

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH,

KOLKATA

C.P (IB) No.346/KB/2018

In the matter of

An application under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

In the matter of:

State Bank of India, Stressed Assets Management Branch, Nagaland House 8th Floor, 11 and 13, Shakespeare Sarani, Kolkata- 700071, having its registered office at Samriddhi Bhawan, Block-B, 1 Strand Road, Kolkata 700001, West Bengal.

... Financial Creditor

Versus

In the matter of:

Infar Tie-Up Pvt. Ltd., CIN U51109WB1994PTC064877, a company registered under the Provisions of Companies Act, 1956, having its Registered Office at 34/1Q Ballygunge Circular Road, Kolkata-700019, West Bengal.

...Corporate Debtor

Date of hearing : 29/11/2021

Order Pronounced on : 14/12/2021

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Joy Saha, Sr. Adv. } For the Financial Creditor
2. Mr. Kuldip Mallik, Adv.
3. Mr. Joydip Mukherjee, Adv .

1. Mr. D.N.Sharma ,Adv. } For the Corporate Debtor
2. Ms. Swati Agarwal, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **State Bank of India**, Stressed Assets Management Branch, having its registered office at Samriddhi Bhawan, Block-B, 1 Strand Road, Kolkata 700001, West Bengal praying for initiation of CIRP against the Corporate Debtor herein who stood guarantor for the Principal Borrower namely GEE PEE Infotech Private Limited on the failure of the Principal borrower to repay the principal amount along with interest to the aforesaid Financial Creditor namely State Bank of India. The Financial Creditor had invoked the bank guarantee against the Corporate Debtor herein to remit the defaulted amount. The Financial Creditor herein also withdrew the credit facilities granted to the Principal Borrower. Finally a Demand Notice dated 2nd August, 2014 was issued to the Corporate Debtor demanding the amount in default along with interest as the account was classified as NPA since the Corporate Debtor failed to repay the defaulted amount to the Financial Creditor, the present application has been filed by the Financial Creditor for initiating CIRP against the Corporate Debtor **Infar Tie-Up Pvt. Ltd**, having its Registered Office at 34/1Q Ballygunge Circular Road, Kolkata-700019, West Bengal under section 7 of the IBC, 2016.
3. It is submitted that in the petition that GEE PEE Infotech Private Limited had written letter to the Assistant General Manager, State Bank of India on 20.01.2006 seeking Credit Proposal for Working Capital Limit which was favourably responded to on 25.03.2006 when the sanction letter was issued by the State Bank of India in favour of GEE PEE Infotech Private Limited (the Principal Borrower) another letter dated 1st

April, 2006 regarding the grant of individual limits within the overall limit was also issued by the SBI to **GEE PEE Infotech Private Limited**. It is stated that a memorandum of agreement of loan dated 01.04.2006 was executed between **GEE PEE Infotech Private Limited** (Principal Borrower) and the State Bank of India along with agreement of hypothecation of Goods and Assets, Agreement of pledged of goods and assets Deed of Guarantee for overall limit jointly by Ganpat Lal Agarwala, Kalpana Agarwala, Shanti Devi Agarwala, Sangita Agarwala, Pavan Kumar Agarwala and Bijay Kumar Agarwala. It is further stated that the Deed of Guarantee for overall limit was executed by Infar Tie-Up Pvt. Ltd. i.e. the Corporate Debtor herein/ Guarantor. It is submitted that sanction of Credit Facilities was issued by the SBI in favour of the Principal Borrower and thereafter on 07.07.2008, the Principal Borrower wrote a letter to the Relationship Manager, State Bank of India requesting for renewal cum enhancement of OCC Limit which was accordingly issued on 18.09.2008. Various Supplemental agreement of Loan, Hypothecation of Goods and Assets for increase in the overall limit were executed by the Principal Borrower. Similarly, a Supplemental Deed of Guarantee dated 19.09.2008 was executed by the aforesaid six Guarantors. The Supplemental of Guarantee for increase in overall limit was therefore executed by the Corporate Debtor herein. On 27th July, 2009, the Principal Borrower issued a letter to the State Bank of India/Financial Creditor requesting for renewal cum enhancement of OCC and vide order dated 30th September 2009 sanction of credit facilities was issued by the Financial Creditor in favour of Principal Borrower. It is further submitted that on 5th October 2009, the Principal Borrower issued a letter regarding grant of individual limits within the overall limit and vide Supplemental Agreement of loan for increase in the overall limit was executed between the Principal Borrower and the Financial Creditor. On the same day a Supplemental agreement of Hypothecation of goods and assets for increase in the overall limit was executed by and between the Principal Borrower and the Financial

Creditor and accordingly on the same day a Deed of Guarantee for overall limit was executed by **Genegrow Commercial Pvt. Ltd.** and Supplemental Deed of Guarantee for increase in overall limit was executed by the above said six Guarantors Ganpat Lal Agarwala, Kalpana Agarwala, Shanti Devi Agarwala, Sangita Agarwala, Pavan Kumar Agarwala and Bijay Kumar Agarwala on 5th October, 2009 Supplemental Deed of Guarantee for increase in overall limit was executed by the Corporate Debtor herein/Guarantor.

