 358 to 360 of the typed set filed with the Application, the outstanding against the Corporate Debtor as on 31.10.2017 is shown as Rs. 5,484,575.25p which is due and payable to the 4th Financial Creditor.

23. In support of the claim, the 4th Financial Creditor has placed on record at page 357 of the typed set filed with the Application, the renewed Promissory Note dated 15.05.2015 which reflects that the said amount has to be paid with interest @ 21% per annum. It is an admitted fact that the Corporate Debtor has paid Rs.20 Lakhs to the 1st Financial Creditor on behalf of the 4th Financial Creditor without asking for legal heir certificate, now ^{the} ~~the~~ Corporate Debtor is *estopped* from raising any issue that the 4th Financial Creditor has

not produced any Succession Certificate and is not legal heir of late Ramanlal Vakharia.

24. The Corporate Debtor in its reply at page 35 has admitted the renewal of the Promissory Note dated 15.05.2015 for Rs.5 Lakhs in favour of 5th Financial Creditor, which is placed at page 362 of the typed set filed with the Application. The Corporate Debtor further states that the said sum of Rs.5 Lakhs was paid to the 5th Financial Creditor vide Cheque No. 029422 dated 18.03.2016 and in terms of OTS of interest. However, the 5th Financial Creditor has relied upon the computation sheet placed at pages 363 to 365 of the typed set filed with the Application, which reveals that on 28.03.2016, Rs. 5 Lakhs has been paid by the Corporate Debtor and the balance outstanding as on 31.10.2017 is Rs.6,71,323.49p. In support of his claim, the 5th Financial Creditor has placed the Promissory Note dated 15.05.2015 at page 362 of the typed set filed with the Application which goes to show that the said amount has to be paid with interest @

24% per annum. The interest which is calculated @ 21% per annum on the said amount, is not shown to have been paid by the Corporate Debtor to the 5th Financial Creditor as per the Computation Sheet and the plea taken by the Corporate Debtor that in terms of the OTS of interest, it has paid to the Financial Creditors a sum of Rs.1.15 Crores in favour of the 3rd Financial Creditor viz., Vijaykumar (HUF). But this assertion of the Corporate Debtor is not being supported with any documentary evidence. Therefore, the plea taken by the Corporate Debtor has no legs to stand.

25. Another plea that has been taken by the Corporate Debtor is that the Power of Attorney dated 05.08.2013 executed by 5th Financial Creditor in favour of 1st Financial Creditor is not specifically authorizing for filing the Application under Section 7 of the I&B Code, 2016. Therefore, this Authority has given notice to the 5th Financial Creditor to execute fresh Power of Attorney specifically authorizing 1st

Financial Creditor for filing Application under Section 7 of the I&B Code, 2016, on behalf of the 5th Financial Creditor. Accordingly, the Power of Attorney dated 21.09.2018 has been filed and placed on record. Therefore, the objection raised by the Corporate Debtor with regard to the earlier Power of Attorney filed on behalf of the 5th Financial Creditor, has become *infructuous*.

26. The Corporate Debtor in its reply at page 38 has admitted the execution of Promissory Note dated 15.05.2015 in favour the 6th Financial Creditor. The Corporate Debtor further states that the principal sum of Rs. 10 Lakhs has been paid to the 6th Financial Creditor vide Cheque No. 029423 dated 18.03.2016 and in terms of OTS of interest, the Corporate Debtor has paid the Financial Creditors a sum of Rs.1.15 Crores in favour of the 3rd Financial Creditor viz., Vijaykumar (HUF). It has been stated in the reply that no interest has been quantified and added in their renewed Promissory Note dated 15.05.2015. However, as seen from the Promissory Note placed at 369 of the

typed set filed with the Application, it is mentioned that a sum of Rs. 10 Lakhs has to be repaid with interest @ 21% per annum. Therefore, the plea taken by the Corporate Debtor is contradictory to the contents of the Promissory Note and is not substantiated with any documentary evidence. The Computation Sheet of the 6th Financial Creditor is placed at pages 370 and 371 of the typed set filed with the Application which reflects that a sum of Rs. 10 Lakhs has been paid on 28.03.2016 and as on 31.10.2017, the balance outstanding against the Corporate Debtor is Rs. 14,48,856.06.

