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**BEFORE THE AJUDICATING AUTHORITY  
(NATIONAL COMPANY LAW TRIBUNAL)  
AHMEDABAD BENCH  
AHMEDABAD**

**IA 197/2017 With C.P. (I.B) No. 54/7/NCLT/AHM/2017  
MP High Court**

Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU  
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD  
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 17.08.2017**

Name of the Company: Axis Bank  
V/s.  
Keti Highway Developers Pvt. Ltd.

Section of the Companies Act: Section 7 of the Insolvency and Bankruptcy  
Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	Mr. Shalin Jani	Advocate	Petitioner,	For, SHARDUL AMARCHAND
2.	Amit R. Joshi For Kunal P. Vaishnav.	Advocate	Respondent	MANEALDAS and CO. R. Joshi. S...

**ORDER**

Learned Advocate Mr. Shalin present for Financial Creditor/ Applicant. Learned Advocate Mr. Amit Joshi i/b Learned Advocate Mr. Kunal Vaishnav present for Respondent.

order pronounced in open Court. Vide separate sheet.

  
**BIKKI RAVEENDRA BABU  
MEMBER JUDICIAL**

Dated this the 17th day of August, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)  
AHMEDABAD BENCH  
AHMEDABAD**

**IA 197/2017 with C.P. No. (I.B) 54/7/NCLT/AHM/2017**

**In the matter of:**

Axis Bank Limited  
Registered Office at  
'Trishul', 3<sup>rd</sup> Floor,  
Opp: Samarteshwar Temple,  
Law Garden, Ellis Bridge,  
Ahmedabad-380006  
Corporate Office at  
'Axix House',  
C-2, Wadia International Centre,  
P.B. Marg, Worli,  
Mumbai-400025

: Applicant.  
[Financial Creditor].

Versus

M/s. Keti Highway Developers  
Private Limited,  
31/6, Vatsalya Chambers,  
Sneh Nagar Main Road,  
Indore-452001  
Madhya Pradesh

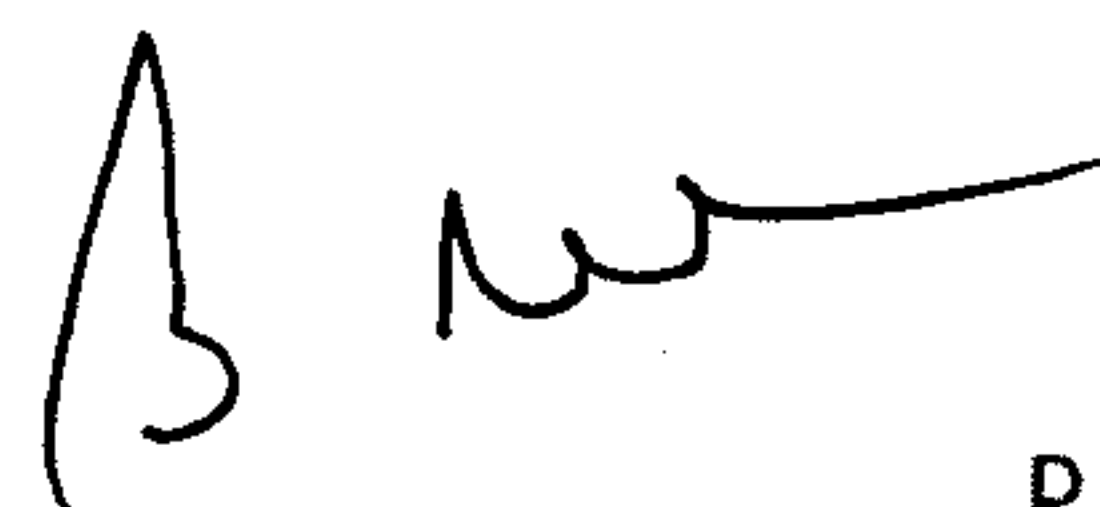
: Respondent.  
[Corporate Debtor].

Order delivered on 17<sup>th</sup> August, 2017.

**Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J).**

**Appearance:**

Shri Ameya Gokhale, learned Advocate with Shri Pulkitesh Tiwari,  
Shri Nirag Pathak, Shri Shalin Jani, learned Advocates on behalf of  
M/s. Shardul Amarchand Mangaldas & Co., for Applicant/Financial  
Creditor.



Shri Saurabh Soparkar, learned Senior Counsel with Shri Kunal Vaishnav and Shri Atul Nema, learned Advocates for Respondent.