4. It is further submitted that even thereafter, whenever the Credit Facilities were issued by the Financial Creditor in favour of the Principal Borrower, the Corporate Debtor herein ie. Guarantor also executed the Supplemental Deed of Guarantee from time to time in addition to other guarantors. The Financial Creditor has annexed with the petition all the relevant and necessary documents which are being relied upon by the Financial Creditor in the present petition. This petition has been filed by one Gurupada Chakraborty on behalf the Financial Creditor who has been duly authorised vide letter of authority dated 27th February 2018 (Annexure-A) to the present petition.
5. The Financial Creditor proposed the name of **Mr. Binay Kumar Singhania** , to act as an IRP having Registration No. **IBBI/IPA-001/IP-P00041/2017-18/10102**, who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.
6. In Part IV of the petition, the Financial Creditor has submitted that a sum of Rs. 162,62,23,609.63/- (Rupees One Hundred Sixty Two Crores, Sixty Two Lacs, Twenty Three Thousand, Six Hundred Nine and Paise

Sixty Three only) are due and outstanding and the Corporate Debtor is in default of making the aforesaid payment to the Bank. It is further submitted that the account of the Guarantor has been declared as NPA on 10th January 2014. It is submitted that the Financial Creditor has got various primary security and collateral security from the Corporate Debtor and that the security held by the Financial Creditor in the shape of Title Deeds and memorandum related to deposit of Title Deeds for creation of charge of term loan/overall limit also been annexed as Ext.E colly. The Copies of the certificate of registration of charge issued by RoC is annexed as Ext.F colly. It is submitted that copy of the sanction letter dated 25th March, 2006 issued by the Financial Creditor to the Principal borrower is annexed Ext.G. Similarly along with the sanction letters issued by the Financial Creditor to the Principal Borrower, similar agreements have been signed by the Guarantors including Corporate Debtor herein. The Financial creditor has annexed enumerable documents in support of its claim against the Principal Borrower and the Guarantors, the present petition, is against the present Corporate Debtor/ Guarantor in the present petition i.e. Infar Tie Up Pvt. Ltd.

7. In reply to the present petition one Bijay Kumar Agarwal, one of the Directors of the Corporate Debtor submitted that the present petition under section 7 is not maintainable because there is no debt due or payable by the Corporate Debtor to the Financial Creditor and that the application has no merit and deserves to be dismissed as not maintainable. It is submitted that section 35A was amended by a Banking Regulation (Amendment) Ordinance, 2017 dated 4th May 2017 to insert further provisions namely 35AA and 35BB. It is submitted that by Gazette Notification dated 5th May, 2017 issued by the Ministry of Finance, the Central Government had authorized the RBI to issue such directions to Banking Companies which may be considered necessary to initiate Insolvency Resolution Process in respect of a default under the provisions of the IBC. The RBI in its circular dated 22nd May, 2017 outlined the action plan to implement the Banking Regulation

(Amendment) Ordinance , 2017.

8. It is submitted on para 10 of the reply affidavit, para 'q' “ **Not only the provisions of the Press Release dated 13th June 2017 and the circular dated 12th February 2018 was not and/or could not be complied with by the Financial Creditor, the Financial Creditor on February, 2018 had filed the present proceeding under section 7 of the IBC**”.
9. It is further submitted that in the reply affidavit that in view of the enactment IBC, the RBI decided to substitute the existing guidelines with a harmonized and simplified generic framework for resolution of stressed asses and for such purpose issued a circular dated 12th February, 2018 indicating the details of the revised framework, a copy whereof is annexed as Annexure-5 to the reply affidavit.
10. It is submitted that in terms of the aforesaid circular for account with aggregate exposure of the lenders below Rs. 20 Bilion (i.e. Rs.2000 crores) and at or above Rs. 1 Billion (i.e. Rs. 100 Crores), the RBI expressed its intention to announce over a two years period, reference dates for implementing the Resolution Plan to ensure calibrated, time-bound resolution of all such accounts in default. It was however clarified that the aforesaid transition arrangement shall not be available for borrower entities in respect of which specific instructions have already been issued by the RBI to the Banks for reference under IBC and the lenders were directed to continue pursuing such cases as per the earlier instructions.
11. It is further submitted that the circular of the RBI further provided that any failure on the part of the lenders in meeting the prescribed timelines or nay action by lenders with an intent to conceal the actual status of accounts or evergreen the stressed accounts, will be subjected to

stringent supervisory/enforcement action as deemed appropriate by the RBI, including, but not limited to, higher provisioning on such accounts and monetary penalties.

12. It is denied by the Corporate Debtor that a sum of Rs.81,92,38,508.50 or any part thereof is due on account of principal or otherwise as on 31st January, 2018 or on any other date as alleged or at all. It is denied that a sum of Rs. 162,62,23,609.63 or any part thereof is due or payable or outstanding as on 31st January, 2018 or any other date as alleged or at all. By reasons of the facts stated hereinabove, the said application is premature as the financial creditor had no right to initiate the Corporate Insolvency Resolution Process against the corporate debtor herein.
13. In the Rejoinder to the reply affidavit filed by the Financial Creditor, it is denied by the Financial Creditor that the application is not maintainable as alleged by the Corporate Debtor. It is further submitted that in the matter of **SBI vs. Bhushan Energy Ltd. (C.P. No. (IB) 530(PB)/2017**. The Hon'ble Bench in this matter has stated that :

“16. A perusal of the aforesaid provisions would make it patent that the powers of the Chairperson are of widest amplitude. On the language of Section 27 read with Regulation 77, it cannot be concluded that the Chairperson is not entitled to delegate the power of signing and verification of affidavit etc. to its employees which ahs been duly done in the present case. It is true that notification dated 27.03.1987 has no reference to delegate the powers under the Insolvency and Bankruptcy Code, yet it gives general power to sign petition which is wider than filing petition under Insolvency and Bankruptcy Code, 2016.the main source of power in any case is discernible from Section 27 of the Sate Bank of India Act. It gives Chairperson power to do all such acts which are to be done

by the Bank itself subject to directions”.