27. The Corporate Debtor in its reply at page 40 has admitted the renewal of the Promissory Note dated 15.05.2015 in favour of the 7th Financial Creditor. The Corporate Debtor further states that the principal sum of Rs. 1,00,00,000/- was paid to the 7th Financial Creditor vide Cheque No. 029421 dated 18.03.2016 and in terms of the OTS of interest, the Corporate Debtor has paid a sum of Rs. 1.15 Crores in favour of the 3rd Financial Creditor viz., Vijay Kumar (HUF). It

has further been stated by the Corporate Debtor that there has been no interest quantified and added in the renewed Promissory Note dated 15.05.2015. As seen from the Promissory Note dated 15.05.2015 which is placed at page 373 of the typed set filed with the Application, it has been recorded that the Corporate Debtor promised to pay Rs. 1,00,00,000/- (Rupees One Crore Only) with interest @ 21% per annum. Therefore, the plea taken by the Corporate Debtor is contrary to the contents of the Promissory Note placed on record. The Computation Sheet of 7th Financial Creditor placed at pages 374 and 375 of the typed set filed with the Application reflects that Rs. 1,00,00,000/- has been paid on 28.03.2016 and as on 31.10.2017, the outstanding balance against the Corporate Debtor is Rs. 1,48,27,755.91p.

28. The above noted factual matrix are specifically evidencing the existence of default on the part of the Corporate Debtor in making payment of the outstanding debt claimed by the Financial Creditors. However, it is necessary to deal with other legal issues

raised by the parties in their pleadings and at the time of final submissions, the issues can be framed as follows: -

- i. *Whether the claim of the Financial Creditors is barred by limitation?*
- ii. *Whether the claim made by the Financial Creditors relates to Financial Debt and thereby being a financial transaction?*
- iii. *Whether the interest charged by the Financial Credits is exorbitant and barred by the Usurious Loans Act, 1918 and the Madras Debtor Protection (Amendment) Act, 1935?*
- iv. *Whether the documents placed on record by the Financial Creditors are sufficient in its nature to ascertain the existence of default in the absence of the record of Information Utility and Financial Contract?*

- v. *Whether the Financial Creditors can file the Application under Section 7 of I&B Code, jointly when all of them are not the corporate persons?*
- vi. *Whether the Application filed under Section 7 of the I&B Code, is maintainable under law on the basis of the authorization given by the 2nd to 7th Financial Creditors through Power of Attorney?*
- vii. *Whether the Corporate Debtor has borrowed the loan from the Financial Creditors against its Articles of Association, thereby it is ultra vires and does not bind the Corporate Debtor?*

Issue No. i

29. Issue No.1 has been raised by the Counsel for the Corporate Debtor that the claim of the Financial Creditors is barred by the period of limitation. As can be seen from the details given in the tabular form in

the preceding paragraph, it appears that the transactions have taken place during the years 2010, 2011 and 2012 and the Corporate Debtor has from the beginning started to give Letters of Confirmation, Promissory Notes, Cheques, Board Resolution and e-mails giving assurance to the Financial Creditors for making payment of the outstanding debt along with interest due. During the said communications, which are placed in the typed set filed with the Application, the Corporate Debtor has renewed the Promissory Notes in favour of each of the Financial Creditors on 15.05.2015. The Application on hand has been filed on 14.12.2017 under Section 7 of I&B Code, 2016 and if the communications i.e., the Promissory Notes, Cheques (the cheques were given with the instructions to the Financial Creditors not to present the same without prior consent of the Corporate Debtor), Confirmation Letters, E-mails, sent by the Corporate Debtor to the Financial Creditors that are placed on record, are to be taken into consideration, then, in each case of the Financial Creditors, the Corporate

Debtor had made the acknowledgement of liability within the period of limitation.

