

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

IA NO.60/2017

(UNDER SECTION 60(5) OF THE
INSOLVENCY & BANKRUPTCY
CODE, 2016)

IN

CP NO.25/ALD/2017

IN THE MATTER OF

Gujarat State Petroleum Corporation Ltd.,
GSPC Bhavan, Behind Udyog Bhavan,
Sector-11, Gandhinagar – 382 010, Gujarat,
through its Authorized Representative.

..... APPLICANT

MEMO OF PARTIES:

JODPL Private Limited,
Plot No.15, Knowledge Park II,
Greater Noida -201 306, Gautam Budh Nagar,
Uttar Pradesh.

.....CORPORATE DEBTOR/APPLICANT

JUDGMENT/ORDER DELIVERED ON 27.11.2017

CORAM: SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

For the Applicant : **Sh. Apsi Kapadia, Advocate.**
Alongwith,
Sh. Rohan Gupta, Advocate.



For the Corporate Applicant : **Ms. Misha, Advocate.**
Alongwith,
Ms. Gunjan Jadwani, Advocate.

PER: SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

JUDGMENT/ORDER

1. The present applicant GSPLC (Gujarat State Petroleum Corporation Limited) is an oil and gas exploration company, which is incorporated under the laws of India and is an undertaking of the Government of Gujarat.

The entire shareholdings of the applicant are held by the State Government of Gujarat and State Sector Entities. The main grievance of the applicant as agitated in the present application is that, its debts has not been classified as financial debt by the Interim Resolution Professional (IRP) now Resolution Professional (RP) Mr. Dinkar T. Venkatasubramanian as per the definition of financial debts given U/s 5(8) of the Code. Further, the applicant has not been included as member in the Committee of Creditors (COC) of JODPL (Jubilant Off Drill Pvt. Ltd.) being a Financial Creditor. Therefore, such action of the RP now is impugned through the present application.

2. Therefore, the present applicant has sought for a direction from this Court as being Adjudicating Authority to be issued to the IRP (now RP) to treat the applicant as a Financial Creditor of the JODPL and to include it as a member of COC of the Corporate Debtor Company. It is also contended that in case the applicant is not allowed, then it would have to suffer a grave and irreparable loss and injury. It is also submitted that the balance of convenience is also in its favour, hence, its present application deserves to be allowed.



3. The present applicant has sought for such relief as stated at page no.27 of the present application for the sake of convenience, which are being reproduced herein below:-

Pending hearing and disposal of this application, adjourn all other proceedings in the present matter pending before this Hon'ble Tribunal, including but not limited to the replacement of the resolution professional pursuant to the resolution passed by the committee of creditors;

The IRP should be directed to invoke sponsor support undertakings/guarantees, as specified above, to ensure the continuance of JODPL as a going concern.

4. Brief facts raising to the present petition are described well in the petition herein below:

1. *Gujarat State Petroleum Corporation Limited is an oil and gas exploration company incorporated under the laws of India. The applicant is a government of Gujarat undertaking and a government company within the meaning of Companies Act, 1956 and the Companies Act, 2013. The entire shareholding of the applicant is held by Government of Gujarat and state sector entities.*
2. *JODPL Private Limited had filed the application being CP No.25/ALD/2017 under Section 10 of the Insolvency & Bankruptcy Code, 2016 and the rules/regulations made there under the (Code) read with Rule 7 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 before the Hon'ble National Company Law Tribunal, Allahabad Bench for initiation of corporate insolvency resolution process for itself which was admitted by the Hon'ble Tribunal vide order dated March 17, 2017.*
5. *The brief background in relation to the aforesaid claim is summarized herein below:*
 - a. *The applicant had entered into a Production Sharing Contract (PSC) dated February 04, 2003 with the Government of India, Jubilant Enpro Limited (JEL) and Geoglobal Resources (India) Inc. for the purpose of exploration, development and production of hydrocarbons (oil and natural gas) from KG-OSN-2001/3 Block (KG Block). It may be noted that KG Block is an asset of national importance being developed under the PSC and aimed at producing scarce natural resources (natural gas). KG Basin is a prolific hydrocarbon reservoir of India with significant gas potential to enhance domestic gas production and meet the objective of energy security of India. The applicant has achieved significant progress in managing a High Pressure and High Temperature reservoir involving technical challenges at a depth of more than 5000 meters in offshore environment in relation to the KG Block.*
 - b. *The applicant was appointed as the operator under the terms of the PSC and each party to the PSC acquired a specified percentage of participating interest (PI the undivided share in rights and obligations under the PSC). The applicant, the operator for the purpose of carrying out petroleum operations in relation to the KG Block, holds 80% of PI in relation to the KG Block and JODPL holds 10% of the PI in relation to the KG Block as a non-operating party.*
 - c. *A Joint Operating Agreement dated August 07, 2003 (JOA) was executed among the applicant, JEL and Geoglobal Resources (India) Inc., setting out the rights and obligations of the parties in relation to the KG Block. It may be noted that a deed of*



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assignment and assumption dated January 04, 2005 was executed whereby JEL's rights and obligations under the PSC and JOA were assigned to JODPL.

d. As per the terms of the PSC and the JOA, all the costs and expenses for carrying out petroleum operations in relation to the KG Block are required to be borne by the parties thereto, including JODPL, in the proportion to their respective PI. Article 7.6.1 of the JOA provides that if any party to the JOA fails to pay its share of costs/cash calls on the due date, then the non-defaulting parties to the JOA are required to contribute the amounts defaulted by such defaulting party. Further, a defaulting party under the JOA can remedy the default on its part by making payment of the defaulted amounts to the non-defaulting parties alongwith interest which is calculated at IIBOR rate plus 2% (on specified days) payable from the due date for the entire period during which the default continues as per article 7.6.2 of the JOA. This inter-se financial arrangement among the joint venture partners of the KG Block, is required to ensure uninterrupted petroleum operations. Further, the funding provided by the KG Block joint venture partners are also adequately protected by a specific provision under the JOA and the PSC.

e. As per the terms of the JOA, JODPL was required to make certain payments towards costs for interalia exploration and development of the KG Block, as per cash calls/joint interest bills (JIBs) made by the applicant. However, JODPL defaulted in making these payments. Since JODPL defaulted in paying the cash calls/JIBs, these amounts were paid by the applicant on behalf of JODPL in terms of Article 7.6.1 of the JOA. The applicant has advanced the aforementioned defaulted amounts on behalf of JODPL in respect of each of the defaulted Cash Calls. It may be noted that JODPL has not made any payments to the applicant against any of the Cash Calls/JIBs raised from July, 2013 onwards and the applicant has been since, solely contributing and funding such defaulted amounts on behalf of JODPL. The applicant has funded a total sum of Rs. 464,74,23,014 (Rupees Four Hundred Sixty Four Crores Seventy Four Lakhs Twenty Three Thousand and Fourteen only) on behalf of JODPL, pursuant to default on the part of JODPL under the JOA. The Cash Calls/JIBs raised on JODPL, since July, 2013, remain unpaid till today.