14. In view of what is stated above, it is denied that they are not authorized to file this Application. A Copy of the said Regulation of the State Bank of India General Regulations,1955 is annexed and marked as Annexure ‘A’ to the Rejoinder.
15. It is further submitted that a sum of Rs.162,62,23,609.63/- (Rupees One Hundred Sixty Two Crores, Sixty Two Lacs, Twenty Three Thousand, Six Hundred Nine and Paise Sixty Three only) as on 31st January, 2018 is due and payable by the Principal Borrower and the Corporate Debtor has executed Deed of Guarantee on 1st April,2006 is annexed and marked as Exhibit “L” to the application. It is stated that the contention of the Corporate Debtor is flawed and misconceived, as under the said Guarantee Agreement dated 1st April, 2006 in Clause 7,11,12 and other clauses, it is categorically mentioned that the Bank can proceed against the Corporate Debtor for recovery of the dues of the Principal Borrower and the Deed of Guarantee has been admittedly executed by the Corporate Debtor after perusing all the terms and conditions therein. The said clauses impose a contractual liability on the Corporate Debtor to pay the dues of the Principal Debtor. It is further submitted that the Corporate Debtor has failed to discharge its liability as the Guarantor and thereby committed default. The law is settled regarding the liability of the Guarantor in the case of this nature. Guarantor’s liability being co-extensive with that of the Principal Borrower, there is no legal bar in initiating actions against the Corporate Debtor who is a Guarantor. Thus the contention of the Corporate Debtor in the paragraph under reference is denied and disputed. It is denied that the present application has no merit or that the same is deserved to be dismissed or is not maintainable as alleged at all.
16. The Financial Creditor has further submitted that with reference to the paragraph no(s). 6(1)to 6(y), the Corporate Debtor and Principal

Borrower were provided sufficient opportunities to repay the outstanding dues in terms of the said Press Release. OTS scheme was also provided to them and the corporate debtor failed to provide a valid resolution plan and the same were rejected and /or not considered by the applicant Bank. It is submitted by the Financial Creditor that that the Corporate Debtor do not fall under the said categories of companies and hence Financial Creditor denies all contentions of the Corporate Debtor in this regard. It is submitted that the Corporate Debtor was ever deprived from availing any resolution plan as alleged or at all. It is further submitted Financial Creditor has denies that the Applicant has not complied with the provisions of the Press Release dated 13th June, 2017 and /or the Circular dated 12th February, 2018 and/or the Financial Creditor has deprived the Corporate Debtor from availing any resolution plan as alleged or at all. It is submitted that after complying all the provisions of the Code, the Applicant has filed the present application in proper form and manner and hence the same is maintainable. It is submitted that reasonable and sufficient opportunities were provided to the Corporate Debtor for recovery of Financial Debt as payable by the Corporate Debtor and hence the contention of the Corporate Debtor in the paragraph under reference is denied in toto.

17. Financial Creditor further submitted that the Press Release dated 13th June 2017 is merely directory and no mandate has been issued to follow the said directions. Be it accepted that the said resolution framework has not been released by the RBI and subsequently no resolution plan has been finalized, does not disentitle the liability of the Corporate Debtor towards the Applicant. It is denied that the present proceedings initiated under the IBC Code are illegal or arbitrary is alleged or at all. Thus the contention of the Corporate Debtor is flawed and misconceived and the contentions of the Corporate Debtor under reply to the application are hereby denied. It is denied that the RBI has derogated any of the guidelines and /or the circulars and/or abused the provisions of the IBC and /or deprives the Corporate of its legitimate rights as

alleged. It is denied that any alleged valuable rights of the Corporate Debtor has been taken away or that non issuance of the resolution framework under the said Press Release and/or initiation of the present proceeding is in contravention of the said Press Release or is gross abuse of the process of the Court as alleged or at all. It is submitted that the Applicant has acted fairly and has come with clean hands and hence the contention of the Corporate Debtor is denied. It is submitted that the existence of the debt and default are two essential factors to be considered by this Tribunal for admission of the present application under the Code. In the present case, there is admittedly a debt and existence of a default on the part of the Corporate Debtor which can be substantiated from various documents annexed to the present application and are on record before this Tribunal. It is further submitted that the Applicant has filed the present application for recovery of the financial debt owed to the Applicant and the Adjudicating Authority has to ascertain the event of default on behalf of the Corporate Debtor on the basis of the Deed of Guarantee dated 1st April 2006 and subsequent deeds.

18. It is further submitted that with reference to paragraph no(s) 7 to 11 of the reply, the Financial Creditor submitted that a sum of Rs. 162,62,23,609.63/- as on 31st January, 2018 is due and payable by the Principal Borrower and the Corporate Debtor has executed Deed of Guarantee on 1st April 2006 and marked as Exhibit "L" to the application. It is submitted that on the basis of the Deed of Guarantee the Corporate Debtor has admitted the debt due to the Applicant and therefore, it is denied that the instant application in any way is premature application. It is submitted that under section 7, the existence of default has to be ascertained based on the records/ documents filed by the Applicant and therefore, it is denied that the present application is a premature one and/ or the same is liable to be dismissed without any order as alleged. The applicant submits that the Company intentionally and with ulterior motives is continuously

lingering the matter with a malafide intention to fetch time to dispose of the pledged securities. The applicant submits that the Corporate Debtor is routing its transactions through accounts maintained with Banks not known to the applicant and other leading bankers. The applicant submits that there is an extreme urgency in the matter in the interest of general public and greater and larger interest of the Society and that the urgent intervention of this Tribunal is necessary to ensure that the matter is not allowed to linger on. It is submitted any further delay in the hearing of the aforesaid matter shall affect adversely the interest of the public at large, who have deposited money with the applicant and the Union Government, which is a major stakeholder in the applicant bank. The applicant further submits that delay in admission of the case will seriously hamper the interest of the applicant as the entire funds will be diverted and siphoned away by the promoters of the Corporate Debtor. It is submitted that hundred crores of rupees are involved in the matter which is the public money and that the Corporate Debtor is a defaulter and have been deliberately trying to linger on the matter so as to escape its liabilities. In view of the above, all the necessary documents are submitted along with the present application filed before this Tribunal. It is most humbly submitted that this is a fit case for admission of the application and initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