30. Under Section 118 of the Negotiable Instruments Act, 1881, the duty cast upon the Court is to rise a presumption in favour of the said instrument and the person defending may adduce direct evidence to prove that the Promissory Note was not supported by the consideration and if such evidence is accepted, then, the burden to prove shifts to the claimant. But, in this case, the Corporate Debtor has not produced any documentary evidence to rebut presumption which is in favour of the Promissory Notes (including renewed) executed by the Corporate Debtor in favour of Financial Creditors. This view is supported by the ruling given in ***Kundan Lal Rallaram vs. Custodian, Evacuee Property, Bombay***, reported in AIR 1961 SC 1316, which is relied upon by the Learned Sr. Counsel for the Corporate Debtor. However, the above ruling is not beneficial to the Corporate Debtor in the facts and circumstances of the case on hand, because the Corporate Debtor has acknowledged the liability

continually by executing documents, sending letters, and e-mail communications to the Financial Creditors.

31. It is worthwhile to mention that the Hon'ble NCLAT in ***Speculum Plast Pvt. Ltd. and Ors. Vs. PTC Techno Pvt. Ltd. and Ors.***, MANU/NL/0163/2017, has held that the Limitation Act, 1963, is not applicable for initiation of 'Corporate Insolvency Resolution Process'. The Hon'ble NCLAT in ***Neelkanth Township and Construction (P.) Ltd. vs. Urban Infrastructure Trustees Ltd.***, MANU/NL/0063/2017 has held that for initiation 'Corporate Insolvency Resolution Process', the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December, 2016, when 'I&B Code, has come into force.

32. It may be placed on record that an amendment has been made in I&B Code, 2016 based on which Section 238 A, has been inserted by which the provisions of the Limitation Act, 1963 are made applicable to the proceedings under I&B Code, 2016.

The said amendment has been brought into force on 06.06.2018, which operates prospectively, because the newly inserted section is a substantive provision of Law. Thus, in the light of the above legal position, the right to apply under Section 7 of I&B Code, 2016 had accrued to the Financial Creditors on 01.12.2016 when the I&B Code was brought into force. Therefore, the Application filed by the Financial Creditors is held within the period of limitation. Hence, the plea that has been taken by the Corporate Debtor that the Application is barred by limitation, stands rejected.

Issue No. ii

33. The second issue is as to whether the claim made by the Financial Creditors relates to Financial Debt and thereby being a financial transaction. The Corporate Debtor in its reply has raised an objection that the Financial Creditors did not produce any '*financial contract*' showing underlying financial transactions on the basis of which a financial debt is sought to be claimed. The Corporate Debtor has referred to the claim of Rs.3,04,23,916.17p of the 1st

Financial Creditor that arose out of a transaction relating to allotment of space in the built up area of 10,000 sq. ft. owned by the Corporate Debtor. The Corporate Debtor has also referred to the claim of 2nd Financial Creditor, which is amounting to Rs.17,23,55,210.84p arising out of a transaction relating to purchase of space of 5,000 sq. ft. of built up area in the building at R.S.No.22/1. The point raised by the Corporate Debtor is that if the money has been advanced for leasing of space, then the same cannot be treated as a Financial Debt.

34. While raising this issue, the Learned Sr. Counsel for the Corporate Debtor has made a reference to Rule 3 (1) (d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, wherein the Financial Contact has been defined, which is extracted below :-

“Definitions-(1) *In these Rules, unless the context otherwise requires,-*

(a)

(b)

.....

(d) "financial contract" means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;

(e)"

Based on the above definition, the Learned Sr. Counsel for the Corporate Debtor has submitted that there is no Financial Contract between the Financial Creditors and the Corporate Debtor, and in the absence of any Financial Contract, the Application filed under Section 7 of I&B Code, 2016, is not maintainable.