f. Additionally, it may also be noted that Article 28.8 of the PSC specifically provides that any encumbrance sought to be created by a party on its respective participating interest in relation to the KG Block will be subordinated to the rights of the other parties under the PSC and similar stipulation has been made under Article 13.7 of the JOA. It is accordingly submitted that the debt owed by JODPL to the Applicant, on account of non-payment of Cash Calls/JIBs, will rank prior to any other claim in relation to the participating interest of JODPL in the KG Block. For ease of reference, the said clauses from the PSC and the JOA are reproduced herein below:

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PSC-ARTICLE 28.8:

"Nothing contained in this Article 28, shall prevent a party comprising the Contractor from mortgaging, pledging, charging or otherwise encumbering at its own risk and cost all or any party of its Participating Interest for the purposes of security related to finance to the extent required for performing its obligations under the Contract; provided that:

.....

the encumbrance shall be expressly subordinated to the rights of the other Parties under the Contract. The obligations occurring from the said encumbrance shall be the sole responsibility of the original Party and shall in no manner compromise the rights of the other Parties to the Contract."

JOA ARTICLE 13.7:

"Nothing contained in this Article 13, shall prevent a Party from mortgaging, pledging, charging or otherwise encumbering all or part of its interest in the Contract Area and in an under this Agreement for the purposes of security related to raising of finance so as to meet its obligations under this Agreement; provided that:

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such Party shall ensure that the any such mortgage, pledge, charge or encumbrance shall be expressed to be without prejudice and subject to the provisions of this Agreement;

any encumbrance sought to be created shall be expressly subordinated to the rights of the other Parties under the Contract and this Agreement."

- g.** On account of non-payment of Cash Calls/JIBs, the applicant issued a default notice dated August 13, 2014 to JODPL, directing JODPL to cure the payment default under the JOA. This notice issued by the applicant was responded to by JODPL vide letter dated August 22, 2014 on frivolous grounds.



Thereafter, vide letter dated May 26, 2015, the applicant refuted all contentions of JODPL and directed JODPL to rectify its default within 15 days of the letter. However, no payment has been made by JODPL till date. Further, in the financial statements of JODPL as filed by JODPL with this Hon'ble Tribunal alongwith its application under Section 10 of the Code, the debts owed by JODPL to the applicant are provided for in the books of accounts of JODPL as "current liabilities". It may be noted in this regard that such provision in books of account as "current liabilities" is required to be carried out only when the debt is admittedly payable by the debtor within a period of 12 months as provided for in Section

129 read with Schedule III of the Companies Act, 201. Further, even as per the audited statements of accounts in relation to the KG Block, for the year ended March 31, 2016, the dues owed by JODPL to the applicant towards Cash Calls/JIBs are shown as 'Current Liabilities'. With respect to these audited accounts, it may be noted that the same are audited by statutory auditor of the applicant as well as another independent auditor appointed by the management committee of the KG Block (a body comprising of nominees of Government of India). Such audited accounts are then placed before and adopted by the operating committee of the KG Block (comprising of the representatives of the applicant, JODPL and the other partner in KG Block) as well as the management committee of the KG Block. Thus, the audited accounts present a clear and irrefutable acknowledgment of debt due by JODPL to the applicant.

- i. It may be noted that as per Article 7.8.2 of the JOA, the fundamental principle of the JOA is that each party pays its participating interest share of all amounts due and payable under the JOA and any party who is in default of such fundamental obligation has expressly waived any set-off or claim that it may have against the non-defaulting party. Further, the defaulting party has also expressly agreed in terms of Article 7.8 that in the event of its default, the amount and nature of remedies available to non-defaulting parties under Article 7 of the JOA are just, proper and appropriate.
- j. It is also important to note that vide letter dated August 22, 2016, JODPL has itself acknowledged its liability towards the applicant under the term of the JOA for the purposes of the Limitation Act, 1963.
- k. Thereafter, as mentioned above, JODPL filed the application, as corporate debtor for initiation of corporate insolvency resolution process under Section 10 of the Code as the corporate applicant, which has been admitted by the Hon'ble Tribunal vide order dated March 17, 2017. Pursuant to the admission, and in terms of the Code, a public announcement was made for collection of claims of creditors of JODPL by the IRP. Consequently, a committee of creditors has also been constituted by the IRP for JODPL.



Further, in the meeting held with the IRP in New Delhi on March 27, 2017, the applicant was advised by the IRP to file the applicant's claim as an 'operational creditor' under the Code. Thereafter, vide an email dated March 31, 2017 which was within the 30 days time specified in the public announcement, the applicant submitted its proof of claims to the IRP as a financial creditor under the Code whereby the amount to be in default by the applicant was Rs.493,14,50,306 (Rupees Four Hundred Ninety Three Crores Fourteen Lakhs Fifty Thousand Three Hundred and Six only). Further, in accordance with the instructions of the IRP, the applicant also

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submitted its proof of claims as 'operational creditor' under the Code, in the alternative.

- m. Since the IRP did not provide any response in relation to the claims filed by the applicant, the applicant vide emails dated April 09, 2017 again wrote to the IRP seeking response in relation to its claims and also sought copies of interalia the application/documents filed by JODPL before the Hon'ble Tribunal. In response to the said email, the IRP vide email dated April 10, 2017 interalia informed the applicant that the applicant does not qualify either as a financial creditor or as an operational creditor of JODPL under the Code and the applicant's claim falls within the scope of "other stakeholder" under Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Therefore, the applicant was not given any representation in the committee of creditors constituted for JODPL despite having duly filed its claim as a financial creditor within the stipulated time period. In response to this email of the IRP, the applicant refuted IRP's contention and sought IRP's time to discuss the same.
- n. The IRP, however, permitted the applicant to have discussions with the committee of creditors for a very limited purpose (consent requirement for assignment of applicant's PI) and informed the applicant regarding the first meeting of the committee of creditors for JODPL vide email dated April 10, 2017. Further, the IRP has been notifying the applicant of all the meetings of JODPL's committee of creditors. However, none of the minutes of the committee of creditors have been shared with the applicant.
- o. Thereafter, vide emails dated April 21, 2017 and April 27, 2017, the applicant again sought copies of the documents specified therein. After several requests and incessant follow up on the part of the applicant, the IRP provided the applicant with the copy of interalia the list of claims maintained by him in relation to JODPL, vide his email dated April 30, 2017.



A perusal of the list of claims maintained by the IRP shows that the claims of applicant (submitted vide email dated March 31, 2017) have not been included by the IRP in the list of claims and in fact, the amount of applicant's admitted claims have been shown as 'not applicable' by the IRP, on the basis that these amounts have been disputed by JODPL.