19. During the course of arguments, Mr. Joy Saha, Ld. Senior Counsel for the Financial Creditor submitted that this is a case filed against the Corporate Guarantor and the only point in this matter is that both the Principal Debtor and another guarantor of the same company were already in CIRP. As a matter of fact, there was an order of liquidation in respect of the Principal Debtor and under these circumstances relying upon the ***Vishnu Agarwal vs. Piramal Enterprises Limited, MANU/NL/0003/2019, 2019] 149 CLA 30 (Piramal)*** judgment, the Corporate Debtor / Guarantor had submitted that this application is not maintainable. Mr. Joy Saha, Ld. Sr. Counsel further submitted that this

is a matter relating to the year 2018 and in the meanwhile, in ***Punjab National Bank Vs. M/s Krishna Alex Pvt. Ltd. CP (IB) No. 1128/KB/2019*** decision was delivered by the previous Bench (Consisting of Mr. Rajasekhar V.K. and Mr. Harish Chander Suri), where this specific point was under consideration as to whether CIRP proceeding against Corporate Guarantor would be maintainable when the Principal Debtor or another Corporate Debtor are already in CIRP, and the orders have been delivered on 14/09/2021, and it has been made clear that there is no bar whatsoever to two separate actions against the Corporate Debtor and the Guarantor. Under these circumstances, Mr. Saha submitted that this was perhaps the only defence that had been squarely taken care of. The Ld. Sr. Counsel further submitted that this is a claim of Rs. 162,62,23,609.63 which is an admitted debt as on 31st January, 2018. Ld. Senior Counsel further submitted that the NPA date mentioned in the application is 10th January, 2014. It is submitted that the CP was affirmed on 28th February 2018 and the petition was filed on 9th March, 2018. Ld. Senior Counsel further submitted that the Financial Creditor filed the O.A. proceedings in the D.R.T i.e. O.A. No. 493/2015 on 24th September 2015. Ld. Senior Counsel submitted that he is relying upon mainly on judgments i.e. ***Sesh Nath Singh and Anr. vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. and Anr.) -2021 SCC Online SC 244*** and recent judgment in the case of ***Dena Bank -vs- Shibakumar Reddy- 2021 SCC Online SC 543 and Laxmi Pat Surana -vs- Union Bank of India &Anr.) 2021 SCC Online SC 267.***

20. It is submitted that these judgments would show that if there is any proceeding in the DRT specially in the nature of O.A, the entire limitation process is arrested as on the date of filing. The date of filing of OA No. 493/2015 is 24th September, 2015, so from that day onwards, the limitation has been arrested. The Ld. Counsel submitted that since the date of NPA is 10th January, 2014 and so, just about a year thereafter, the O.A. was filed, and thus there is no issue of limitation

involved.

21. Ld. Senior Counsel further submitted that **Piramal (supra)** says that when CIRP proceedings had been admitted in respect of same debt against the Corporate Debtor, the Main Principal Borrower, or any other Corporate Guarantor, then it can no longer proceed. It is submitted that the orders passed in **M/s Krishna Alex Pvt. Ltd.** has discussed in details various judgments including Piramal judgment, followed by few other judgments but one of the those judgments has already been stayed by the Hon'ble Supreme Court. The Ld. Senior Counsel has placed reliance on **M/s Krishna Alex Pvt. Ltd.** in which all these judgments have been elaborately discussed. He further submitted Para 23 of the judgment of **M/s Krishna Alex Pvt. Ltd (supra)**, and the same is reproduced as under:-

“23- According to the Ld. Counsel for the Corporate Debtor, in Dr. Vishnu Agarwal v. Piramal Enterprises Limited, MANU/NL/0003/2019, 2019] 149 CLA 30 (Piramal), IFCI Limited v. ACCIL Hospitality Limited, MANU/NL/0130/2020, Shadad Khan Vs. Nisus Finances and Investment Managers & Ors., MANU/NL/0251/2020 and Bijay Kumar Agarwal, Ex-Director of Genegrow Commercial Private Limited, MANU/NL/0032/2020, this position has been appreciated by the Hon'ble NCLAT. In State Bank of India v. Athena Energy Ventures Private Limited, MANU/NL/0436/2020, [2021] 164 SCL 293 (Athena Energy), a different bench of Hon'ble NCLAT has taken a contrary view. There is no judgment of the Supreme Court which decides this issue”.