35. The plea taken by the Learned Sr. Counsel for the Corporate Debtor cannot only be the requirement of a valid contract, because a contract can be oral; based on exchange of communications which may or may not be signed and it may be single document signed by both the parties. Therefore, even an oral agreement can be a valid and enforceable contract. Thus, it is not essential that a contract must be in writing for the purpose of advancing loan, repayment of the same and the interest, if any, agreed between the two parties. In



this connection, reliance has been placed on the ruling given by the Hon'ble High Court of Delhi in **Nanak Builders and Investors Pvt. Ltd vs. Vinod Kumar Alag**, reported in *AIR 1991 Delhi 315*, wherein it has been held that *there can even be an oral agreement*.

36. In the instant case the mortgage deed and Memorandum of Agreements, Promissory Notes (including renewed one), other communications and the Cheques issued and signed by the Corporate Debtor ^{are} ~~is~~ sufficient documentary evidence, which remained unrebutted, to conclude that there has been Financial Contract between the Financial Creditors and Corporate Debtor.

37. It may be placed on record that the Corporate Debtor is making a reference to the Mortgage Deed dated 02.03.2009, which was executed by the Corporate Debtor in favour of 1st Financial Creditor for the purpose of allotment of space of 10,000 sq. ft, at No.144/7, Old Mahabalipuram Road, Kottivakkam, Chennai- 600 041. In the said Deed, placed at pages

262 to 267 of the typed set filed with the Application, it has clearly been provided under Para 2(a) that the Corporate Debtor agreed to repay the said Mortgage Loan on demand together with all other amounts due from the Corporate Debtor to the Financial Creditors with interest @ 24% per annum. As per the Memorandum of Agreements (MoAs) dated 01.11.2010, which is placed at pages 312 to 317 of the typed set filed with the Application, the Corporate Debtor agreed to transfer the constructed area of 2500 sq. ft. in favour of 2nd Financial Creditor, and obtained Rs.2.50 Crores from 2nd Financial Creditor, and under Para 6 of the said MoAs, it has been agreed that if, for some reason, the Agreement of Corporate Debtor with MBDL and Baba Enterprises fails or does not materialize as envisaged under the settlement reached with MBDL, then the Corporate Debtor shall repay a sum of Rs.2.50 Crores to the Financial Creditors within a period of 10 days from the expiry of 6th month from the date of the Agreement, and in such an eventuality, the

Corporate Debtor shall pay interest at the rate of 24% per annum to the Financial Creditors.

38. In the light of the above facts, it is clearly established that the amount that has been advanced by 1st and 2nd Financial Creditors to the Corporate Debtor for the space as mentioned above is for consideration for the time value of money and the said transactions have a commercial effect of borrowing. Subsequently, the project could not see the light of the day and the Corporate Debtor has time and again acknowledged the debt by providing Cheques, Promissory Notes and sending e-mail communications from time to time on the demand raised by the Financial Creditors. Therefore, the debt in question falls within the purview of the definition of "Financial Debt" as defined under Section 5(8) of the I&B Code, 2016. Thus, the issue stands decided in favour of the Financial Creditors and against the Corporate Debtor.



Issue No. iii

39. The third issue is pertaining to the charging of interest @ 24% per annum which as per the Corporate Debtor is exorbitant and violates the provisions of Section 3 of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003 (the Act). The Act provides that no person shall charge exorbitant interest on any loan advanced by him. In reply to the objection raised by the Corporate Debtor, the Learned Sr. Counsel for the Financial Creditors has relied upon the order of the Hon'ble High Court of Andhra Pradesh passed in ***Konakalla Venkata Satyanarayana (Died) & Ors. -vs- State Bank of India & Ors,*** reported in AIR 1975 AP 113, wherein the Hon'ble High Court while discussing the issue has referred to the judgement passed in ***Manladina -vs- Sukhdeo Bose,*** AIR 1933 Nag 224. Paras 51 & 52 of the judgment of the Hon'ble High Court of Andhra Pradesh are extracted as below: -



“51.

“excessive is a relative term and what is excessive in one case will not necessarily be so in another. It depends upon surrounding circumstances. Courts however cannot assume their existence; they must be found on proper evidence.