- 6. With respect to the debt owed by JODPL to the applicant, it may be noted that the amount of Cash Calls/JIBs, from July, 2013 onwards, have been funded by the applicant on behalf of JODPL, which JODPL is required to repay to the applicant in accordance with the provisions of the JOA alongwith interest at prescribed rate if such repayment is not made by JODPL within 30 days from the due date of repayment under the JOA. It is accordingly, submitted that the amounts owed to the applicant are 'financial debt' for the purpose of the Code and applicant satisfies the criteria prescribed to qualify as

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a 'financial creditor' under the provisions of the Coe. Further, it is submitted that the failure on the part of the IRP to determine the claim of the applicant as a 'financial creditor' under the Code and his rejection of applicant's claim on the ground that the same is disputed by JODPL, is contrary to the admitted facts as well as the express provisions of the Code and relevant regulations and therefore bad in law.

5. The present applicant has submitted that keeping in view of the above given facts & circumstances of the case, the JODPL (now Corporate Debtor Company) is required to repay the amount of Cash Call/JIBs from July, 2013 onwards which the applicant has actually incurred for and funded on behalf of the JODPL. Therefore, such payment is still due and payable under the terms of the JOA alongwith interest accrued therein at prescribed rate, if such payment is not made to it by the JODPL as per the terms of Joint Operation Agreement within 30 days from its due date. It is also stated as such payment has been denied, hence such amount due under the payment falls within the definition of financial debt for the purpose of Code. As the present applicant satisfy the criteria prescribed for, hence, is entitled to be treated as a financial creditor under the provision of the Code. Despite, this the IRP/RP has failed to determine the applicant's claim as a financial creditor under the Code and rejected the same on such reason that such payments for Cash Call/JIBs from July, 2013 onwards are being disputed by the JODPL. Therefore, it is not only contrary to the admitted liability of the JODPL but also against the statutory provisions read with relevant regulation of the I & B Code. The applicant further submits that the amount advanced so far by it to be considered for time value of money. Therefore, the JODPL is required to pay interest at specified rates for such period of default in making repayment thereof. Thus, the applicant clearly satisfy the requirement prescribed for a debt to be treated as a financial debt under the Code and the applicant equally deserved to be considered as a



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Financial Creditor of Corporate Debtor Company (JODPL). In support of its claim, the applicant further placed reliance on Sections 5(7), 5(8)(f) & (h) read with section 3(6) of the I & B Code read with other relevant provision of the Regulation. It is further alleged that the applicant earlier made its claim to the IRP of the Corporate Debtor Company, but the same was wrongly rejected. The RP although constituted a COC for JODPL but without including the present applicant. Therefore, the present applicant has not only been denied with its legal claim but has also been deprived of to represent the COC as a Financial Creditor in the decision making process for a resolution plan for JODPL, which is not justified. Hence, the above mentioned prayer and relief is being sought for. In support of application and prayer the applicant has submitted an affidavit of its Manager (Secretarial and Legal) annexing therewith necessary documents of Production Sharing Contract (PSC) which were entered among the parties. A copy of the default notices issued time to time from 13th August, 2014 onwards to the present Corporate Debtor Company. The applicant further enclosed a copy of a communication dated 22nd August, 2016 as received from the Corporate Debtor Company (i.e. JODPL) informing such that it has acknowledged its liability towards the JIBs amount under the JOA for KG Block but only for a purpose of limitation and subject to certain dispute raised by the Corporate Debtor Company in respect of amount claimed under JIB. As per the annexure, such letter till May and June, 2016 a sum of Rs.4,27,32,82,170/- towards the JIBs was due and pending. In this letter, the JODPL did not contended such that the entire bill is unfounded and bogus. There may be some dispute on the quantum of amount claimed, but entire claim cannot be *brushed aside*. Moreover, the Corporate Debtor Company even in its application U/s 10 of the I & B Code filed before this

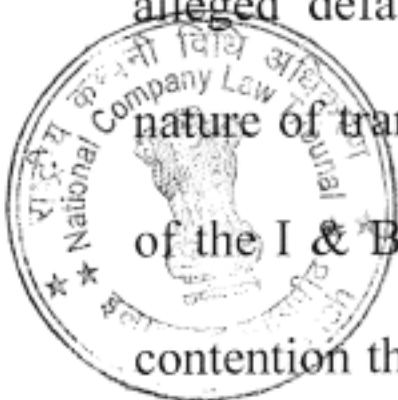


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Tribunal has already classified the present applicant as an Operational Creditor with certain remark that the demand pertaining to Cash Call has not been raised or amount due is disputed or in some of cases the demand in respect of Cash Call were raised but the amount involved therein is disputed. Thus, as per the applicant, the Corporate Debtor Company has admittedly treated the applicant as in the category of one class of creditors/stakeholders, which is now undisputed fact. That apart the corporate applicant (now corporate debtor) in its application U/s 10 has made some averment to this effect that the present applicant is raising the demand on Cash Call (which is narrated in para 2.11 of the present application). The relevant portion of the above such para 2.11 may be reproduced herein below:-

2.11 That as the Corporate Debtor has been facing extensive monetary losses; the Corporate Debtor has been consistently drawing the attention of GSPC, which had the majority participating interest in the Contract Area. In relation to the works at the Contract Area, GSPC has made numerous cash calls upon the Corporate Debtor. The Corporate Debtor has raised numerous concerns regarding such cash calls by way of various communications to GSPC.

6. In addition to the above stated pleadings the applicant by its written submission made an effort to appraise of the brief facts of the case on alleged default committed by corporate debtor with the applicant. The nature of transaction under the JOA and its interpretation on the provision of the I & B Code and by giving an analysis of the case in support of its contention that nature of transaction as entered between GSPC and JODPL is such that having commercial effect of borrowing and has been incurred by the GSPC on behalf of the JODPL. Further, as per the provision of Section, the amount already incurred/contributed by GSPC on behalf of the JODPL are repayable by it alongwith interest at LIBOR plus 2%



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representing time value of money. Therefore, the nature of debt owed by JODPL to GSPC is a financial debt, thereby resulting the GSPC as a financial creditor of the JODPL.

