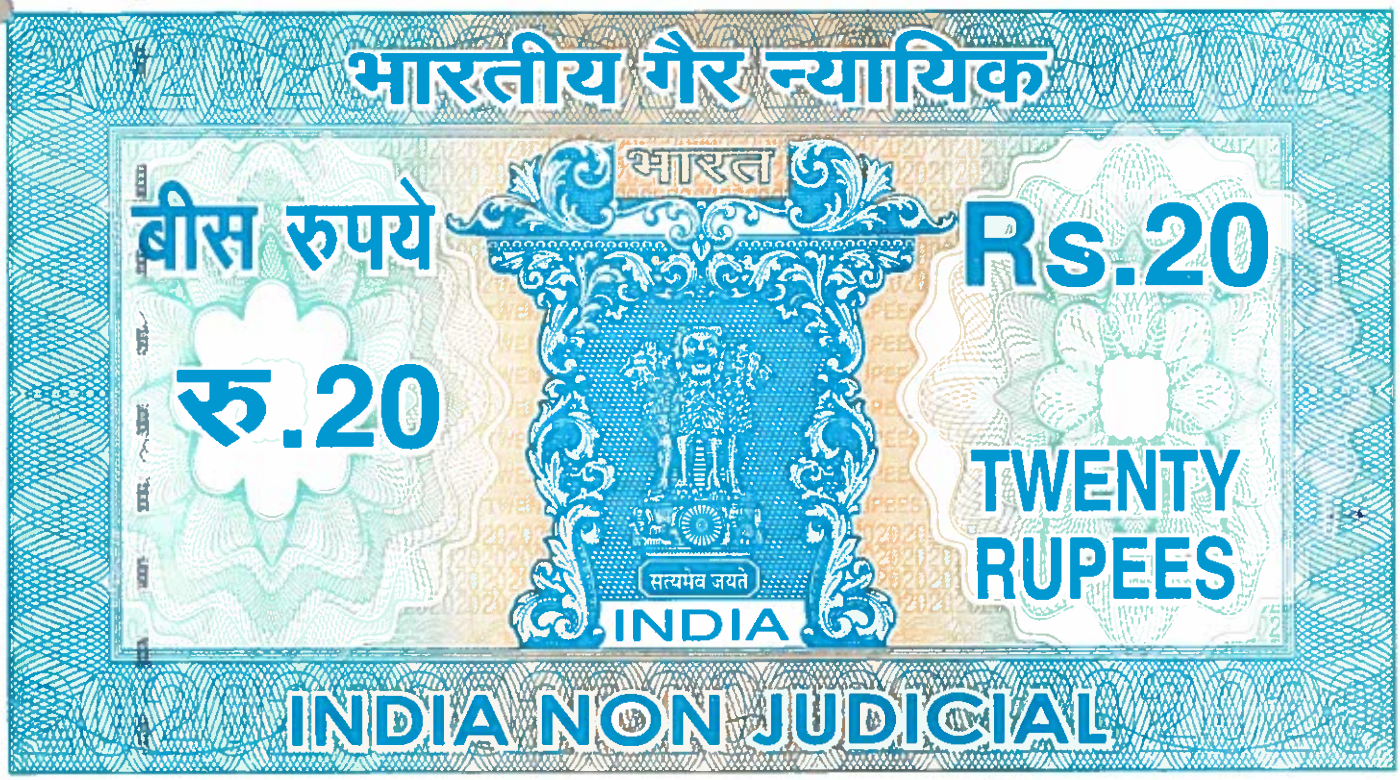

18 FEB 2022

తెలంగాణ తెలంగాణా TELANGANA 30AA 176852

Sl.No. 958 Dt: 18/2/22 Rs. 20/-

Sold to I. V. Siddhivardhana

S/o. D/o. W/o I. Venkatnarayana

For Whom Self

M. PRABHAKAR
LICENCED STAMP VENDOR
L.No.16-08-052/2012
R.L.No.16-08-050/2021
#20-1-1082/96, S.V.Nagar, Puranapool,
Hyderabad.

राष्ट्रीय कम्पनी विधि अधिकरण National Company Law Tribunal अमरावती न्यायपीठ Amaravati Bench

CERTIFIED COPIES (1 SET) OF ORDER DATED (18-2-2022) IN CP (IB) NO. 204/7/AMR/2019

IN THE MATTER OF KVR INDUSTRIES PRIVATE LIMITED.