52. Again His Lordship observed: *“a bargain which is fair in its inception cannot become unfair by the happening of subsequent events nor can interest which was reasonable in the beginning become excessive at a later date. The Court is limited to a consideration of circumstances which existed “at the date of loan”. “Further the learned Judge stated, “there is nothing inherently wrong in a creditor securing compensation for himself for interest which is not paid and for money which is not returned when due and where the parties are couple of money lenders who are perfectly well able to look after their own interests court should not interfere with the contract they themselves have made.”*

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40. By relying upon the above ruling, the Learned Sr. Counsel for the Financial Creditors has submitted that the perusal of the provisions of the Usurious Loans (Tamil Nadu Amendment) Act, 1918, would clearly reveal that the Court even in the insolvency proceedings after declaring that the transaction is substantially unfair, has to ascertain whether the interest charged by the Financial Creditors is excessive or not. In the case on hand it appears from the Mortgage Deed and MoAs referred in the preceding paragraphs, the Corporate Debtor did agree for payment of 24% of interest on the loan advanced by the Financial Creditors. The Corporate Debtor has also been paying the interest at the same rate on the principal amount. Therefore, if at the time of advancement of the money, the rate of interest was not considered as exorbitant by the Corporate Debtor, subsequently it cannot object to the said rate of interest. It is otherwise clear from the record that the Financial Creditors have not got an adequate security i.e., the space for the money advanced as the project in

question stated to have been scraped by the Corporate Debtor. Therefore, the interest charged by the Financial Creditors cannot be said ^{as} ~~to be an~~ excessive. In the circumstances, the objection of the Corporate Debtor that the Madras Debtor Protection (Amendment) Act, 1935, is barring the charging of exorbitant interest is devoid of merits and stands rejected. This view is also fortified by the reasoning that 24% compound interest in modern business exigencies is common and as such, is an accepted arm's length rate of interest for commercial loans. It is otherwise not the case of the Corporate Debtor that ~~he~~ ^{it} is in any way willing to pay the outstanding debt on the terms of the lesser rate of interest.

Issue No. iv

41. The 4th issue raised by the Corporate Debtor is as to whether the documents filed by the Financial Creditors are sufficient in nature to ascertain the existence of a default in the absence of the record of Information Utility and Financial Contract. The

Learned Sr. Counsel for the Corporate Debtor has submitted that the Mortgage Deed, Memorandum of Agreements, Promissory Notes, e-mail communications and Cheques along with computation sheets are not admissible in evidence for being considered for ascertaining the existence of default on the part of the Corporate Debtor. The Learned Sr. Counsel for the Corporate Debtor has specifically stated that the e-mail communications relied upon by the Financial Creditors are not supported by certificate under Section 65B of the Indian Evidence Act, 1872 and the same are not admissible.

42. The Learned Sr. Counsel for the Corporate Debtor has further stated in the Rejoinder that the Promissory Notes were kept with the Financial Creditors which were blank and have been filled up at a later date, and the same is in violation of Section 10(A)(1) of the Tamil Nadu Money Lenders Act, 1957, which provides that no money-lender, whether licensed or not, shall take from a debtor or an intending borrower any note, promise to pay, acknowledgement, power of attorney,

bond, security or other document which does not state the actual amount of the loan, the rate of interest charged and the time, if any, within which the principal is stipulated to be repaid in full, or which states any of such particulars incorrectly, nor shall he take from any debtor or an intending borrower any document in which any entry is left blank for completion at a later date.

43. The objection that has been raised by the Learned Sr. Counsel for the Corporate Debtor with regard to the absence of the certificate under Section 65B of the Indian Evidence Act, pertaining to e-mail communications has no substance, because the requirement of certificate under Section 65B(h) is not always mandatory for the reason that a party who is not in possession of device from which the document is produced, such party cannot be compelled to produce certificate under Section 65B(4) of the Indian Evidence Act. Thus, the applicability of the requirement of certificate being procedural can be relaxed by Court whenever interest of justice so