7. For the sake of convenience, the relevant portion of para 2 of the main application i.e. para 2.1 to 2.5, 2.7, 2.9 & 2.13, may be reproduced which reads as under:

2. *A brief overview of the circumstances which have led to the filing of the present application by the Corporate Debtor is provided herein below for the purpose of assisting this Hon'ble Tribunal:*

2.1 *The Government of India, Gujarat State Petroleum Corporation Limited, Jubilant Enpro Limited and Geoglobal Resources (India) Inc. (GGR) entered into the Production Sharing Contract (PSC) on 04.02.2003 with respect to contract area identified as Block-KG-OSN-2001/3 to explore and produce petroleum and related products from the Contract Area (Project).*

2.2 *JEL acquired a participating interest of 10% (PI) in the Contract Area under the PSC. 80% of the PI in the Contract Area was acquired by GSPC and the remaining 10% of the PI was acquired by GGR.*

2.3 *The PSC recognizes GSPC as the Operator who was responsible for carrying out petroleum operations for and on behalf of itself and all other parties i.e. the Corporate Debtor and GGR.*

2.4 *It is pertinent to mention that GSPC, GGR and JEL had formed a consortium, in the nature of a quasi partnership, to bid for discovery and exploitation with utmost expedition of petroleum resources which may exist in the Contract Area. In view of the personal confidence and trust that the Corporate Debtor had in GSPC that it agreed to GSPC assuming a majority and controlling stake in the PI of Contract Area.*

2.5 *That pursuant to the execution of the PSC, a Joint Operating Agreement dated 17.08.2003 (JOA) was also executed amongst GSPC, JEL and GGR, in order to define the respective rights and obligations of the parties with the object to conduct and perform their mutual rights and obligations towards achieving the purpose of the PSC, in a manner consistent with the PSC.*



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- 2.7 Towards financing of its share of the capital expenditure for appraisal and development of the Contract Area and other related activities under the PSC and JOA, the Corporate Debtor had also approached various banks and financial lenders for obtaining financial assistance/facilities. The financial assistance/facilities amounting to INR 1340,00,00,000/- ("Financial Facility/ies") came to be ultimately disbursed pursuant to a facility agreement dated September 28, 2012, executed by and between the Corporate Debtor and various financial lenders by way of a consortium lending. The financial lenders who are parties to the said consortium are State Bank of India, Allahabad Bank, Bank of Baroda, Bank of India, Corporation Bank, Export Import Bank of India, Indian Bank, Punjab National Bank, State Bank of Bikaner & Jaipur, State Bank of Patiala, United Bank of India respectively ("Financial Lenders").
- 2.9 By way of the present application the Corporate Debtor also draws the attention of this Hon'ble Tribunal to the fact that the Corporate Debtor, has received an amount of Rs.774 Crores as per the commitment made under the Financial Facility. This clearly demonstrates that the corporate debtor was fully committed to ensure the successful completion of the works in the Contract Area.
- 2.13 The time and cost overruns in the execution of petroleum operations pertaining to the Contract Area severely strained the financial resources of the Corporate Debtor. Consequently, the Corporate Debtor was unable to service the debts raised by its from the Lenders from January, 2016 onwards. Due to the aforesaid reasons the Lenders started declaring the Corporate Debtor as a non performing asset account (NPA) on various dates. The Corporate Debtor's account was declared an NPA by the State Bank of India on 31.03.2016, by Punjab National Bank on 31.03.2016, by Export and Import Bank of India on 28.04.2016, by the Corporation Bank on 31.05.2016, by the Bank of India on 30.06.2016 and by the Allahabad Bank on September, 2016. Notices of recall/demand have been received by the Corporate Debtor from State Bank of India, Export and Import Bank of India and the Punjab National Bank respectively. It is stated that presently INR 1,332.5 Crores of the principal borrowing remains outstanding towards the Lenders.



8. That apart a perusal of the exchange of correspondence between the corporate applicant (JODPL) and the present applicant GSPC goes to show that both parties have admitted in principal, their respective claim made

against each other by acknowledging their liabilities and due payments for a purpose of Limitation Act, 1963. The Corporate Debtor Company in its letter dated 22nd August, 2016 has stated such that it acknowledges the liability **towards the JIBs amount under the JOA for KG Block for the purpose of Limitation Act, 1963**, but it equally disputes the extent and quantum of such liability. Further, in its letter dated 22nd August, 2016 by replying to the present applicant has stated such that there is some breach of contract alleged on the part of GSPC under the JOA and the JODPL has raised some claim for indemnification of losses caused to it by the GSPC on account of operations pertaining to KG-OSN-2001/3 Block (hereinafter KG Block). The GSPC while disputing such claim/allegation stating such the JODPL did not specify its claim to the GSPC. However, it has acknowledged its limited liability in respect of claim only for the purpose of Limitation Act, 1963.

9. Thus, it is evident although both the parties having dispute with regard to their claims yet they have admitted their liabilities for limited purpose to save limitation. Therefore, such kind of disputes required to be adjudicated by a Competent Forum of Law either for setting off the amount of compensation from the payment due under the Cash Call or the amount of the JIBs, if such losses has actually occurred to Corporate Debtor Company (JODPL) and is duly proved before a Competent Court/Forum of Law.

10. In this regard another letter dated 28th April, 2016 as issued by the GSPC goes to show such endorsement made on behalf of the JODPL in respect of account of Cash Call receivable by one Mr. Nikhil Pandey, which reads as such:



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The Cash Call of Rs.413,13,73,959/- as at 31st March, 2016 as per JIB No.12 dated 25th May, 2016 has been called by the operator. However, full or partial OC Member-Block KG-OSN-2001/3 payment of the same and timing thereof is subject to our review and approval with respect to agreed work program and completion thereof, commencement of first commercial gas and sustainable production, detailed technical and financial audit of petroleum operations, receipt of pending responses/information from the operator regarding cost and time overruns, loss of revenue etc.,

which substantiate the claim of GSPC.

11. The applicant further contended that the alleged dispute of respondent JODPL by raising question on the validity of the Cash Call is Sham in nature and irrelevant in facts there exist no dispute. Moreover, till date of filing present application there is no formal dispute is filed or any adjudicating proceeding for resolution of dispute is pending before Competent Court of Law.

12. Notwithstanding the above, as per the applicant the pendency or existence of a dispute is no bar for initiating a proceeding U/s 7 or 10 of the I & B Code, nor it can be relevant for the present application. It is relevant only in respect of proceedings filed under Section 9 of the I & B Code.



Therefore, respondent's such contention that the applicant claim is being disputed does not come to aid to it for seeking discharge from its contractual obligation and financial liability nor such entitles to the RP and COC to reject the applicant's claim nor such dispute can have bearing on classification of the present applicant as a financial creditor under the Code. Therefore, such dispute is Sham in nature and is liable to be rejected with heavy cost. Thus, on the basis of the amount incurred by the GSPC on behalf of the JODPL under the provision of PSC and JOA such may be treated as a financial debt under Section 5(8)(f)(h) because such amount of expense is having commercial effect of borrowing. Therefore, the status

and category of the present applicant U/s 5(7) shall fall within the purview of the Financial Creditor. Therefore, the present applicant is entitled to be included in the COC for the purpose of CIRP.

13. For the sake of convenience, we feel appropriate to quote the relevant portions of the applicant's written submission, which are stated as under:-

FACTS IN BRIEF

A. The Parties

Gujrat State Petroleum Corporation Limited ("**the Applicant**" or "**GSPC**") is a Government Company where the entirety of the Share Capital is held by Government of Gujarat and entities controlled by Government of Gujarat.

The Applicant is engaged in the business of Exploration and Production of oil and natural gas and trading of natural gas. As a part of Exploration and Production business, the Applicant has participating interest in 23 oil and gas Blocks out of which the Applicant is an Operator of 6 oil and gas Blocks. The applicant is also the second largest gas trading company of India.