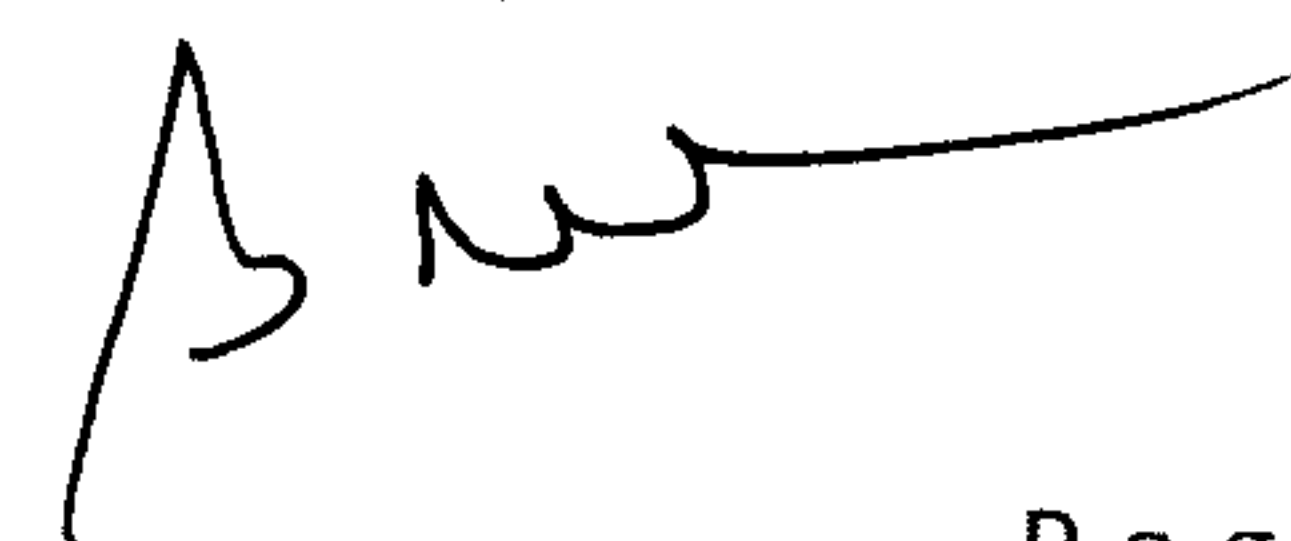
ORDER

1. The Applicant Bank, originally filed Company Petition No. 47 of 2016 before the Hon'ble High Court of Madhya Pradesh, at Indore Bench against Respondent under Section 433(e) and (f), 434 and 439 of the Companies Act, 1956 read with Rule 9 of the Company Court Rules, 1959. The Hon'ble High Court of Madhya Pradesh, Indore Bench, transferred the above said Petition to the National Company Law Tribunal, Ahmedabad Bench in view of Rule 5 read with Rule 7 of the Company (Transfer of pending Proceedings) Rules, 2016. Thereafter, Applicant furnished further information and filed the necessary Forms before this Tribunal which came to be registered as "CP (IB) No. 54 of 2017".

2. The case of the Applicant Company, in brief, is as under;

2.1. The Applicant Bank is a Banking Company within the meaning of Section 5(c) of the Banking (Regulation) Act, 1949 having its Registered Office at Trishul, Law Garden, Ahmedabad, Gujarat and Corporate Office at Axis House, Worli, Mumbai. Shri Sumit Sharma, Branch Manager of the Applicant Bank, Indore, is authorised to file this Petition by way of General Power of Attorney dated 22<sup>nd</sup> May, 2011.

2.2. Respondent Company is a Company registered under the Companies Act, 1956 having its Registered Office at Vatsalya Chambers, Indore. The Object of the Respondent Company is to carry on the business of construction, development etc. The Authorised Share Capital of Respondent Company is Rs. 21,00,00,000 divided into 2,10,00,000 Equity Shares of Rs. 10/- each.



2.3. On the request of the Respondent Company, the Applicant Bank sanctioned Term Loan to the tune of Rs. 55 Crores for development of Chandpur-Alirajpur-Kukshi-Barwani Road on the terms and conditions mentioned in the Sanction Letter dated 24.3.2011 which was duly accepted by the Respondent Company. The reduction in rate of interest was sanctioned and conveyed to Respondent Company vide letter dated 04.01.2013.

2.4. The Respondent Company had executed the following Agreements;

1. Escrow Account Agreement;
2. Term Loan Agreement;
3. Composite Hypothecation Deed;
4. Loan Agreement.

Respondent Company availed credit facility but not paid the outstanding dues to the Applicant Bank towards the Credit Facility. The account of the Respondent Company became a non-performing asset with effect from 29.11.2013 in the books of accounts of the Applicant Bank. The Applicant Bank issued a Demand Notice under Section 434 of the Companies Act, 1956, on 21.4.2016. In that Demand Notice, Applicant Bank claimed outstanding amount of Rs. 68,07,42,449/- as on 20<sup>th</sup> April, 2016 and called upon the Respondent Company to pay the said amount with further interest at contractual rate from 21.4.2016.