22. The Ld. Counsel for the Corporate Debtor relied upon and discussed **Dr. Vishnu Agarwal vs. Piramal Enterprises Limited, MANU/NL/0003/2019, 2019] 149 CLA 30 (Piramal)** and other judgments namely **IFCI Limited vs. ACCIL Hospitality Limited, MANU/NL/0130/2020, Shadad Khan Vs. Nisus Finance and**

Investment Manager& Ors. MANU/NL/0251/2020 and Bijay Kumar Agarwal, Ex-Director of Genegrow Commercial Private Limited, MANU/NL/0032/2020, wherein this position has been appreciated by the Hon'ble NCLAT. It is submitted that **Piramal** judgment followed by **Shadad Khan** case has already been stayed by the Hon'ble Supreme Court of India. He argued that, in effect, **Piramal** is also stayed. It is further argued that Hon'ble NCLAT took a contrary view in **State Bank of India vs. Athena Energy Ventures Private Limited, MANU/NL/0436/2020, [2021] 164 SCL 293 (Athena Energy)** case. It is further argued that Piramal case was not founded on the earlier decision of the Supreme Court in the case of **State Bank of India vs. Ramakrishnan – (2018) Vol 17 SCC 394** and another. Therefore, it can be said that **Piramal** was per incurium, so in Athena Energy case Hon'ble Justice A.I.S. Cheema, who was then presiding over the Bench held completely a contrary view and refused to tow the line which was being followed in **Piramal's** case. It is submitted that in paragraph 24 and 25 of the **M/s Krishna Alex Pvt. Ltd** judgment passed in Athena Energy case, **Ramakrishnan** case and **Lalit Kumar Jain case** have been discussed and after discussing all these judgments and following the aforesaid principle laid down by the Hon'ble Supreme Court that has been followed by Hon'ble High Court, in the matter of **Punjab National Bank** judgment where it was held that proceedings against the Guarantor can always continue. Following the aforesaid principle laid down by Hon'ble Supreme Court, the NCLT Kolkata Bench came to the conclusion that “**Following the aforesaid principle laid down by the Hon'ble Supreme Court that has been followed by the Hon'ble High Court, we are of the considered view that the Hon'ble NCLAT's judgment in Athena Energy is the correct position of law. The present petition against the Corporate Debtor can be admitted despite the Corporate Debtor being under CIRP**”.

23. It is stated by the Ld. Counsel that the **Athena Energy** judgment principally relied upon section 60(2) of the Code which is reproduced as
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under:-

“ 60(2)- Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be , of such corporate debtor] shall be filed before such National Company Law Tribunal”.

24. Ld. Counsel further submitted that there is no attempt in the Insolvency and Bankruptcy Code to exclude the Guarantor. The language of Section 60(2) by itself demonstrates that simultaneous proceedings both against the Principal Debtor and the Guarantor are still within the scope of Code. He submitted that in the present case, the quantum of the debt and default are completely admitted that it is submitted that no defence has been raised that the debt is not payable or the default has not occurred. The only defence was this technical defence which no longer survives after **M/s Krishna Alex Pvt. Ltd.** judgment. He further submitted that this was not at all a real defence to be countenanced. It is submitted that due to Piramal judgment, this Bench has granted indulgence to the Corporate Debtor. He submitted that all these judgments have been fully discussed by giving full fledged hearing to the parties and only after considering all that, it was held that **Athena** view will prevail over **Piramal view**.
25. Ld. Counsel further submitted that in the present case the Principal Borrower was a company by the name of Gee Pee Pvt. Ltd. which went into liquidation on 31st January, 2020 and finally dissolved on 14th December, 2020. He further submitted that the other Corporate Guarantor by the name of **Genegrow Commercial Pvt. Ltd.** was also admitted to CIRP on 2nd August 2019 against which an appeal was

preferred before the NCLAT. There was an order passed by NCLAT, by which the order of this Tribunal was set aside following **Piramal** view on 23rd January, 2020 but the order of the NCLAT has been stayed by the Hon'ble Supreme Court on 3rd November 2020. Ld. Counsel further submitted that for a long time in between, while the order of the NCLAT was holding the fort. Ld. Counsel submitted that the Financial Creditor prayed for an order of admission, submitting that there was no settlement and no proposal for settlement.

26. Ld. Counsel for the Corporate Debtor however, at the very outset submitted that the claim of the Financial Creditor is not maintainable. He submitted that the judgments cited by Ld. Senior Counsel arguing on behalf of the Financial Creditor citing various judgments wherein the principle of **Athena Energy** case has not been followed. He submitted that the Athena Energy followed the principle laid down by **Piramal** and that from the **Piramal**, the matter is pending before the Hon'ble Supreme Court. He further submitted that he is waiting for the order of Hon'ble Supreme Court but the Piramal view which was not accepted by latest judgment of NCLAT passed by Justice A.I.S. Cheema in the **Athena Energy** matter. Ld. Counsel relied upon order passed in **CP No. 353/KB/2018** by this Adjudicating Authority on 2nd August, 2019. He further submitted that by order dated 8th August 2019, this Adjudicating Authority had passed an order of admission in respect of **Genegrow Commercial Pvt. Ltd.** and the Principal Shareholder of **Genegrow Commercial Pvt. Ltd.** had preferred an appeal before the NCLAT, which was allowed by the Hon'ble NCLAT by order dated 23rd January, 2020.
27. He further submitted that pursuant to the said order passed by the Hon'ble NCLAT, this Adjudicating Authority passed order on 27th January, 2020 closing the proceedings in C.P.No. 353/KB/2018, which was instituted by the Financial Creditor against the other Guarantor Genegrow. It is submitted by the Ld. Counsel for the Corporate Debtor

that in the meantime, the Financial Creditor preferred a Civil Appeal before the Hon'ble Supreme Court claiming to be aggrieved from the order dated 23rd January, 2020 passed by NCLAT. The Supreme Court in that Civil Appeal No. 2715 of 2020 passed an order on November 3, 2020 staying the order dated January 27, 2020 passed by the NCLAT. Thereafter, the Financial Creditor applied before this Adjudicating Authority for resumption of the CIRP issued in IA No. 1327 /KB/2020.