justifies. In the instant case, all the e-mail communications that are relied upon by the Financial Creditors have been sent by the Corporate Debtor, and device from which the e-mails have been sent is in possession of the Corporate Debtor. It is not possible for the Financial Creditors to produce the required certificates. Therefore, the Financial Creditors are being given relaxation for non-production of said certificate in the interest of justice. In this connection, reliance is placed on the judgement of the Hon'ble Apex Court given in *SLP(Crl).No.2302/2017* titled ***Shafhi Mohammed Vs. The State of Himachal Pradesh, MANU/SC/0058/2018***, dated 30.01.2018, wherein it has been held that the requirement of certificate under Section 65B (h) is not always mandatory. The Corporate Debtor has raised an issue in its reply that Mr. Gulam with whom the Financial Creditors had the communications including e-mails regarding outstanding dues, is not the authorized representative of the Corporate Debtor whereas in the letter dated 06.03.2009 placed at page 39 of the typed

set filed with the Rejoinder, the Corporate Debtor itself has admitted that Mr. Gulam who is CFO of the Corporate Debtor had discussions regarding the reduction in interest rate on the mortgage loan with the 1st Financial Creditor. This goes to show that Mr. Gulam is the authorised person to handle the transactions on behalf of the Corporate Debtor with the Financial Creditors. Therefore, the plea taken by the Corporate Debtor is *per se* contradictory and misleading, so stands rejected.

44. In relation to the issue of blank Promissory Notes which as per the submission of the Corporate Debtor were kept with the Financial Creditors are stated to have been filled at a later date. But, this assertion of the Corporate Debtor is contradictory to the averments made in the reply statement filed by the Corporate Debtor. The Corporate Debtor at page(s) 4, 38, and 40 of the reply, has admitted the execution/renewal of the Promissory Notes. Similarly, there is no denial of providing of the Cheques by the Corporate Debtor to the Financial Creditors with the instructions not to

present the same without its prior consent/approval. Therefore, the plea taken by the Corporate Debtor is devoid of merits and stands rejected.

45. As to the computation sheets, the Learned Sr. Counsel for the Corporate Debtor himself has made references to the same during the course of arguments to establish that some of the transactions mentioned in the computation sheets are evidencing that part payments have been made by the Corporate Debtor to the Financial Creditors. Therefore, on one hand, the Learned Sr. Counsel for the Corporate Debtor has raised objections to the computation sheets; on the other he himself has relied upon the same. Therefore, he cannot blow hot and cool in the same breath. Thus, there cannot be any room for rejection of the computation sheets and other documents filed by the Financial Creditors, and ^{these} ~~they~~ can be considered as other record or evidence to ascertain the existence of default on the part of the Corporate Debtor in the absence of the record of the Information Utility, as the

Information Utility is still at an inception stage and is not capable of providing record pertaining to financial debt as envisaged under Sub-Section (4) of Section 7 of the I&B Code, 2016. In short, the plea of the Learned Sr. Counsel for the Corporate Debtor that the documents placed on record are inadmissible in evidence stands **rejected**. Thus, the issue is decided in favour of the Financial Creditors and against the Corporate Debtor.

Issue No. v

46. The Learned Sr. Counsel for the Corporate Debtor has also raised an issue that the Financial Creditors cannot file the Application jointly for the reasons that two of them are Corporate Bodies and one is HUF and rest are the individuals. The Learned Sr. Counsel for the Corporate Debtor has referred to the contents of Form-I which is meant for the purpose of the Application to be filed under Section 7 of I&B Code, 2016, by the Financial Creditors for initiating CIRP against the Corporate Debtor. The Learned Sr.

Counsel for the Corporate Debtor has further submitted that Colum 2, 3 and 4 of Part-I of Form –I shows that the Application under Section 7 of the I&B Code, 2016 can only be filed by the Corporate Persons and not by the individuals, to which the Learned Sr. Counsel for the Financial Creditors has referred to the definition of the “Financial Creditor” given under Section 5(7) of the I&B Code, 2016 that provides as follows:-

*“Financial Creditor” means **any person** to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.*

Further, the Learned Sr. Counsel for the Financial Creditors has referred to Sub-Section (23) of Section 3 of the I&B Code, 2016 which provides the definition of “person” as follows:-

3. *In this Code, unless the context otherwise requires:-*

- (1)
-
-



(23) 'person' includes:-

(a) **an individual;**

(b) **a Hindu Undivided Family;**

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute and includes a person resident outside India.