2.5. Applicant filed Form-1 before this Tribunal on 5<sup>th</sup> June, 2017.

3. Rule 4 Sub-Rule (3) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 require the Applicant to despatch forthwith copy of Application filed with the Adjudicating Authority by Registered Post or Speed Post to the Registered Office of the Corporate Debtor. On 02.8.2017, when the

matter was heard before this Adjudicating Authority, it was brought to the notice of this Authority that a copy of the Application has not been despatched to the Respondent Corporate Debtor. It is also found out that the Applicant did not disclose the information relating to the proceedings pending before Debt Recovery Tribunal in Item No.2 Para 5 of Form-1. It has also come to light that Applicant has not filed Escrow Agreement, Concession Agreement and Substitution Agreement. Thereupon, this Adjudicating Authority directed the Registry to give Notice to the Applicant to rectify the above said defects within 7 days. Accordingly, a Notice was issued by the Registry to the Applicant. Applicant, in compliance with the direction, filed the following documents;

1. Copy of Original Application No. 455 of 2016 along with Annexures filed by Financial Creditor before Debt Recovery Tribunal at Jabalpur;
2. Copy of Concession Agreement dated 30<sup>th</sup> June, 2017 between Madhya Pradesh Road Development Corporation Limited ['MPRDC'], Corporate Debtor/Respondent Company;
3. Copy of Substitution Agreement dated 4<sup>th</sup> October, 2011 between MPRDC. Corporate Debtor and Financial Creditor;
4. Copy of Escrow Account Agreement dated 4<sup>th</sup> October, 2011 between Corporate Debtor, Financial Creditor and MPRDC;
5. Order dated 7<sup>th</sup> December, 2016 passed in Company Petition No. 47 of 2016;
6. Orders dated 23<sup>rd</sup> January, 2017 passed in Company Petition No. 47 of 2016.

Applicant also served a copy of the Application on the Respondent.



4. On the next date of hearing, on 7<sup>th</sup> August, 2017, during the course of the arguments it was noticed that in the copy of the Loan Agreement filed by the Applicant some clauses were missing and some pages of the Agreement were also missing, whereupon the learned Counsel undertook to file fresh copy of Loan Agreement containing all clauses in all pages in the Loan Agreement. Accordingly, on 10.8.2017, copy of Loan Agreement was filed.

5. Respondent Company filed objections.

5.1. The first and foremost objection raised by the Respondent is that Applicant Bank has not produced the vital documents such as Escrow Account Agreement, Concession Agreement, Substitution Agreement, and that those documents were suppressed because those documents contained the dispute resolution mechanism.

5.2. This objection raised by the Respondent has been rectified by the Applicant by filing the above said Agreements. In fact, Applicant filed Escrow Agreement along with Company Petition No. 47 of 2016 as Annexure P-4. Applicant filed Concession Agreement dated 30<sup>th</sup> June, 2017.

5.3. It is the contention of the Applicant that Financial Creditor is not a party to the Concession Agreement and therefore it need not be filed as a material document. Further, it is the contention of the Applicant that the claim is not based on Substitution Agreement dated 4<sup>th</sup> October, 2011 and it is based on Loan Agreement and therefore the Substitution Agreement is not a material document for the purpose of adjudication of Application under Section 7 of the IB Code.

5.4. It is the contention of the learned Senior Counsel appearing for the Respondent that in view of the Clauses in the Substitution Agreement and Concession Agreement, it cannot be said

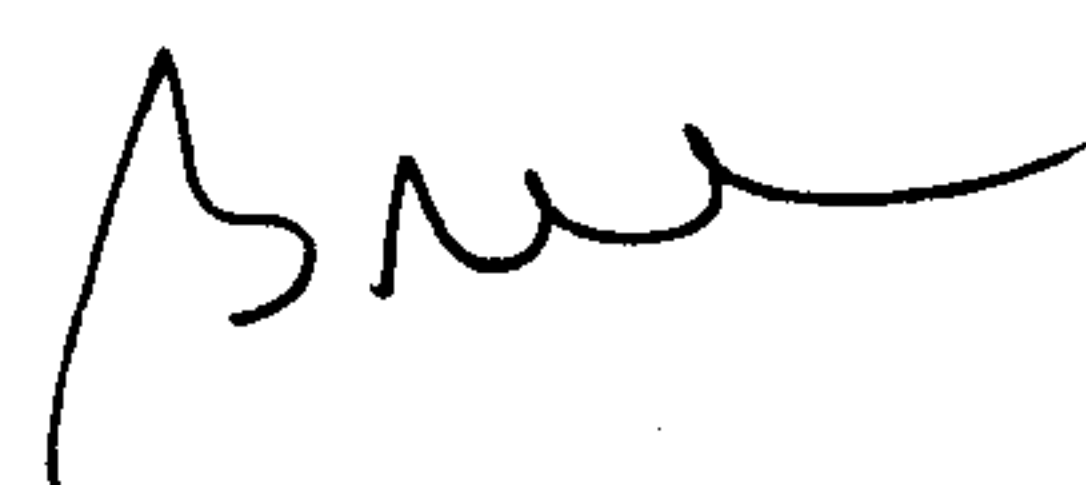


that a default has been committed by the Respondent in repayment of the Cash Credit amount.