28. It is submitted that the RP who was appointed in C.P.No. 353/KB/2018 had also taken steps on the purported basis that the CIRP of the other Creditor Guarantor/Genegrow has commenced. The said **Genegrow** /Corporate Guarantor opposed the resumption application filed by the Financial Creditor. The application for resumption of CIRP of **Genegrow** was finally dismissed by this Adjudicating Authority by its order dated 3rd May, 2021 (Amended vide order dated 11th May, 2021).
29. It is further submitted that an Appeal was filed by **Genegrow before** the Hon'ble NCLAT order dated 3rd May, 2021/(as amended), vide Company Appeal AT(Insolvency) No. 450/2021. The said appeal was disposed of by the Hon'ble NCLAT vide order dated 14th June,2021 without interfering with the order passed by this Adjudicating Authority on 3rd May, 2021.
30. Ld. Counsel for the Corporate Debtor has submitted that the present application under section 7 of IBC filed against the Corporate Debtor is not maintainable because the Financial Creditor has already proceeded against Principal Borrower and one of the other Corporate Guarantor in respect of the self-same credit facility/amount which has been claimed against the present Corporate Debtor in the present proceedings. It is submitted that the application is not maintainable because the same amount has been claimed to be in default that there cannot be more than one CIRP in the instant case. It is an admitted fact that the CIRP of the Principal Borrower has gone into liquidation and finally dissolved. The Financial Creditor in the present case had also proceeded against

the other Corporate Guarantor/Genegrow and such proceedings are pending. Therefore, in view of the principles laid down by the judicial pronouncements, the CIRP cannot be proceeded against the Corporate Guarantor when the Financial Creditor has already proceeded against Principal Borrower. Ld. Counsel for the Corporate Debtor has relied upon citation in support of this legal proposition which are mentioned hereinbelow.

31. Ld. Counsel relied upon NCLAT Judgment dated **January 8, 2019 in C.A.(AT) (Ins) No. 346/2018**, it has been held that CIRP cannot be initiated against the corporate guarantor when CIRP against the Principal Borrower has already been initiated. However, another Coordinate Bench of the Hon'ble NCLAT in the judgment dated November 24, **2020 (State Bank of India-vs-Athena Energy) reported in 2020 SCC Online NCLAT 744** has taken a contrary view to the view of the Hon'ble NCLAT in the Piramal Judgment dated January 8,2019. In the Athena Energy matter, the NCLAT has held that the CIRP against the corporate guarantor is maintainable even if the CIRP has been initiated against the Principal Borrower thereby not following the ratio of the earlier Coordinate Bench judgment of NCLAT in Piramal matter dated January 8,2019.
32. It is further submitted that the subsequent judgment of the NCLAT in the Athena Energy matter is a good law and is per incuriam in view of the established principles laid down by the **Hon'ble Supreme Court in the judgment reported as National Insurance Company Limited vs. Pranay Sethi and others- in 2017 (16) SCC 680 Pr-16-20** on the proposition that even if an earlier decision may be seen to be incorrect to a Bench of Coordinate jurisdiction considering the question later, yet it will have the binding effect on the latter Bench of Coordinate jurisdiction and that it was necessary for the latter Bench to refer to the matter to a larger Bench to examine the issue in case the latter Bench felt that the

earlier decision was not correct on merits. NCLAT Bench which passed the Athena Energy judgment on November 24, 2020 was a coordinate Bench and hence the latter coordinate Bench could not have taken a different view and the best remedy was to refer the matter to a larger Bench and therefore the reliance placed by the Financial Creditor on the Athena Energy judgment is fallacious. It is submitted that this view has also been taken by Full Bench of Calcutta High Court in the judgment reported in 2001(2) Calcutta High Court Notes 762 in para 34. The Full Bench of Calcutta High Court held that when the Division Bench of two judges differ from the judgment of another two judges of the Division Bench, it has to refer to the case to Full Bench. In the present case, the latter coordinate Bench of NCLAT should have referred the matter to a larger Bench instead of differing from earliest coordinate Bench and hence the Athena Energy judgment will be considered as a per incuriam.

33. It is submitted that the date of default which has been mentioned in Section 7 application by the Financial Creditor in Part-IV at pages-5 is January 10,2014. The section 7 application has been filed sometime in March, 2018. In the meantime, the Financial Creditor had already applied under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against Principal Borrower/Gee Pee and also against all the individuals and corporate guarantors including the corporate debtor herein, as would appear from O.A. No.493 of 2015 filed by the Financial Creditor before the Learned DRT-1, Kolkata on September 24, 2015. It has been held by the Hon'ble Supreme Court by a recent judgment reported in 2020 SCC Online SC 647 (Re: Babulal Vadjarji Gurjar) that Article 137 of Limitation Act, 1963 will apply to all the applications filed under section 7 of IBC, 2016 to the extent as held by recent three judgments delivered by the Supreme Court on this issue relied upon by the Corporate Debtor in the matter of; **(1) Laxmi Pat Surana Vs. Union Bank of India & another, (2) Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal & another (3) Sesh Nath Singh & another vs. Baidyabati Sheoraphuli**

Co-operative Bank Ltd. & Another. On behalf of the Corporate Debtor reliance is placed upon several judicial pronouncements on the issue of the application being barred by limitation, which will appear from the judgment cited by the Corporate Debtor, which are as under:-