JODPL Private Limited ("**the Corporate Debtor**" or "**JODPL**") was originally incorporated as Jubilant Offshore Drilling Private Limited and belongs to a privately held Jubilant Group of Companies including the Jubilant Foods Limited (owning the "Dominos' Pizza"). The Corporate Debtor is also engaged in the business of Exploration and Production of oil and gas and to the best of the knowledge of the Applicant, having participating interest in only 2 oil and gas Blocks and having no experience as an Operator.

The Corporate Debtor filed CA No. 25/ALD/2017 being the Application to commence corporate insolvency resolution process ("**Section 10 Application**") under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("**Insolvency Code**") on March 3, 2017. It is interesting to note that merely 2 days before the filing of Section 10 Application, i.e. on March 1, 2017, the name of Corporate Debtor was changed from Jubilant Offshore Drilling Private Limited to JODPL Private Limited. On the very next date i.e. on March 2, 2017, the Board of Directors of JODPL Private Limited passed resolution approving filing of the Section 10 Application.

B. Default of Corporate Debtor to the Applicant:

The Applicant and the Corporate Debtor are co-venturers in KG-OSN-2001/3 Block ("**KG Block**") which is an offshore oil and gas exploration block located off the east coast of India. The relationship between the Parties is governed by the Production Sharing Contract



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with respect to KGI Block dated February 4, 2003 ("the **PSC**") and Joint Operating Agreement with respect to KG Block dated August 7, 2003 (the **JOA**").

The Applicant is also the Operators of the KG Block and is responsible for carrying out the operations pertaining to exploration, development and production from KG Block. As per the terms of the PSC and the JOA, all the costs and expenses for carrying out petroleum operations in relation to the KG Block are required to be borne by the parties thereto, including JODPL, in the proportion to their respective Participating Interest (**PI**). Article 7.6.1 of the JOA provides that if any party to the JOA fails to pay its share of costs/cash calls on the due date, **then the non-defaulted on behalf of such defaulting party**. The defaulting party under the JOA can remedy the default on its part by making payment of the defaulted amounts to the non-defaulting parties alongwith interest which is calculated at LIBOR rate plus 2% (on specified days) payable from the due date for the entire period during which the default continues as per article 7.6.2 of the JOA.

As per the terms of JOA, JODPL was required to make certain payments towards costs for *inter alia* exploration and development of the KG Block, as per cash calls ("Cash Calls")/joint interest bills ("JIBs") mad by the Applicant. However, JODPL defaulted in paying the Cash Calls/JIBs, these amounts were paid by the Applicant on behalf of JODPL in terms of Article 7.6.1 of the JOA. The Applicant has advanced the aforementioned defaulted amounts on behalf of JODPL in respect of each of the defaulted Cash Calls. It may be noted that JODPL has not made any payments to the Applicant against any of t Cash Calls/ JIBs raised from July 2013 onwards and the Applicant has been since, solely contributing and funding such amounts on behalf of JODPL.



Though the Corporate Debtor came to later on "dispute" the JIBs raised by the Applicant, it is submitted that in light of submission made hereinafter, such "dispute" is a sham dispute and in any case does not have any bearing on the classification of the Applicant as the Financial Creditor of the Corporate Debtor.

It is submitted that the Corporate Debtor has been in continuous default of its payment obligations to the Applicant and the cumulative amount in default as on March 17, 2017 (being the date till which claims were invited by the IRP) amounts in INR 464.74 Crores.

C. Claim filed by the Applicant:

Corporate Debtor's application u/s of the code came to be admitted by this Hon'ble Tribunal on March 17, 2017. The Interim Resolution Professional ("**the IRP**"), vide public announcement dated March

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19, 2017 invited the claims to be filed with the IRP on or before March 31, 2017.

Vide Email dated March 31, 2017, GSPC filed its claim within the stipulated time with the IRP as a Financial Creditor.

However, before filing of the claim, GSPC was advised by the IRP in a meeting held on March 27, 2017 that GSPC should file claim as an Operational Creditor and accordingly, the claim was also filed as an Operational Creditor by GSPC.

Since GSPC did not receive any communication from the IRP till April 9, 2017 regarding the claim of GSPC as Financial Creditor, GSPC addressed another reminder email to the IRP stressing that the nature of debt owed by JODPL to GSPC is a financial debt and therefore GSPC is entitled to receive notice of a meeting of Committee of Creditors including voting rights at such meeting.

In response to the aforesaid reminder of GSPC's email, the IRP vide his email dated April 10, 2017, opined that GSPC is neither Financial Creditor nor an Operational Creditor. The IRP stated that GSPC fell into (albeit an imaginary) category of "other stakeholder". **The aforesaid opinion of the IRP was in stark contradiction to his own advice to GSPC in meeting held on March 27, 2017 where GSPC was advised to file claim as an Operational Creditor.** GSPC completely refuted the aforesaid stand of the IRP vide its email dated April 10, 2017 and sought a meeting in this regard with the IRP.

It may be noted that GSPC was in fact invited at all the meetings of the Committee of Creditors commencing from April 11, 2017 till May 9, 2017.

Since the discussion with the IRP did not materialize and IRP did not include GSPC as a Financial Creditor of the Corporate Debtor, GSPC has filed the present application seeking classification of GSPC as a Financial Creditor of JODPL.



THE NATURE OF TRANSACTION

The Applicant submits that the amounts paid by the Applicant on behalf of JODPL are a Financial Debt as defined under the Code and consequentially the Applicant is a Financial Creditor as per the Code. The nature of the transaction by which such moneys have been lent by the Applicant to JODPL is therefore significant as the same demonstrates beyond doubt that such a transaction is in fact a financial debt as it inter alia has the commercial effect of borrowing made by JODPL from GSPC. The key provisions and the scheme of the commercial arrangement between the Applicant and JODPL as per the PSC and the JOA is set out below:

Production Sharing Contract or PSC:

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- A. PSC is a contract entered into by the President of India with GSPC, Jubilant Enpro Limited and Geo Global Resources (India) Inc (“GGR”). Jubilant Enpro Limited subsequently assigned its Participating Interest to Jubilant Offshore Drilling Private Limited followed by change in name of Jubilant Offshore Drilling Private Limited to JODPL Private Limited being the Corporate Debtor herein.
- B. The PSC is mandated to be entered into by Article 297 of the Constitution of India read with Rule 5 of the Petroleum and Natural Gas Rules, 1995. The PSC thus entrusts the Parties with exploration and production of hydrocarbons from the block allocated to them.
- C. The Applicant the Corporate Debtor and GGR (“Contractors”/“parties”) are appointed as the “Contractors” under the PSC.
- D. The Participating Interest in KG Block held by each of the Contractors is as follows: GSPC-80%; JODPL – 10% and GGR – 10%.
- E. Each of the Parties to the PSC is obligated to contribute to its share of expenditures pertaining to KG Block in the aforesaid proportion.
- F. GSPC is nominated as the Operator of KG Block and as such is entitled to carry out the operations pertaining to exploration, development and production from KG Block.
- G. Article 28.2 of the PSC allows the Parties to create security over its share of Participating Interest **provided that such security is created so as to secure the finances required by such party for performing its obligations under the PSC.** In other words, any encumbrance over a party’s PI can be created in favour of its lenders only to the extent that the finance availed by creating such security is utilized for the purpose of discharging that party’s payment obligations under the PSC. **Any security created over any party’s PI with respect to monies borrowed for any other purpose would be void under Article 28.8 of the PSC.**
- H. Article 28.8 (ii) of the PSC also stipulated that any encumbrance created in favour of lenders would be subordinate to the rights of the other parties to the Contract. In effect to the said article provides that **in case any party makes any contributions on behalf of the other party, the rights of such party shall be superior to the rights of lender of the party on whose behalf such contribution was made.**



14. Thus, under the scheme of the PSC, carrying out of the petroleum operations in the Block is of paramount importance. While the PSC requires each of the parties to contribute to the costs of carrying out petroleum operations in the proportion of participating interest, it is also

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envisaged that in case any of the parties fail to honour such contribution, other parties must ensure continuity of petroleum operations and contribute the share of any defaulting party also. Albeit, the PSC also protects such party who make a contribution on behalf of a defaulting party in the sense that such party's rights of recovery are superior to any encumbrance created with respect to defaulting party's participating interest.

Joint Operations Agreement or JOA:

- A. The JOA is a contract defining relationship inter-se the parties who are the "Contractors" under the PSC. The JOA is a contract defining the rights and obligations of the parties with respect to carrying out petroleum operations under the PSC in the KG Block.
- B. The JOA also envisages that one of the Contractors/parties will also undertake the role of the Operator under the JOA. Under Article 4.224, the applicant is designated as the Operator and as such is entitled to carry out operations under the Contract and raise Cash Calls or Joint Interest Billing ("JIB") towards each party's share in costs of carrying out the operations.
- C. Article 1.11 of the JOA defines a Cash Call to mean a requires for payment of cash made by Operator pursuant to Approved Work Program and Approved Budget. It may be noted that as per Accounting Procedure under the JOA, such request for payment can be made either as an advance for activities planned during a month. While the request for advance payment is called "Cash Call", the request for reimbursement at actual is called "Joint Interest Billing".
- D. Approved Budget and Approved Work Program are defined to mean the budgets and programs approved by the Operating Committee.
- E. Article 2.3 stipulates that each of the parties to the JOA shall have share in all the costs, obligations and benefits in proportion to its participating interest.
- F. Article 3.1 specifies the Participating Interest of each of the Parties being (i) The Applicant -80%; (ii) the Corporate Debtor -10% and (iii) GGR – 10%.
- G. An Operating Committee is constituted under Article 5.1 of the JOA which comprises of one member from each of the parties to the JOA. Under Article 5.1.2 of the JOA, the Operating Committee is empowered to "review, approve and revise" the work programs and budgets. **Such work programs and budget as reviewed, approved and revised by the Operating Committee would constitute Approved Work Program and Approved Budget in respect of which each of the parties is obligated to contribute in accordance with the Cash Call or JIB raised by the Operator.**
- H. Article 5.6 provides for the manner in which the decision of the Operating Committee shall be taken. It provides that any proposal



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approved by a majority vote of 70% Participating Interest shall be deemed to have been approved by the Operating Committee and that proposals approved by such majority shall be final and binding on all the Parties. The aforesaid majority principle is a conscious commercial agreement reached way back in 2003 amongst the Applicant, the Corporate Debtor and GGR and is as such an unassailable decision making process under the JOA. Any Work Programs and Budgets approved by such majority would constitute Approved Work Program and Approved Budget in respect of which each of the parties is obligated to contribute in accordance with the Cash Call or JIB raised by the Operator.

I. Article 7.1 requires that all the expenditures incurred by the Operator (GSPC in this case) in carrying out the operations under the JOA shall be borne by all the parties in proportion to their participating interest. There is a positive obligation on each of the parties to contribute to and/or reimburse the Operator.

J. Article 7.8.2 provides that it is a fundamental principle of the JOA that each party pays its Participating Interest Share of all amounts due under the JOA as and when required. Article 7.6 provides for a situation where any of the parties fails to pay its share of costs and expenses. In such a scenario, Article 7.6.1(d) provides that all the Non-Defaulting Parties shall contribute additionally towards the share of costs and expenses of the Defaulting Party also. Further, in Article 7.6.2, the JOA also protects the time value of additional monies contributed by Non-Defaulting Parties on behalf of Defaulting Party by providing that the repayment by Defaulting Parties of such default amounts shall carry interest at the rate of LIBOR plus 2%. Thus, a rate of interest which, is a commercially acceptable rate of interest, has also been provided for the moneys lent/paid on behalf of a defaulting party. This further demonstrates that the transaction had the commercial effect of a borrowing.



K. In addition to the payment of interest on delayed payment of defaulted amounts by the Defaulting Parties, article 7.6.3 of the JOA also provides for protection in the form of lien over the share of revenues and participating interest of the Defaulting Party in favour of the Non-Defaulting Party that makes contributions on behalf of the Defaulting Party. Article 7.7.1 provides that in case the default by a Defaulting Party is not cured within 30 days from the date of notice of default such party's right to vote at Operating Committee meeting ceases. And in case the Default continues for more than 90 days, Article 7.7.2 provides ultimate remedy in the form of forfeiture by Non-Defaulting Party of the participating interest of Defaulting Party. It may be noted that these rights of Non-Defaulting Party have superiority over any encumbrance created by a Defaulting Party in favour of its Lenders as more particularly provided in Article 28.8 (ii) of the PSC and Article 13.7(3) & (4).

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L. Lastly, Article 21.1. provides that the rights, covenants and obligations of each of the parties under the JOA shall be several to the extent of its participating interest and not joint and several. Thus, it is an individual obligation of JODPL to make payment against JIBs raised by GSPC from time to time which individual obligation of JODPL has been discharged by GSPC on behalf of and on account of JODPL giving rise to debt owed by JODPL to GSPC.