5.5. In view of the contention of the learned Senior Counsel for the Respondent only, this Adjudicating Authority directed the Applicant to file Escrow Account Agreement, Concession Agreement and Substitution Agreement and accordingly Applicant filed those documents. In view of the above said facts, the first objection of the learned Senior Counsel for the Respondent, relating to non-filing of certain Agreements, no longer holds good for the purpose of adjudication of this Application.

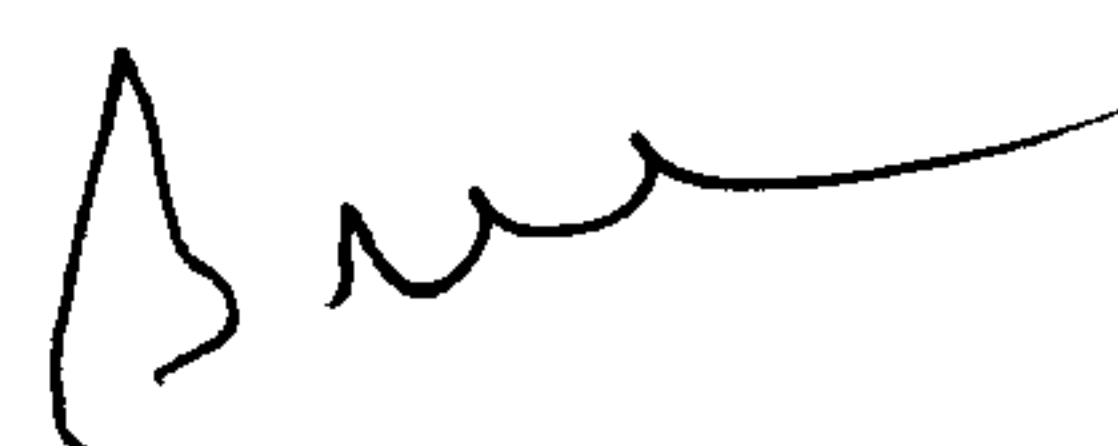
6. The second objection raised by the learned Senior Counsel for the Respondent is that Clause 8.1.1. of the Substitution Agreement provides for Dispute Resolution Mechanism and according to the Dispute Resolution Mechanism, any dispute, difference or claim arising out of or in connection with Substitution Agreement shall be referred to arbitration and therefore the present Application filed by the Applicant is not maintainable before this Authority. On this aspect, learned Counsel appearing for the Applicant contended that default has been committed by the Corporate Debtor in terms of the Loan Agreement and the claim in the present Application relates to the terms of the Loan Agreement, but not related to the Substitution Agreement. He further contended that the Arbitration Clause in the Substitution Agreement cannot be made applicable to the present proceedings since the claim does not arise under the Substitution Agreement. He further contended that provisions of Section 238 of the IB Code will have overriding effect over any other provisions in Law which is inconsistent with the provisions of the IB Code, and the Arbitration Clause does not bar the filing of the insolvency proceedings.

6.1. The Substitution Agreement dated 4<sup>th</sup> October, 2011 is entered into between MPRDC, Corporate Debtor and Financial Creditor.



6.2. A reading of Clause 3 of the Substitution Agreement clearly indicates that in substance it is assignment of rights and title. It says, the Concessionaire (Corporate Debtor) assigns the rights, title and interest in the Concession Agreement in favour of Lender's Representative by way of security in respect of financing by the Lenders under the Financing Agreement. As per Clause 3.1.2. of the Substitution Agreement, MPRDC agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the nominated Company selected by the Lender's Representative in accordance with the Substitution Agreement. It is further stated in Clause 3.2. that substitution is upon occurrence of Financial Default.

6.3. Clause 3.2.1. further lays down that upon occurrence of a Financial Default, the Lender's Representative may issue a notice to the Concessionaire marking a copy to MPRDC and upon issuance of such notice without prejudice to its rights under Financing Agreement, substitute the Concessionaire by a nominated Company. The Substitution Agreement also provides procedure for substitution. In view of the said Clauses in the Substitution Agreement, the Arbitration Clause 8.1.1. of the Substitution Agreement in no way prevent the Financial Creditor to claim the amount due under the Loan Agreement. Clause 8.1.1. is only to resolve the dispute that arise out of or in connection with the Substitution Agreement. It is pertinent to mention here that there is no Arbitration Clause in the Loan Agreement. In the absence of Arbitration Clause in the Loan Agreement, on the basis of Arbitration Clause in the Substitution Agreement, it cannot be said that the proceedings under the Insolvency Code are barred because of an Arbitration Clause in the Substitution Agreement. Moreover, given the fact that even though there is an Arbitration Clause, and even if the arbitration proceedings are pending, it is no bar for initiation of Insolvency Resolution Process under Section 7 of the Code, in view of Section 238 of the IB