- i. *Gaurav Hargovindbhai Dave- vs- Asset Reconstruction Company (India) Limited & Anr. (2019) 10 SCC 572;*
- ii. *Jignesh Shah & Anr.-vs- Union of India & Anr. (2019) 10 SCC 750;*
- iii. *B.K. Educational Services Pvt. Ltd. – vs- Parag Gupta and Associates (2019) 11 SCC 633;*
- iv. *Babulal Vardharji Gujar –vs- Veer Gujar Aluminium Industries Pvt. Ltd. & Anr. (2020)SCC Online SC 647;*
- v. *UCO Bank-vs-Xenitis Infotech Ltd. In C.P.(IB) No. 1233/KB/2018 and (2020) SCC online SC 647*
- vi. *Sagar Sharma & Anr.- vs- Phoenix Arc Pvt.Ltd. & Anr. (2019) 10 SCC 353;*
- vii. *Invent Assets Securitization and Reconstruction Pvt. Ltd. –vs-Xylon Eletrotechnic Pvt. Ltd. NCLAT order dated 11.08.20 [MANU/NL/0300/2020] IN CA(AT)(INS)677 OF 2020;*
- viii. *Invent Assets Securitization and Reconstruction Pvt. Ltd. –vs-Xylon Eletrotechnic Pvt.Ltd.SC order dated 07.01.2021 in Civil Appeal No. 3783 of 2020;*
- ix. *Sri Kaustav Roy-vs- SBI & Anr. NCLAT order dated 20.02.2021 (Three member Bench);*
- x. *Rajendra Narottamdas Sheth and Anr.-vs- Chandra Prakash Jain & Anr. 2020 SCC Online NCLAT 827.*

34. **The Corporate Debtor** submits that the present application filed under section 7 of the IBC, 2016 is liable to be dismissed in view of the Judgment of the Hon'ble Supreme Court of India in *Dharni Sugars and Chemicals Ltd. vs. Union of India and others.* [reported in 2019 (5) SCC-480 Para 72].

To substantiate its argument, the Ld. Counsel for the Corporate Debtor has referred to Circular dated 12th February, 2018 (annexed at

page 23 of the reply of the Corporate Debtor) issued by Reserved Bank of India and submits that this circular has been declared to be non est in the referred judgment.

35. Before dealing with the arguments of the Financial Creditor and the Corporate Debtor in this behalf, it is pertinent to refer to Rejoinder of Financial Creditor dated 28th September, 2018 in Paragraph 6: Financial Creditor while dealing with Paragraph 6(q) of the reply, which is as under:-

“ 6..... I deny that the Applicant has not complied with the provisions of the Press Release dated 13th June, 2017 and/or the Circular dated 12th February, 2018 and/or the Financial Creditor has deprived the Corporate Debtor from availing any resolution plan as alleged or at all. I say that after complying all the provisions of the Code, the Applicant has filed the present application in proper form and manner and hence the same is maintainable.”

36. Now coming to para (q) of the reply of the Corporate Debtor at page 10, it is mentioned as under:-

“(q) Not only the provisions of Press Release dated 13th June 2017 and the circular dated 12 February 2018 was not and /or could not be complied with by the financial creditor, the financial creditor on February 2018 had filed the present proceeding under section 7 of the IBC.”

37. It has been argued by the Ld. Counsel for the Financial Creditor that it is not the case of Corporate Debtor that the Financial Creditor has while filing an application under section 7 of the IBC has relied upon Press Release dated 13th June, 2017 and the Circular dated 12th February, 2018 rather the Corporate Debtor has stated that these two documents were not and could not be complied with by the Financial Creditor.

38. He further argued, a perusal of application filed by the applicant i.e. SBI reveals that it has been filed under section 7 of the IBC,2016 read with rule 4 of the IBC. This is mentioned in the Form-1 at page 1 of the petition. The present application under section 7 IBC has been filed in accordance with the form as prescribed under the Code only.
39. The Ld. Counsel for the Financial Creditor also stated, It can be seen from application that it was filed under section 7 of IBC only and even assuming there is some reference to Press Release and the Circular dated 12th June 2018 which has been found be non est, the application under section 7 can be proceed independently, as it can be seen from the application itself there was no reference to rely upon these two documents while filing the petition under section 7 IBC. .Further, It was never the intent of the applicant bank to seek aid of any other statute or circular while filing the present application. Also, a perusal of the Circular dated 12th February, 2018 shows that the RBI had issued the circular or the resolution of the Stressed Assets.The IBC being an independent Code, this application under section 7 of IBC is independently maintainable.
40. It has been further submitted on behalf of the applicant that a mere passing reference to the Circular in the rejoinder by it cannot and will not change the original nature of the application which was filed only under section 7 of IBC.
41. **We have considered the arguments of the parties, record and law referred by them and we are of the view, that the present application is maintainable under section 7 of the IBC, 2016 and the submissions of the Corporate Debtor are not sustainable.**
42. It is further submitted that this ratio has also been applied by the Adjudicating Authority, Kolkata to dismiss the section 7 application
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which was filed on the basis of the Circular of Reserve Bank of India dated February 12,2018. This will appear from the judgment passed by the Adjudicating Authority, Kolkata Bench dated March 19,2020 reported in **2020 SCC Online NCLT 386 (UCO Bank -vs- Xenitis Infotech Ltd.)**.