15. From the aforesaid analysis of the provisions of PSC and JOA following picture emerges as far as the nature of transaction is concerned:

1. The fundamental principle under the PSC and the JOA is that all parties are to contribute their share of cost and expenses pertaining to Petroleum Operations in the KG Block. While these costs are incurred by the Operator (in this case GSPC), all parties are required to bear all such costs in proportion to their respective PI.
2. The provisions of the PSC mandate and make it an obligation of the Contractors to ensure continuance of Petroleum Operations. In order to ensure this the PSC requires that in the event a Contractor fails to discharge its payment obligation, the other Contractors should make payments on behalf of such Contractor. The non-paying Contractor (in this case JODPL) is then required to repay such payments made on its behalf to the other Contractor(s). Further, the interest of the Contractor making good such default shall have superiority over any other encumbrance of the non-paying Contractor.
3. Under the JOA, the rights and liabilities of Contractors are several and not joint and several. It is a fundamental principal of the JOA that each Contractor bears its share of costs.
4. The JOA further elaboratively provides the following:
 - i. The JIBs raised by GSPC in its capacity as the Operator were to be paid by all Contractors including JODPL within 30 days from the date of the JIB;
 - ii. In case JODPL defaulted in making such payment, the other Contractors (which in this case was GSPC) was required to make payment for such expenses on behalf of JODPL;
 - iii. Such expenses incurred by GSPC on behalf of JODPL are required to be repaid by JODPL alongwith interest at LIBOR + 2% representing time value of money in the sense that GSPC would incur expenditure at a particular time which would be repaid by JODPL at a later point in time. The nature of the payment made by the Applicant/GSPC on behalf of JODPL was therefore clearly a commercial



borrowing which also carried a commercially acceptable rate of interest; and

- iv. The amounts so contributed by GSPC on behalf of JODPL create a lien and right of forfeiture over JODPL's share of revenue and participating interest which rights are meant to protect recovery of amounts incurred by GSPC on behalf of JODPL and are superior to any other encumbrance.

Thus, in light of the above, it is evident that the monies paid on behalf of JODPL by GSPC were in fact in the nature of commercial borrowings by JODPL from GSPC as per the agreed terms under the JOA including the interest to be paid thereon. GSPC has funded JODPL's expenditure obligations under the PSC and the JOA which was otherwise an individual and several liability of JODPL. Such funding is no different to a loan taken from a bank by JODPL to meet its obligations under the PSC and JOA. From June 2013 onwards, the financial obligation of JODPL under the JOA and PSC are being financed by GSPC in the form of meeting JODPL's share of expenditure obligations.

In effect, instead of JODPL having to borrow from a Bank to meet its obligations, GSPC has provided the funding of JODPL's share of expenditure obligations. Thus, the transaction between GSPC and JODPL is one which has commercial effect of borrowing by JODPL from GSPC.

16. Despite the above stated contention of the applicant, the Respondent-Corporate Debtor Company (through the RP) has refuted the same in its



reply by taking such plea that the GSPC does not qualify to be a Financial Creditor of the Respondent-Corporate Debtor Company (JODPL) as per the definition of the I & B Code, because (as per it) a financial debt means,

which is disbursed against the consideration for the time value of money, which is not the case of applicant here. In support of its contention, the RP has placed reliance on a decision of Hon'ble Principal Bench, New Delhi in the matter of Nikhil Mehta & Sons versus AMR Infrastructure Ltd.

However, such decision stands set aside by the Hon'ble NCLAT. That apart the Respondents-Corporate Debtor has impliedly admitted the terms of the agreement entered between the applicant and the Corporate Debtor

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Company under the **PSC and JOA** and participating interest to the extent of 10% in respect of Oil Block known as KG-OSN-2001/3 Block had disputed the Cash Call. The Respondent-Corporate Debtor Company further reiterated its stand contending such all costs and expenses which were incurred by the operator (GSPC) on behalf of the parties as per the Joint Operation Agreement till May, 2013 have been paid which approximately amount to INR. 1420 Crores. However, thereafter some dispute arises among the parties on the validity of Cash Call from June, 2013 afterword for making payment to the present applicant which were refused by the respondent by giving such reason for some extraordinary and unprecedented cost and time overruns in the operations, hence, such are disputed. It is also contended that the demand as raised under such Cash Call is a demand for reimbursement of the contribution made by a non-defaulting party. Hence, it does not necessarily fall in a transaction in terms of a debt where a sum is advanced against the time and value of money. The respondent further submitted in their reply that their letter dated 22nd August, 2016 issued in favour of the applicant is only an acknowledgement limited for the purpose of Limitation Act, 1963. The Corporate Debtor Company equally referred a letter dated 22nd August, 2016 issued by the present applicant acknowledging the certain claims of JODPL for indemnification of losses caused to it on account of operation done in KG Block and it gave also acknowledgement for a limited purpose of limitation.



17. In addition to the above, during the course of hearing and as per direction of this Court, the RP produced before us the minutes of COC's meeting dated 25th May, 2017 and 5th June, 2017 wherein certain correspondence are annexed, those were addressed to the present RP or

COC. It is pertinent to note here that in its internal letter dated 10th July, 2017 (addressed to the member of COC), the RP earlier had recognized this fact that the only assets owned by the JODPL is the **participating interest of 10% in a Gas Block in the KG Basin operated by the GSPCL**. Therefore, any resolution plan needs to be centred around the said assets of the company (herein the Corporate Debtor Company). Hence, the COC was required to use the same for the purpose of its revival. Therefore, on the basis of above line of action the proposed plan was being considered and being contemplated by the COC to communicate to GSPC and/or to ONGC, who may like to acquire the participating interest of JODPL in the KG Basin Block. Thus, it is one of the vital and important issue before the COC to explore for an purchaser of legal right as participating interest of the JODPL in the KG Basin Block and if it so, as being a theme and planning of the Resolution Plan, then, why GSPC and /or ONGC being public sector company cannot be invited to participate in such meeting of COC to ascertain the asset of the corporate debtor company and to discuss about the taking over its participating interest and to materialize the resolution plan for the revival of the Company.



18. It is strange to note that, while the claim of the present applicant as a financial debts and financial creditor is not accepted by the RP but on the other hand, a member of the Suspended Management of JODPL is very well participating in such meetings and has been allowed to raise issue for the consideration of the COC, which is evident from minutes of the 7th COC dated 5th June, 2017. Such issues relate to cash call of JODPL as raised by one Sh. Nikhil Pandey and were taken into consideration and discussed by the COC as an agenda in its meeting held on 27th April, 2017. This vindicate such fact that RP himself has pointed out and sent a letter

before the COC proposing such that protection of 10% participating interest of JODPL in KG Block is the only assets of value available in JODPL and it was a felt need of the COC to protect such interest from any risk of fore feature pending resolution in the CIRP. It is a matter of record in such meeting(s) of the COC a representative from GSPC as well as a member of the suspended management of JODPL (Mr. Nikhil Pandey) has been allowed to participate.

19. Thus, it is evident that, GSPC is already participating in such meetings of the COC. Hence, this Court requires only to determine/decide its status as of a financial creditor or otherwise.

20. It is evident that COC and RP have agreed to the suggestion as given by Mr. Nikhil Pandey in respect of the claim of the applicant and treated it as disputed claim and not being financial debt. However, contrary to this the Corporate Debtor Company in its main application filed under Section 10 of the I & B Code before this Court itself, has treated the present applicant as an operational creditor with some reservation of disputed amount took such plea that the company is unable to pay amount of Cash



Call NIBs and on the basis of such ground, it made a prayer for initiation of Corporate Insolvency Resolution Process. Hence, we find such action on the part of COC to reject the claim of present applicant as a financial creditor is not bonafide nor inconformity with the provisions of the I & B Code.