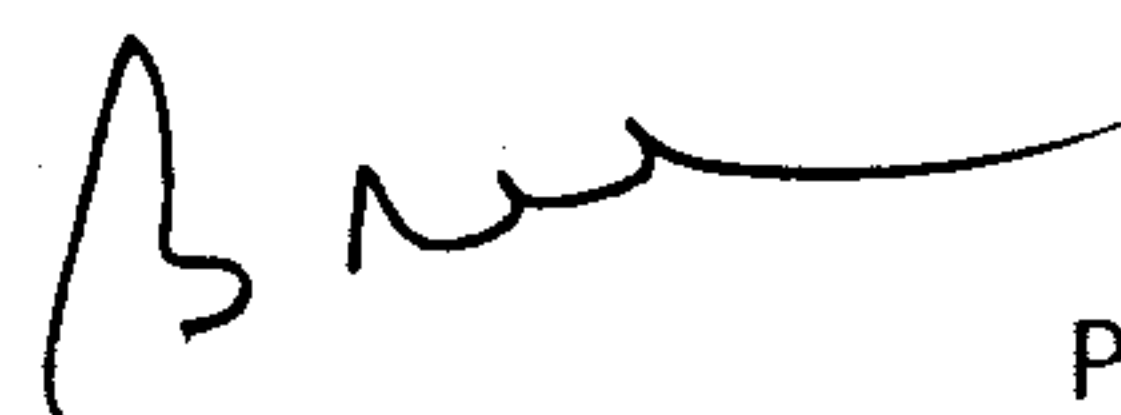


Code. Therefore, the second objection raised by the learned Senior Counsel for the Respondent do not merit acceptance.

7. The third objection raised by the learned Senior Counsel for the Respondent is, that in view of the Escrow Agreement dated 4<sup>th</sup> October, 2011 there is no default committed by the Respondent.

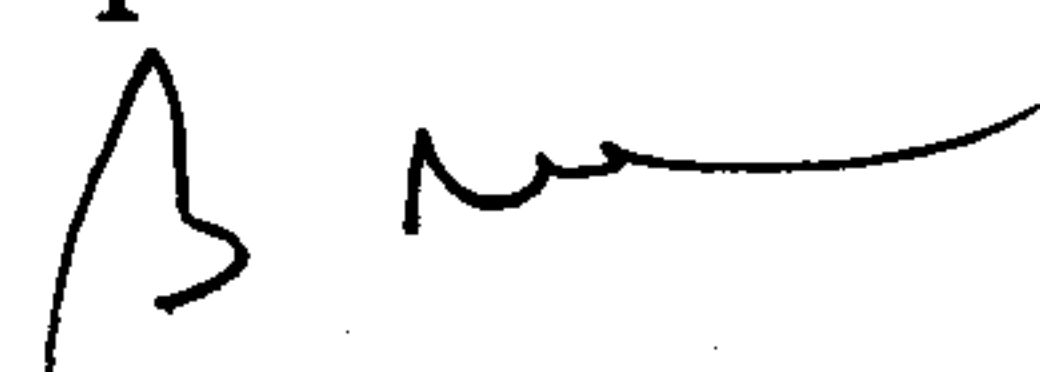
7.1. Learned Senior Counsel for the Respondent pointed out that as per the Amortisation Schedule, the repayment of the loan is based on cash flow of the borrower. Learned Senior Counsel for the Respondent further contended that as per the Escrow Account Agreement, Applicant Bank itself is an Escrow Agent and it is the Escrow Agent that maintains the Escrow Account in terms of the Escrow Account Agreement and whatever deposited into Escrow Account in whatever manner will be disbursed as per the Escrow Account Agreement and the borrower has no control over it.

7.2. A perusal of the Escrow Account Agreement dated 4<sup>th</sup> October, 2011 entered into between Corporate Debtor, MPRDC and the Applicant shows that Escrow Account is required to be funded as per Clauses (a) to (i) mentioned in Clause 4.1. of the Agreement and the withdrawals are according to Clause 4.2.1. The Escrow Account Agreement also says what are the rights and obligations of the Escrow Agent. Therefore, the functions of Escrow Agent as per the Escrow Account Agreement are different from the functions of the Insolvency Resolution Professional, in case of triggering of Insolvency Resolution Process. Simply because no sufficient funds are deposited into the Escrow Account, due to less cash flow or 'Nil' cash flow, the borrower is not absolved from the liability to pay the outstanding loan amounts. In case of amounts deposited in the Escrow Account, they have to be disbursed by the Escrow Agent in the manner in which it is laid down in the Escrow Agreement. Therefore, the Escrow Account Agreement nowhere absolves the liability of the Corporate Debtor to pay the outstanding loan amount, if any.