Based on the above mentioned provisions, the Learned Sr. Counsel for the Financial Creditors has submitted that the interpretation with regard to the entries of Form-I given by the Learned Sr. Counsel for the Corporate Debtor is not in consonance with the definition as mentioned above and such interpretation is narrowing the scope of the Application to be filed under Section 7 of the I&B Code, 2016. This Adjudicating Authority finds force in the submissions of the Learned Sr. Counsel ^{for the} Financial Creditors. The same is also fortified with the ruling given by the Hon'ble Apex Court in **Life Insurance Corporation of India Vs. Escorts Ltd. and Ors.**, reported in (1986) 1 SCC 264, wherein a similar issue has come up for

consideration before their Lordships and after examination it was opined that “*the Form cannot control the Act*”. Therefore, the plea taken by the Learned Sr. Counsel for the Corporate Debtor stands rejected.

Issue No. vi

47. The Learned Sr. Counsel for Corporate Debtor has also raised an issue during the course of argument that the Application filed under Section 7 of I&B Code, 2016 cannot be filed on the basis of Power of Attorney. The Learned Sr. Counsel has placed reliance on the Judgement given in **Palogix Infrastructure Pvt. Ltd. Vs. ICICI Bank Ltd.** reported in MANU/NL/0095/2017 wherein the Hon’ble NCLAT held that the I&B Code, 2016, is a complete Code by itself and the provisions of the Power of Attorney, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder. Resultantly, it was held that the Power of Attorney

Holder is not competent to file an Application on behalf of a “Financial Creditor” or “Operational Creditor” or “Corporate Applicant”. However, the Learned Sr. Counsel for the Financial Creditors has controverted the same by making a reference to the ruling given by the Hon’ble NCLAT in **Vijay Kumar Jain Vs. DBS Bank Ltd. and Ors.**, reported in MANU/NL/0050/2018 and **Sumeet Ahuja Vs. Union Bank of India and Ors.**, reported in MANU/NL/0175/2017, wherein it has been held that a duly authorised person can file the Application on behalf of the Financial Creditors under Section 7 of I&B 2016. More specifically, the Hon’ble NCLAT in the Judgement given in **Sumeet Ahuja’s case (supra)** has observed as follows:-

“as noticed, in the present case the Application under Section 7 has been filed by the Deputy General Manager of the Bank, in the Authorisation order it is mentioned as Power of Attorney, but that will not change the complex of the instrument which is an order of Authorisation. In view of such

position of law the submission made by the Counsel for the Appellant cannot be accepted.”

48. From the above, it can safely be concluded that if a person is duly authorised by the Financial Creditors, even by way of Power of Attorney, is competent to file the Application under Section 7 of I&B Code, 2016. Thus, the submission made by Learned Sr. Counsel for the Corporate Debtor stands overruled as the submission made by the Learned Sr. Counsel for the Financial Creditors is found plausible, and backed by the ruling of the Hon'ble NCLAT given in **Sumeet Ahuja's case (supra)**.

Issue No. vii

49. In relation to this issue the Learned Sr. Counsel for the Corporate Debtor has submitted that the Corporate Debtor has borrowed the loan from the Financial Creditors against its Articles of Association and thereby is *ultra vires* and does not bind the Corporate Debtor. This objection has been controverted by the Learned Sr. Counsel for the

Financial Creditors by making reference to the ruling given by the Hon'ble Apex Court in **“Oil and Natural Gas Corporation Ltd. Vs. Modern Construction and Company”** reported in (2014) 1 Supreme Court Cases 648, wherein under Para 20 of the Order, the Court was pleased to make reference to its earlier ruling given in **“BhartiyaSevaSamaj Trust Vs. Yogeshbhai Ambalal Patel”** reported in AIR 2012 SC 3285, wherein the court while dealing with a similar issue, observed as follows :-