21. That apart by following decision of Hon'ble NCLAT in the matter of Nikhil Mehta & Sons v/s AMR Infrastructure Ltd., we are of the considered view that the nature of present transaction entered in and amount incurred by the GSPC on behalf of the Corporate Debtor Company

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(which is having 10% participating interest) is having a commercial effect of borrowing and falls within the ambit and scope of the financial debt as being the transaction in nature of the commercial borrowing as per Section 5(8)(f) & (h) of the I & B Code. The relevant provision of Section 5(8)(f) & (h) are being reproduced herein below:-

Section 5(8) of the Code, defines "financial debt" to mean "a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

...

- (f) any amount raised under any other transaction including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*

22. Further, the judgment of Hon'ble NCLAT in the matter of **Nikhil Mehta & Sons versus AMR Infrastructure Ltd. in CA (AT) (Insolvency) No.07/2017** as having binding effect on us. Hence, the relevant portions thereof are being reproduced herein below:-



The agreement shows that the respondent agreed to complete the construction of shopping mall on or before December 2009, in all respects and was required to complete and handover the shop in the shopping mall before the said date. It is not the case of the respondent that the construction was stopped or delayed on account of factors beyond the control of the respondent, as stipulated in the later part of the Memorandum of Understanding. It was agreed upon by the respondent that since the appellants have paid most of the amount the respondent was ready to pay "monthly committed returns" to the appellants. However, as the appellants were not required the monthly return till December 2008 i.e. for 9 months so the respondent-corporate debtor undertook to make a consolidated payment of Rs.99,600/- less TDS. For every calendar month the Corporate Debtor was liable to pay committee return w.e.f. January 2009 till the date of handing over the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was "against the consideration of the time value of the money" and "the Respondent-Corporate Debtor raised the amount by way of sale – purchase agreement, having a commercial effect of

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borrowing.” This is also clear from annual returns filed by Respondent and not disputed by the Respondent-Corporate Debtor in their annual returns, wherein the amount so raised/borrowed has been shown as ‘commitment charges’ under the head “Financial cost”. The financial cost includes “interest of loans” and other charges. Therefore, the ‘commitment charge’, which include interest on loan, shown against the head “Financial cost” having accepted by the Corporate Debtor in their annual return, we hold that the appellants have successfully proved that they are ‘financial creditor’ within the meaning of Section 5(7) of the I & B Code.

Learned Adjudicating Authority while rightly interpreted the provisions of law to understand the meaning of expression ‘financial creditor’ at paragraph 12 of the impugned judgment as quoted above, but failed to appreciate the nature of transactions in the present case and wrongly came to a conclusion “that it is a pure and simple agreement of sale and purchase of a piece of property and has not acquired the status of a financial debt as the transaction does not have consideration for the time value of money.”

For the reasons aforesaid, we set aside the impugned judgment dated 23rd January, 2017 passed by the learned Adjudicating Authority in CP No. (ISB)-03(PB)/2017 and remit the matter to Adjudicating Authority to admit the application preferred by appellants and pass appropriate order, if the application under Section 7 of the I & B Code is otherwise complete. In case it is found to be not complete, the appellants should be given seven days’ time to complete the application as per proviso to Section 7 of the I & B Code.

23. In addition to the above, that apart the Hon’ble Supreme Court in the matter of *Regional Provident Fund Commissioner versus The Hooghly Mills Company Ltd. and Ors. in Civil Appeal No.655 of 2012 (Arising out of SLP (C) No.17298 of 2009)* has observed and ruled as *obiter dictum* by referring to its earlier decision in the matter of *N.K. Jain & Ors. v/s C.K. Shah and Ors. In MANU/SC/0308/1991 : (1991) 2 SCC 495* and pleased quote an English decision in the matter of *Seaford Court Estates Ltd. v/s Asher (1949) 2 All E.R. 155 (CA)* wherein the learned Judge laid down such proposition stated hereunder:

“A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they



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would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

24. The counsel for both the parties through their written submission placed reliance on some other decisions and judicial precedents in support of their respective contention, which are as follows:-

Authorized Officer, Indian Overseas Bank and Anr. versus Ashok Saw Mill in Civil Appeal No.4429 of 2009 arising out of SLP (C) No.27399 of 2008 and Civil Appeal No.4433 of 2009 arising out of SLP (C) No.3020 of 2009, (Union of India versus Raman Iron Foundry and Union of India versus Air Foam Industries Pvt. Ltd. in Civil Appeal Nos.1224, 1225 and 1330 of 1973.

Which were carefully read and considered by us but in our humble view the proposition laid down therein may not be relevant to or have direct bearing on peculiar facts & circumstances of the present case under the provisions of the I & B Code, 2016.

25. Thus, by following the above stated proposition as laid down by the Hon'ble Supreme Court and also following the decision of Hon'ble NCLAT in Nikhil Mehta case, we are of the considered view, that the present transaction which relate to a Cash Call fall within the definition of commercial effect of borrowing. Further, by raising dispute with respect to quantum of amount due under such transaction or omission to perform the terms of the contract or such allegation to exceed beyond the terms of the contract does not necessarily absolved the corporate debtor from its liability arisen under such contract, until a Competent Court of Law determines the issue and adjudicate the dispute. In our humble opinion the RP and COC have not been vested such jurisdiction under the Code to adjudicate a dispute/claim of an interested/affected party, while preparing for a resolution plan. Therefore, the present applicant is qualified as per the terms



of PSC & JOA is to be treated as a financial creditor to the extent of amount of expenditure incurred by it on behalf of the Corporate Debtor Company.

26. Since, there appear some dispute with regard to quantum of expenses incurred by and the amount due under the Cash Call and JIBs as the Corporate Debtor Company has also sought indemnification of some loss occurred to it, which is a subject matter of a Competent Court of Law. Therefore, we restrain ourselves to express our view on merits of such issue involved but must feel that the present applicant deserves to be treated as a financial creditor and its claim of expense incurred by it fall within the ambit and scope of a financial debt having a commercial effect of borrowing. Hence, it is entitled to be included in COC as a financial creditor. However, the ratio of its voting share can be decided by the COC by taking into consideration the actual amount so far incurred by the GSPC on behalf of the JODPL, but excluding the interest component and other miscellaneous expenses. The COC may adopt above guidelines as suggested by us and to take appropriate decision for preparation of a resolution plan for the sake of revival of the Corporate Debtor Company, which is paramount interest and the main theme of the I & B Code.



With the above stated observation, the present company application is allowed and stands finally disposed of.

No order as to cost.

Dated: 27.11.2017

Typed by:
Kavya Prakash Srivastava
(Stenographer)

Sd
H.P. Chaturvedi,
Member (Judicial)