8. The most important argument advanced by the learned Senior Counsel for the Respondent is that there is no material on record to satisfy this Adjudicating Authority that Corporate Debtor has committed default in repayment of the loan amount. He further contended that this is not a case where the amounts are due by virtue of the Loan Agreement alone. He further contended that on consideration of the Loan Agreement, Concession Agreement, Substitution Agreement and Escrow Account Agreement it shows that whatever the Toll amount collected by the Corporate Debtor has to be deposited in the Escrow Account and from out of it the payment has to be made to the Loan Account and other amounts as agreed upon. He contended that in Clause 2A.3 of the Loan Agreement, the outstanding amounts are payable from time to time and on all monies occurring due under the agreement and not paid on due dates monthly in each year on the dates set out in Schedule IV. He contended that in Schedule IV, there are no such dates. Learned Senior Counsel appearing for the Respondent contended that Clause 2A.3 deals with interest. The Schedule number is wrongly typed as 'Schedule IV' instead of 'Schedule III'. A perusal of Schedule III shows that it deals with particulars of interest, whereas Schedule IV deals with Drawdown schedule. Therefore, it is obvious that a typographical mistake is there in typing the Schedule number in Clause 2A.3. Therefore, it is necessary to read the Schedule Number in Clause 2A.3 as "Schedule-III" instead of "Schedule IV".

9. Learned Senior Counsel appearing for the Respondent, turning to Schedule III, contended that the dates of payment of interest indicated in Schedule III is monthly on the last date of each calendar month or as and when debited to the account. He contended that no interest has been debited to the loan account and therefore the interest amount is not due and payable. Learned Senior Counsel further contended that the amounts already deposited by the Respondent are more than the Principal amount which is due and the interest so far debited i.e., up to March 2014 and therefore there is no default committed by the Respondent. Along with the

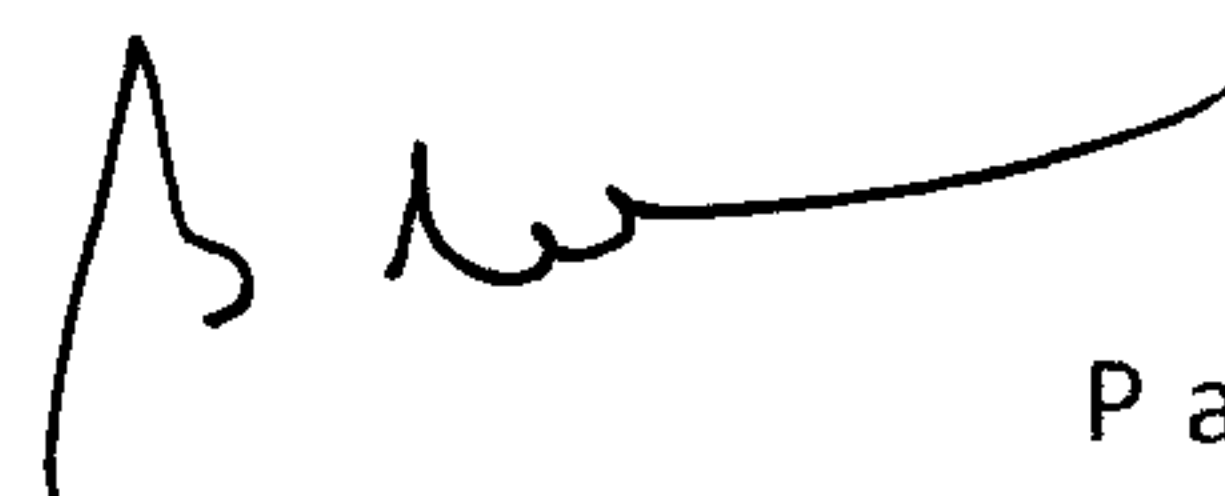


Additional Objections, Respondent filed summary of Toll deposited in Axis Bank Term Loan Account. As per the said Statement, no interest was shown as due for the months from April 2014 to June 2017 and interest was debited only up to March 2014. Learned Senior Counsel for the Respondent contended that after the loan account became non-performing account, interest will not be shown in the account but it is due and recoverable. It is a fact that the loan account of the Respondent became a non-performing account and therefore on the ground that interest is not shown as due in the loan account of the Respondent, it cannot be said that interest is not payable.

10. As per the Loan Agreement, its Clause 2A.7 deals with repayment. The repayment shall be made as per the Amortisation Schedule. No doubt, in Clause 2A.7(i), the Schedule number is mentioned as 'Schedule VI', but if we refer to Schedule VI, it deals with the Facility Sanction Letters, but not Amortisation Schedule. Amortisation Schedule is there in Schedule-V. Basing on the description of Amortisation Schedule in Clause 2A.7(i), the Schedule number has to be read as "Schedule-V" instead of "Schedule-VI", since it is a typographical error. "Schedule-V" deals with Amortisation Schedule. It says that based on the cash flow of the borrower the repayment of the loan will be made in 144 step up monthly instalments. In this Amortisation Schedule, it is clearly mentioned that interest will be served as and when applied into the account. Therefore, the argument of the learned Senior Counsel for the Respondent, that interest is not due and payable and it has not been debited to the Loan Account, do not merit acceptance. Here, it is pertinent to mention that before filing the winding up petition itself before the Hon'ble High Court of Madhya Pradesh, in the statutory notice itself a demand has been made by the Applicant/Financial Creditor to the Corporate Debtor to pay the entire outstanding loan amount. Therefore, the contention of the learned Senior Counsel for the Respondent, that the Respondent has paid more than what is due, do not merit acceptance. The Clauses in the Loan Agreement clearly give authority to the Financial Creditor to recall the entire loan