NO OF PAGES COMES TO (57) (CERTIFIED COPY ISSUED TO FINANCIAL CREDITOR)

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
*** *** ***

CP (IB) No. 204/7/AMR/2019

In the matter of a 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

In the matter of
M/s.KVR INDUSTRIES PRIVATE LIMITED

Between:

M/s.PP Bafna Ventures Private Limited,
Registered office at No.111,
World Trade Centre Tower A, S.No.1,
Kharadi, Hs.No.1B/2/B, Pune, Maharastra.

...Financial Creditor

AND

M/s.KVR Industries Private Limited,
#47-11-3, Dwarakanagar,
Visakhapatnam – 532016,
Andhra Pradesh.

...Corporate Debtor

Date of Order: 18.02.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor	:	Mr.I.V.Siddhivaradhana & Ms.Divya Datla, Advocates.
For Corporate Debtor	:	Mr.P.Vikram, Advocate.

ORDER

1. This Application is filed by M/s. PP Bafna Ventures Private Limited("hereinafter referred to as Financial Creditor") against M/s. KVR Industries Private Limited, Visakhapatnam, Andhra Pradesh seeking to initiate the Corporate Insolvency Resolution Process (CIRP) for the default committed by the Respondent/Corporate Debtor in respect of the deposit given by the Financial Creditor to the Corporate Debtor.

2. The facts as set out in the form filed by the Financial Creditor are briefly as follows:

   I. A cash credit was granted to the Corporate Debtor by the Financial Creditor as Inter corporate Deposit (ICD) for Rs.12,55,00,000/- under Inter Corporate Deposit Agreement dated 29.12.2018 supplemented by Supplemental Inter Corporate Deposit Agreement dated 21.01.2019. An amount of Rs.12,55,00,000/- was advanced as Inter Corporate Deposit (ICD) upon the request of the Corporate Debtor on certain terms and conditions as set out in the Inter Corporate Deposit Agreement. Clause 5B of the Inter Corporate Deposit Agreement is as under:

"depositor shall not recall the deposit at any time before the expiry of 36 months from the date of disbursal of the deposit unless there is breach of any of the conditions of either the shareholders and Share Subscription Agreement, Business Management Agreement or this Agreement".

The Financial Creditor advanced Rs.12,55,00,000/- to the corporate Debtor with interest @ 6% p.a. as per the terms and conditions agreed by the parties. Subsequently on 31.12.2018 an amount of Rs.15,24,00,000/- was transferred to the Corporate Debtor towards the payment of (i) Inter Corporate Deposit (ICD) of Rs.12,55,00,000/- (ii) Part of various tranches of the working capital loan of Rs.24,66,665/- (iii) Share subscription amount of Rs.2,45,00,000/-.

II. The Business Management Agreement dated 29.12.2018 was executed between Corporate Debtor and Financial Creditor as per which the Corporate Debtor along with its promoters has approached the Financial Creditor seeking an investment of Rs.15,00,00,000/- in the form of Inter Corporate Deposit (ICD) and investment in clause B equity shares. The same was agreed between the parties and it was

agreed that the Inter Corporate Deposit (ICD) and the investment in series B equity shares would be utilized by the Corporate Debtor only for one time settlement of State Bank of India loan under OTS Scheme.

III. A Supplemental Business Management Agreement dated 05.01.2019 was executed between the Corporate Debtor and Financial Creditor jointly with Mr.Yogesh Bafna. The Corporate Debtor has violated the majority of the clauses under Business Management Agreement and caused monetary loss to the Financial Creditor. The violations are as under:

a) As per Clause 7 of the Business Management Agreement (BMA) the balance profit amounting to 60% is to be utilized by the first promoters towards loan instalments, interests on borrowings, statutory dues, working capital loan and other expenses and only after all these payments the remaining balance shall be considered for giving remuneration to the promoters. However, the promoters as well as the Corporate Debtor represented by Mr.K.V.Rao have illegally transferred huge amounts from the Corporate Debtor's account into personal account of the promoter,

Mr.K.V.Rao and his relatives without first utilizing the funds towards payment of loan instalments, interest on borrowings, statutory dues, and working capital loan.