*“28. A person alleging his own infamy cannot be heard at any forum, what to talk of a writ court, as explained by the legal maxim *alleganssuamturpitudinem non estaudiendus*. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong.... This concept is also explained by the legal maxims *commodum ex injuriasua non habere debet* and *nullus commodum capere potest de injuriasuapropria*.”*

If the Articles of Association of the Corporate Debtor was not allowing for taking loan, and in spite of that, the loan has been taken by the Corporate Debtor, then, it is not open for the Corporate Debtor to challenge its own action to seek the relief in its favour.

Therefore, the Corporate Debtor is *estopped* from raising an objection that the loan has been advanced in contravention of the provisions of the Articles of Association of the Corporate Debtors. In the light of the principle laid down by Hon'ble Apex Court in the above referred case, the Applicant cannot be allowed to take the benefit of his own wrong. Therefore, the plea raised by the Learned Sr. counsel for the Corporate Debtor stands rejected.

50. In the facts and circumstances and elaborate discussions made hereinabove, it can safely be concluded that the debt claimed by the Financial Creditors is due and payable, which the Corporate Debtor failed to pay. This Authority is satisfied that there is an existence of default on the part of the Corporate Debtor as is evidenced from the record placed on the file by the Financial Creditors. It has been held by the Hon'ble Supreme Court in **M/s. Innoventive Industries Ltd. vs. ICICI Bank**, MANU/SC/1063/2017 that "*.....it is of no matter that the debt is disputed so long as the debt is "due" i.e.*

*payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and **not otherwise.***”

51. In view of the facts and circumstances and the legal position stated above, the Application of the Financial Creditors is complete in all respect. The Financial Creditors have also proposed the name of IRP after seeking his consent in Form 2, which is placed at pages 222 to 223 of the typed set filed with the Application. Therefore, this Authority has ascertained the existence of a default on the basis of the documents produced by the Financial Creditors, and the Corporate Debtor has failed to pay the amount of loan borrowed from the Financial Creditors even after renewing the promissory notes on 15.05.2015 and executing other documents in favour of the Financial Creditors. The Financial Creditors have

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fulfilled all the requirements of law. Therefore, CP/62/(IB)/CB/2017 is **admitted** and the commencement of the Corporate Insolvency Resolution Process is ordered which ordinarily shall get completed within 180 days, reckoning from the day this order is passed.

52. Mr. P. Sriram is hereby appointed as IRP, as has been proposed by the Financial Creditors. There is no disciplinary proceeding pending against the IRP as evidenced from Form-2. 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 I&B Code, 2016, within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

53. The moratorium is hereby declared 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. It is hereby ordered 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.

54. The supply of essential goods or services of the Corporate Debtor/Guarantor shall not be terminated

or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

55. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of I&B Code. The Directors of the Corporate Debtor, its promoters or any person associated with the Management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19, so that he could discharge his functions under Section 20 of the I&B Code, 2016.

56. The Financial Creditors and the Registry are also directed to send the copy of this Order with immediate effect 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. The address details of the IRP are as follows: -



Mr. P. Sriram,

IBBI/IPA-002/IP-N00292/2017-18/10895

10/17 Anandam Colony, South Canal Bank

Road, Mandaveli,

Chennai – 600 028.

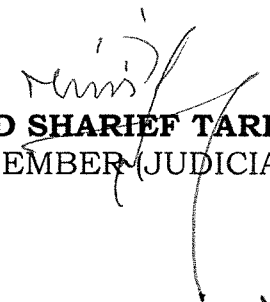
Email ID: srirampcs@gmail.com

Mobile No. 9940336666

57. The Registry is directed to communicate this Order to the Financial Creditors and the Corporate Debtor with immediate effect. There is no order as to costs.

58. The Order is pronounced in open Court in the presence of the Counsels for the Financial Creditors and the Corporate Debtor.

P.ATHISTAMANI


[CH.MOHD SHARIEF TARIQ]
MEMBER (JUDICIAL)