amount which carries interest irrespective of the Substitution Agreement and Concession Agreement which are in the nature of securities. It is a case where the Financial Creditor chose to recall the entire loan amount and, therefore, the contention of the learned Senior Counsel for the Respondent, that as on date what is due has been paid by the Respondent, and there is no default in making payment, do not merit acceptance. Therefore, this Adjudicating Authority is unable to accept the contention of the learned Senior Counsel for the Respondent that no default has been committed by the Corporate Debtor in repayment of the loan amount as per the Loan Agreement. Learned Senior Counsel appearing for the Respondent further contended that in view of Clause 7.2(ii) there must be declaration of the unpaid principal amount and interest in respect of the loans and unless and until such declaration of unpaid principal amount and interest is there it cannot be said that Respondent committed default. The very fact that Financial Creditor chose to recall the entire outstanding amount by issuing statutory notice in the winding-up proceedings, amounts to declaration of unpaid principal amount and interest. Therefore, this argument is also not acceptable. The documents placed on record by the Applicant, such as Loan Agreement and Statement of Accounts certified under the Banker's Books Evidence Act clearly establish that a default has been committed by the Corporate Debtor in repayment of the loan amount outstanding to the Financial Creditor. The Financial Creditor complied with all the requirements and now the Application is complete in all aspects.

11. Learned Senior Counsel for the Respondent further contended that in view of the pendency of debt recovery proceedings, this Application is not maintainable. I see no force in the contention of the learned Senior Counsel for the Respondent. The debt recovery proceedings are initiated by the Financial Creditor against the Corporate Debtor and the Guarantor and they are at the stage of filing of Reply by the Corporate Debtor.

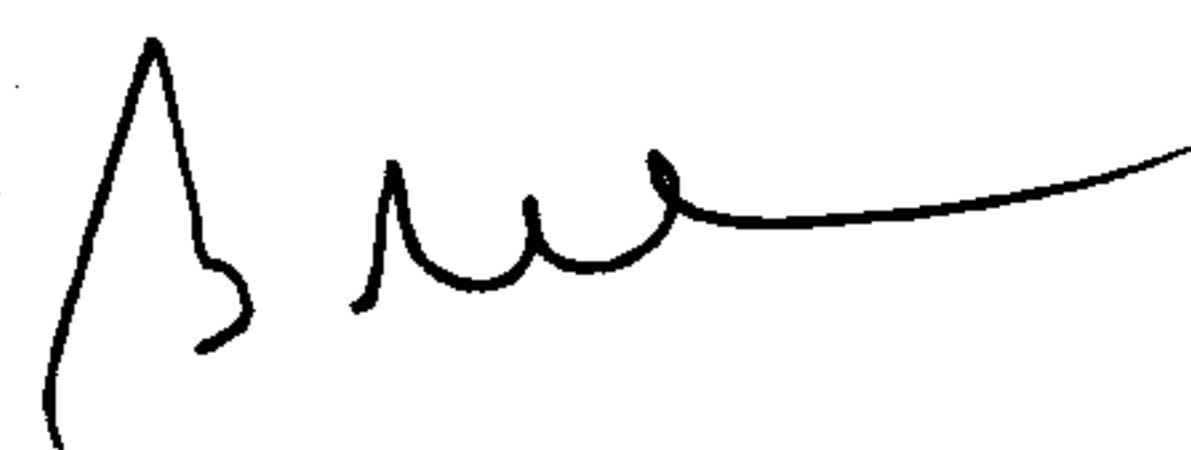


11.1. In view of provisions of Section 238 of the IB Code, the pendency of Debt Recovery proceedings is no ground not to initiate 'Corporate Insolvency Resolution Process' under Section 7 of the Code if this Authority satisfies that there is an occurrence of default in repayment of the loan amount and if the Application is complete in all aspects.

12. In view of the above discussions, the Application deserves to be admitted, and accordingly admitted under Section 7(5)(a) of the IB Code.

13. Coming to the appointment of 'Insolvency Resolution Professional', in the Application, Applicant proposed the name of one Shri Rajan Wadhwan for the purpose, but after the filing of the Application, Applicant filed IA No.197 of 2017 seeking for substitution of the Insolvency Resolution Professional on the ground that the registration of Mr. Rajan Wadhwan as 'Insolvency Resolution Professional' has expired on 6<sup>th</sup> July, 2017 and hence he cannot be appointed as 'Interim Resolution Professional'. To substantiate the same, Applicant placed on record a copy of letter dated 7<sup>th</sup> July, 2017 written by Mr. Rajan Wadhwan to the Financial Creditor. In the said circumstances, the Applicant by way of IA No. 197/2017 proposed the name of Mr. Udayraj Patwardhan and filed his Written Communication. In view of the above said facts and circumstances, Mr. Udayraj Patwardhan is appointed as 'Interim Insolvency Resolution Professional' who is residing at 2, Patwardhan Apartments, Patil Colony #3, College Road, Nashik-422005 with Registration No. IBBI/IPA-001/IP-P00024/2016-17/10057.