b) Clause A (10) of the Business Management Agreement (BMA) require Bank accounts of the Corporate Debtor to be operated jointly by the both parties. The Financial Creditor though permitted by Business Management Agreement (BMA) to be the joint operator of the Bank accounts, the promoters of the Corporate Debtor as well as the Corporate Debtor did not allow for the same with respect to Axis Bank Account until February, 2019 and with respect to Panjab National Bank account until July, 2019. All the administrative rights for the Bank accounts were reserved by the promoters of the Corporate Debtor and the same rights were denied by the Financial Creditor.

c) Clause A (17) of BMA requires for Annual Business Plan to be formulated and amended jointly by the both parties. Clause A(18) of BMA also requires that the first business plan to be prepared in 30 days after execution of the agreement and thereafter the preparation of the Annual Business Plan within

commencement of the financial year i.e., 1st April to 31st March, 2018. However, despite various endeavours and cooperation extended by the Financial Creditor towards finalizing the aforesaid Annual Business Plan the Corporate Debtor and promoters did not turn up for the meeting and miserably delayed to finalize and implement the Annual Business Plan.

IV. Another Agreement being Share Subscription and Shareholders Agreement (SSSHA), was executed on 29.12.2018 between the parties. The Financial Creditor invested Rs.2,45,00,000/- as equity in the company which represents Rs.24,50,000/- shares of Rs.10 each. The Supplemental Share Subscription and Shareholders Agreement (SSSHA) was executed on 05.01.2019. The Corporate Debtor and its promoters violated majority of the clauses of SSSHA which caused huge losses and also troubled the Financial Creditor. The violations are as under:

a) Clause 3 (V) (a) (viii) and clause 12 (IV) (iv) requires any decisions to transfer any assets of the Corporate Debtor to be taken with prior consent of Financial Creditor. However, funds were fraudulently transferred from the Axis Bank account of the Corporate Debtor to

Punjab National Bank account of the Corporate Debtor without any knowledge, prior intimation or written consent of the Financial Creditor.

b) Clause 4 (iii) (a) (2) (3) and (4) which requires that the Memorandum of Association (MOA) and Articles of Association (AOA) of the Corporate Debtor have to be altered and the name of the Financial Creditor has to be entered in the register of Shareholders of the Corporate Debtor. But till date the Corporate Debtor's Articles of Association (AoA) are not amended as such.

c) Clause 4 (iii) (9) clearly states that in case of any breach or non-fulfilment of obligations of Clause 4 (iii), the Corporate Debtor and promoters shall cause to repay the ICD amount along with 12% interest thereon to the Financial Creditor. However, despite the Corporate Debtor and its promoters having full knowledge of their non-compliance of the said Clause 4(iii), the amount has not been returned to the Financial Creditor.

d) Clause 4 (iv) (b) requires the promoters and Corporate Debtor to issue a letter setting out the completion of the

conditions together with supporting documents to the satisfaction of the Financial Creditor and shall issue a certificate stating that no further actions/steps are pending and required to be taken, the same was not done.

e) Clause 8 (I) (i) requires that the Corporate Debtor and shareholders should exercise all available power to procure and that no action shall be taken or resolution passed by the Corporate Debtor with respect to the reserved matters covered under Clause 12 of the SSSHA except with the affirmative vote of the Financial Creditor. However, the Corporate Debtor and promoters intentionally took the following actions without obtaining the affirmative vote of the Financial Creditor; a) Arbitrarily prohibiting the entry of the General Manager, Mr.Avshesh Maheshwari in contravention of Clause 12 (IV) (xiv) of SSSHA; b) Entering into any related party transaction by the Corporate Debtor with Ratnam Jute Private Limited which is an entity related to the promoters of Corporate Debtor, in contravention of Clause 12(IV) (xxv) of SSSHA.

f) Clause 10(iv) requires that the Bank account operations can be altered only with the written consent of all the parties. But the promoters have arbitrarily and malafidely issued instructions to Axis Bank without knowledge of the Financial Creditor.

g) Clause 11 (II) (a) and (b) require that each party and their authorised representatives shall have all the rights to access and examine the books, records, information, properties, contracts, commitments, financial and operational data of the Company. But the Corporate Debtor and promoters have not paid heed to several requests made by the Financial Creditor both oral and written requests for the access and inspection for the aforesaid documents.

h) Clause 11 (III) requires the Corporate Debtor to provide audited accounts of the books within a period of 120 days after the end of each financial year. Clause 11 (IV) provides for other information that may be provided on receipt of written demand for the same.