43. It is further submitted that Financial Creditor cannot seek to extend the period of limitation by construing the OTS letters issued by Corporate Debtor as alleged admission to save limitation. For this the Corporate Debtor is relying upon the judgments for the proposition that documents or letters exchanged during the course of settlement cannot be construed as alleged admission. Reference is also made to the judgment of the Hon'ble NCLAT on this proposition reported in **2020 SCC Online NCLAT 661 para-9 (dated September 23, 2020 at page-14 of compilation-II). In the case of Saurabh Bharathushan Jain Shareholder and Director of Sysco Industries Ltd. Vs. Excel Tubes & Cones and Another.**
44. The Ld. Counsel for the Corporate Debtor Finally submitted that the judgments passed by the Hon'ble Supreme Court of India relied upon by the Financial Creditor are distinguishable and do not apply to the facts of the present case. The Ld. Counsel further submitted that in the case of **Laxmi Pat Surana -vs- Union Bank of India & Anr.) SCC Online SC 267**, the issue which was involved has been mentioned in para 1 of the judgment. In para 32, the Hon'ble Supreme Court decided the second issue, as framed, as to whether an application under section 7 of the Code filed after three years from the date of NPA is not barred by limitation. From para 46, it will appear that the letter dated December 8, 2018 issued by the Corporate Guarantor (corporate debtor) was without prejudice but still in para 48, the Hon'ble Supreme Court construed the said letter to be a written acknowledgement of liability and thereby the period of limitation was deemed to be extended by applying the

principles of section 18 of the Limitation Act. However, Ld. Counsel submitted that there is no such letter issued by the Corporate Debtor /corporate guarantor on the merits of the purported claim of the Financial Creditor. Infact, letters which were issued were of all in relation to OTS prepared which was being considered amongst the Financial Creditor and the Principal Borrower (**GEE PEE Infotech Pvt. Ltd.**) and that too pursuant to the order passed by the learned DRT-I dated December 18,2018 (annexed at page-17 of the supplementary affidavit of corporate debtor affirmed on January 22,2019). Therefore, the letters exchanged between the borrower and bank were in relation to the settlement process which was initiated pursuant to the order of judicial forum and hence such letters are always exchanged without prejudice to the rights and contentions of the parties. The Ld. Counsel argued that in view of the principles laid down in section 23 of the Evidence Act, such letters do not construe as an admission It is also relevant to note that none of the letters which were exchanged between the borrower and bank were on the merits of the purported claim of the Bank unlike the letter dated December 8,2012 which has been referred to in para 46 of the Supreme Court judgment in (**Laxmi Pat Surana -vs- Union Bank of India & Anr.**). In **Sesh Nath Singh and Anr. -vs- Baidyabati Sheoraphuli Co-operative Bank Ltd. and Anr.) -2021 SCC Online SC 244-** The issue involved in this judgment dated March 22,2021 will appear from Para 57. This judgment is not on the issue of applicability of section 18 of the Limitation Act. On the contrary the issue which is involved is the applicability of section 14 of the Limitation Act, 1963 and whether the section 5 of the Limitation Act can be applied for seeking condonation of delay in filing the section 7 application. Therefore, the Ld. Counsel argued that this judgment is also clearly distinguishable and does not apply to the facts of the case.

45. **Asset Reconstruction Company (India) Limited-vs- Bishal Jaiswal and Anr.)- 2021 SCC Online SC 321-** Ld. Counsel for the Corporate

Debtor further argued that in this case the Hon'ble Supreme Court delivered the judgment on April 15, 2021 and it will also not help the cause of the bank/financial creditor because the financial creditor has not relied upon the Balance Sheets of either the corporate debtor (corporate guarantor) or the Principal Borrower in C.P.(IB) No. 346/KB/2018. The Financial Creditor has made no attempt to either place reliance upon the Balance Sheet to take benefit under section 18 of the Limitation Act, 1963 nor has the Financial Creditor made any effort to explain the delay or the reason for condonation of delay, if any. Therefore, the ratio of the judgment of the Supreme Court in Bishal Jaiswal matter does not help the cause of the Financial Creditor.

46. In view of the judgments of Hon'ble Supreme Court in **Ramakrishnan** case and **Lalit Kumar Jain's** case, the proceedings can continue against the Guarantors. Therefore, it is no longer necessary to have discussions between the **Athena Energy case and Piramal Case**.
47. We have considered all the pleadings filed on behalf of both the parties and the judgments cited by them.
48. We have considered the recent order passed by this Adjudicating Authority in **CP No. 1128/KB/2019, Punjab National Bank- vs- M/s Krishna Alex Private Limited**, in which all the relevant judgments of the Hon'ble NCLAT and the Hon'ble Supreme Court were discussed following the aforesaid order of this Adjudicating Authority.
49. We consider it fit, to adopt the view taken in **State Bank of India vs. Athena Energy Ventures Private Limited, MANU/NL/0436/2020, [2021] 164 SCL 293 (Athena Energy)** case wherein, it was clearly held that in the matter of guarantee, CIRP can proceed against the Principal Borrower as well as the Guarantor. The Hon'ble NCLAT had held in that matter that the law as laid down by the Hon'ble High Courts for the

respective jurisdictions, and law as laid down by Hon'ble Supreme Court for the whole country is binding. The Hon'ble NCLAT further held that in the matter of Piramal, the Bench of this Appellate Tribunal “ interpreted” the law. It was held that ordinarily, “ ***we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal***”.

50. Following the ratio as deducted from ***Athena Energy (supra)***, we admit the present petition against the Corporate Debtor herein which is a Guarantor as well. In view of the aforesaid position of law, the petition is admitted and CIRP in respect of the Guarantor is initiated.
51. We are satisfied and have no option but to admit this petition under section 7 of IBC with the following orders : -

O R D E R S

- i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
- 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 Securitization 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.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Binay Kumar Singhania** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-001/IP-P00041/2017-18/10102**, Email binay1@yahoo.com hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Financial Creditor/Applicant is directed to deposit **Rs. 3,00,000./- (Rupees Three Lakh Only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

- xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) List the matter on 01/03/2022 for the filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor.)
Member (Judicial)

Order signed on, this 14th day of December, 2021

Pj