14. This Adjudicating Authority hereby directs the Interim Insolvency Resolution Professional to cause public announcement of the initiation of Corporate Insolvency Resolution Process and calls for submission of claims under Section 13(1)(b) read with Section 15 of the Code and Regulation 6 of Insolvency and Bankruptcy Board of



India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

15. This Adjudicating Authority hereby order moratorium under Section 13(1)(a) of the IB Code prohibiting the following as referred to in Section 14 of the Code;

(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;

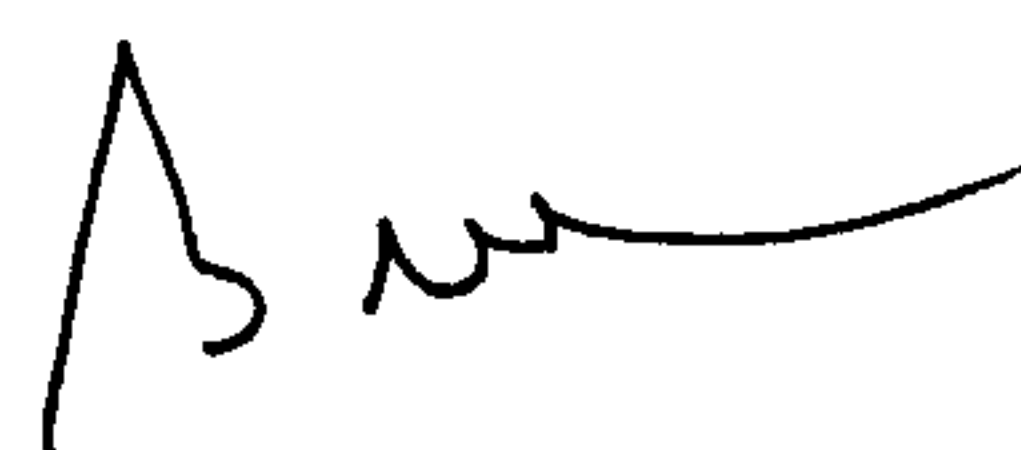
(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(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.

(i) However, the order of moratorium shall not apply in respect of supply of essential goods or services to Corporate Debtor.

(ii) The order of moratorium is not applicable to the transactions that may be notified by the Central



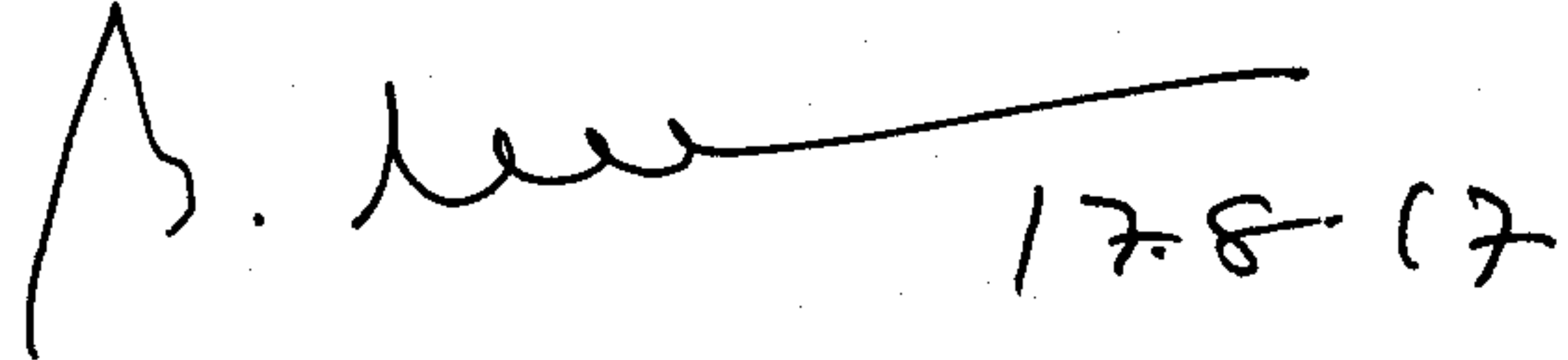
Government in consultation with any financial sector regulator.

- (iii) The order of moratorium comes into force from the date of the order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14.

16. This Application is disposed of accordingly. No order as to costs.

17. Communicate a copy of this order to the Applicant Financial Creditor, and to the Respondent Corporate Debtor, and to the Interim Insolvency Resolution Professional.

Signature:

Handwritten signature of Sri Bikki Raveendra Babu, with the number 17817 written to the right.

**Sri Bikki Raveendra Babu, Member (J).  
Adjudicating Authority.**