i) Clause 11 (IV) requires that the promoters shall inform the Financial Creditor in writing in case of any

warranties under the SSSHA are breached. But no written intimation is provided to the Financial Creditor regarding breaches of warranties under Clause 13 of SSSHA wherein the promoters have represented to the Financial Creditor that the Corporate Debtor does not have any indebtedness and no consents from 3rd parties are required for approval and the Corporate Debtor is not a party to any legal or quasi legal proceedings. Contrary to the above, the promoters have misrepresented that the Corporate Debtor had obtained a prior No Objection Certificate (NOC) from the Punjab National Bank for opening additional Bank accounts of the Corporate Debtor and despite having knowledge of such No Objection Certificate (NOC) from the Punjab National Bank, the promoters malafidely proceeded to accept investment in the form of ICD amount without informing the Financial Creditor about the non-compliance of statutory laws by the Corporate Debtor and continued banking activities from the Axis Bank without first obtaining No Objection Certificate (NOC) from the Punjab National Bank. A letter dated 28.12.2018 was addressed by the Corporate Debtor to Punjab National Bank intimating

that Rs.2,45,00,000/- was invested for issuance of series B equity shares by the Financial Creditor in the Company. The promoters and the Corporate Debtor have violated the conditions of Business Management Agreement (BMA) as well as SSSHA, in which case the Financial Creditor shall have the right to recall the Inter Corporate Deposit (ICD). They have become liable to pay the Inter Corporate Deposit (ICD) amount with interest @ 12%. The Financial Creditor issued a legal notice detailing all the aforementioned breaches. Since, the Inter Corporate Deposit (ICD) is made as against the time value of money, it becomes a financial debt. Since the Corporate Debtor defaulted the payment of the said debt this application for Corporate Insolvency Resolution Process (CIRP).

3. The Respondent/Corporate Debtor filed counter denying the averments in the Company Petition except those which are a matter of record. It is contended as follows:

a) The petition is not maintainable as there is suppression of material facts and there is an arbitration clause in the agreements. The transaction between the parties is composite and indivisible in nature in relation to three

agreements. Claim amount does not amount to debt and there is no debt payable under Insolvency and Bankruptcy Code, 2016. There are pre-existing disputes between parties and there is no default for the initiation of Corporate Insolvency Resolution Process (CIRP). The facts relevant for consideration of the present proceedings are stated which are briefly as under:

The Respondent/Corporate Debtor is engaged in the business of manufacturing paper and allied products since 2008 with its factory at Sarasanapalli Village in Srikakulam District, Andhra Pradesh. The Financial Creditor/Petitioner approached the Respondent/Corporate Debtor with a proposal to invest in the Respondent/Corporate Debtor's Company and also to run and operate the factory. In or about 2018, the Respondent/Corporate Debtor was in the process of settling the liability of Rs.22,79,24,671/- only to the State Bank of India (SBI) and after several rounds of negotiations with State Bank of India, a favourable One Time Settlement (OTS) for Rs.17,94,07,405/- only was obtained. At that point of time, Mr.Praful Bafna, who was promoter of the Petitioner/Financial Creditor approached Respondent/Corporate Debtor and claimed

to have significant interest in trading of paper and paper related products. Mr.Praful Bafna and other representatives of the Petitioner visited the factory on 20.10.2018 and conducted due diligence in all aspects including financial and were convinced of the financial viability of the factory. Mr.Praful Bafna expressed his interest to enter into a joint venture, wherein the Petitioner would manage the factory using its experience in the paper factory and also bring about significant contracts from the paper industries. The promoter informed Mr.Praful Bafna about the impending repayment of loan to State Bank of India. Mr.Praful Bafna put forward a proposal to invest an amount of Rs.15,00,00,000/- with additional working capital of Rs.5,00,00,000/- which would be utilised to repay the loan to State Bank of India in addition to paying working capital. In lieu of it, Mr.Praful Bafna and the Petitioner would run and operate the factory for a share in the profit and loss of the Respondent Company. Understanding between the parties was reduced to a term sheet dated 20.11.2018. Thereafter, the parties entered into the agreements Share Subscription and Shareholders Agreement (SSSHA),

Business Management Agreement (BMA) and Inter Corporate Deposit Agreement (ICDA). All the agreements were amended by way of supplemental deeds i.e., Supplemental Deed SSSHA dated 05.01.2019, Supplemental Deed BMA dated 05.01.2019 and Supplemental Deed ICDA dated 21.01.2019 wherein Mr.Yogesh Bafna was inducted as a Nominee Director of the Respondent. The transaction between the Petitioner and the Respondent is composite in nature and the Petitioner has committed numerous breaches under all the agreements which are as under:

I. **Failure to make investments as per schedule agreed by the parties;**

a) As per term agreement dated 29.12.2018 an amount of Rs.15,00,00,000/- to be invested in the following manner:

i. Rs.12,55,00,000/- in the form of unsecured Inter Corporate Deposit;

ii. Rs.2,45,00,000/- towards equity shares

iii. Working capital up to Rs.5,00,00,000/- as and when required.

b) Clause 4(ii)(a) of SSSHA provided that Rs.2,45,00,000/- would be invested on 29.12.2018 i.e., the completion date. The completion date shall be the date of signing of the agreement or such other date as the parties may mutually agree in writing. On the completion date the investment amount shall be paid by the investor through RTGS into the designated Bank account and the investor shall also pay ICD amount into the Designated Bank Account in two tranches. However, contrary to the terms of SSSHA, the Petitioner did not made the investment of Rs.2,45,00,000/-. The Respondent took all steps to induct the Petitioner's nominees in the Board of Directors of the Respondent with effect from 29.12.2018. Further in accordance with the terms of SSSHA, the Respondent allotted shares to the Petitioner on 28.02.2019. The Petitioner only paid Rs.2,45,00,000/- towards his share subscription.

II. Failure to make timely payment of Inter Corporate Deposit.

Clause 1 of ICDA which details the terms of payments as follows:

Inter Corporate Deposit of Rs.12,55,00,000/- in two tranches starting from the agreement date out of which Rs.10,00,00,000/- shall be paid immediately upon signing of the agreement of Rs.2,55,00,000/- from the date of the agreement or from the date of first payment, whichever is earlier. The petitioner breached the terms of the ICDA by depositing the ICD amount only in the month of July, 2019. It also failed to extend the working capital loan as agreed in the SSSHA.

III. Failure to manage Business of the Respondent and Breach of Fiduciary Duties.

a) The Petitioner assumed sole management rights as provided in Business Management Agreement (BMA) and became responsible for the management of the factory. The Petitioner is required to work together with

the Respondent to formulate Annual Business Plan but did not take any steps for the same. The Respondent sent email correspondence dated 06.08.2019 & 13.08.2019 requesting the Petitioner to formulate the same. The Petitioner gave vague reasons and shifted the responsibility to the Respondent. The Respondent took all steps to hand over operations of the factory to the Petitioner and the Petitioner has taken charge of the factory on 15.01.2019 and became responsible to finalize the accounts of the factory and determine debt dues on the monthly basis. However, the Petitioner failed in the said responsibility. The Petitioner informed the Respondent through E-mail dated 28.08.2019 that the Respondent made a loss of Rs.28,91,861/- during the month of June, 2019. The Respondent got the accounts verified by the accountants and found the following several discrepancies, the Petitioner having agreed to share 40% of PBIDTA has conveniently shirked its

responsibility for the losses and only claimed profits. The Petitioner routed supplies to its customers in a fraudulent manner without accounting to these profits to the Respondent. The Petitioner failed to infuse working capital required for the business of the Respondent. The Petitioner made purchases on its own accord without informing the Respondent. The Petitioner has withdrawn a sum of Rs.4,52,22,500/- in the form of credit sales from the Respondent and the said amount is outstanding even till date. The accounting firm prepared by the Petitioner shows false statements to show that the Respondent have withdrawn amounts whereas it is found that the promoters have significant credit balances due from the Respondent. The acts of the Petitioner resulted in shutting down the factory in Sarasanapalli Village. In September, 2019 the Petitioner shut down the factory without any valid reason and consultation with the other Directors and

blocked the Bank funds to the extent off Rs.1,40,00,000/-. The Petitioner issued invoices and is liable to clear the same to the Respondent. The Respondent issued the demand notice. The Petitioner was well aware at the time of entering into the agreements that the Respondent had two operational bank accounts one with Axis Bank and another with Punjab National Bank. The same was never hidden from the Petitioners. The Petitioner is a joint signatory to the Axis Bank Account.

b) The Petitioner issued legal notice on 04.09.2019 alleging several breaches under the agreements and calling upon the Respondent to cure the same. The Respondent issued a legal notice denying the breaches. The Petitioner issued second legal notice dated 18.10.2019 recalling the ICD amount for which the Respondent issued a reply denying the committing of breaches. The Petitioner does not have right to recall the ICD amount before expiry of 36 months.

The Petitioner issued 3rd legal notice dated 11.11.2019 alleging breaches and recalling certain amounts. Reply was issued by the Respondent on 29.11.2019 denying the allegations and invoked arbitration clause and appointed an arbitrator and called forward the Petitioner to appoint arbitrator so that the Arbitral Tribunal may be constituted. But the Petitioner did not take any steps in that regard. Further the Petitioner came forward to restart the operations of the factory vide reply notice dated 09.12.2019 only after the Respondent proposed annual business plan vide its notice dated 13.11.2019 to ensure continued operation of the factory and protect worker's interest. In order to resolve the workmen's agitation, the Respondent issued an urgent notice to the Petitioner vide e-mail dated 13.12.2019. The Petitioner sent reply mail on 13.12.2019 raising frivolous grounds. The Petitioner approached the High Court of Mumbai by way of Petition under Section 9 of the

Arbitration and Conciliation Act, 1996 and obtained interim order dated 03.12.2019 directing the Respondents not to give effect to any matters covered by the Affirmative voting rights of the Petitioner under SSSHA. The Petition was disposed of by directing the parties to release all the payments due by the Respondent Company towards statutory dues, workmen dues and other liabilities. Clarification was sought by the Respondent and finally the Petition was disposed of on 13.12.2019. Due to the Petitioner's failure to run the business of the Respondent, the factory had to be shut down and resulted in non-payment of dues. The present application is not maintainable as issues raised by the Petitioner are not relevant to all the three agreements. It is a composite transaction between the parties and the petitioner is liable for its breaches. The correspondence between the parties evidence the pre-existing disputes between the parties. Hence, the petition is liable to be dismissed.

4. Heard the arguments of both the counsel and perused the written submissions filed on either side. The contentions of the counsel appearing for the Financial Creditor are as follows:

I. The Financial Creditor was approached by the Respondent to infuse money into the Corporate Debtor in order to settle its loans with SBI. It has approached with comprehensive proposal for investments in shares, working capital, deposits to Intercorporate Deposits. The Financial Creditor has considered the request and agreed to invest Rs.15 Crores out of which Rs.12.55 Crores is ICD for the period mentioned in the agreement. Same was deposited with a view to earn interest.

II. The parties entered into a term sheet dated 20.11.2018 which clearly recites as follows:

(a) debt transaction with rights in profit sharing;
(b) timely working capital infusion by the Respondent as and when necessary;
(c) investment by the Respondent representing 10% of the paid-up share capital of KVR Industries Private Limited.

III. The ICD amount falls within the ambit of money borrowed against payment of interest as defined under Section 5 (8) (a) of IBC. As per the agreement schedule the deposit can be recalled by the Financial Creditor if there is any breach of the conditions of either Shareholders Agreement (SHA), Share Subscription Agreement (SSA), Business Management Agreement (BMA) or Intercorporate Deposit Agreement (ICDA).

IV. The Respondents committed various breaches which are:

a) Instructions sent to Axis Bank without Financial Creditor's knowledge. Clause -10 (I) (iv) states that the Bank account operations can only be altered with the written consent of the Financial Creditor. Clause –A (10) states that the Bank account of Corporate Debtor ought to be operated jointly by the Financial Creditor and promoters of the Corporate Debtor, but promoters have violated the same. Clause -3 (V) (a) (viii) read with Clause 12 (iv) prohibits any decision being taken transferring substantial assets of the Corporate Debtor without the affirmative consent of the Financial Creditor.

b) The acts of breach are as follows:

i. Email sent by the representative of the Corporate Debtor to Axis Bank to transfer all amounts in Axis Bank to PNB Bank.

ii. Exchange of mails on 30.08.2019 between representative of Corporate Debtor and Financial Creditor wherein Financial Creditor stated that he did not transfer from the Axis Bank account to PNB Account.

iii. Email dated 03.09.2019 by Financial Creditor to Chairman of Corporate Debtor informing him that Axis Bank Account has been frozen and reply email dated 03.09.2019 by Chairman of Corporate Debtor stating that Financial Creditor knew all transactions had to be routed through PNB.

iv. Letter dated 04.09.219 by Financial Creditor alleging breach on account of sending instructions to Axis Bank without Financial Creditor's knowledge.

v. Withdrawals made by promoters of Corporate Debtor from Axis Bank Account without Financial Creditor's knowledge. Financial Creditor made a request to the promoters to return the monies overdrawn by the promoters vide email dated 28.08.2019.

c) The Second breach is with regard to Articles of Association of Corporate Debtor. According to Clause 4 (iii) (a) (4) the Corporate Debtor's Articles of Association (AoA) would be altered by entering Financial Creditor's name and Clause 4 (iii) (a) (9) states that if Clause 4 (iii) is not adhered to, then the Inter Corporate Deposit ought to be returned with 12% interest. The Articles have not been altered till date even upon a request to alter the same, through a letter dated 04.09.2019.

d) The third breach is with regard to the prohibition of the employee from entering into the factory premises of the Corporate Debtor. Clause 12(IV) (xiv) stipulates that any decision on the appointment, removal, conditions of employment of any key managerial personnel of the Corporate Debtor cannot be taken without the

affirmative vote of the Financial Creditor. The General Manager, wrote an email which was forwarded by the Financial Creditor to the Chairman of Corporate Debtor stating that his entry into the factory was denied.

e) The fourth breach pertains to withdrawal of 60% of profits by promoters without first servicing the loans. Clause (A) (7) stipulates that 60% of the profits ought to be used for paying the loan instalments only after which the promoters of Corporate Debtor can draw the remunerations. Withdrawals are made by Promoters of Corporate Debtor from Axis Bank Account without Financial Creditor's knowledge.

f) According to the Inter Corporate Deposit Agreement (ICDA), Clause 5 (b) Financial Creditor can recall the deposit if there is breach of either the SHA, MBA or the ICD. The prohibition of entry of the General Manager, Mr.Avshesh Maheshwari, is in violation of Clause 12 (IV) (xiv). Promoters of Corporate Debtor accepted investment from Financial Creditor without an NOC from PNB, which is in violation of Clause 13 (II) (ix), (x), (xii) and (xiii).

g) There are breaches pertaining to the Business Management Agreement (BMA). Promoters failed to co-operate with the Financial Creditor to prepare the business plan in violation of Clauses (A) (17) and (A) (18).

h) Clause 5(b) of the Inter Corporate Deposit Agreement (ICDA) recites that the Financial Creditor can recall the deposit if there is a breach in any of the agreements. Agreement provide for a 'cure period' in the event of non-compliance with the terms of the Agreement. The Financial Creditor addressed a notice dated 04.09.2019 informing the Respondent to cure the breaches under the Agreements within a period of 15 days from the date of the notice addressed by the Financial Creditor. The Respondent failed to cure the breaches due to which the Financial Creditor recalled the entire ICD amount.

V. The contention of the Corporate Debtor that the Financial Creditor is an investor and not a Creditor is a smokescreen. Investor does not have colour to it, and it is a larger species that includes a Financial Creditor. The Petitioner is squarely

covered by the definition of Financial Creditor under Section 5 (8) (a).

VI. The contention of the Corporate Debtor that the Financial Creditor has not recalled the ICD amount is erroneous. Though it is not required under the Code, the Financial Creditor addressed notice dated 18.10.2019 recalling the entire ICD amount, calling upon the Corporate Debtor to cure the breaches identified by the Financial Creditor.

VII. The contention of the Corporate Debtor that the Financial Creditor has suppressed certain facts is incorrect. The Financial Creditor has filed the memo dated 13.11.2019 prior to filing of counter by the Corporate Debtor. The notice dated 04.09.2019 given by the PCs on behalf of the Financial Creditor was filed at Pg.11 of the memo. Hence there is no suppression of the said notice.

VIII. The consent given for arbitration by the Financial Creditor is without prejudice to all their rights and contentions in the ongoing proceedings, including those before the NCLT and NCLAT and the present reference is not be construed by either party, in any manner, to give up their rights and contentions in those proceedings.

IX. This Tribunal alone has power and authority to order for the initiation of Corporate Insolvency Resolution Process (CIRP).

5. In reply to the said arguments of the counsel for the Financial Creditor, the Counsel for the Corporate Debtor submits that the Inter Corporate Deposit Agreement (ICDA) cannot be read independently as it is part of composite transaction. There is no default which is financial default and even as per the Applicant, it is an alleged contractual default which is arbitrable. The debt is not a financial debt in view of the composite nature of transaction.

I. The nature of the investment by the Financial Creditor was hybrid in nature. The Applicant was to manage the production and manufacturing of the Corporate Debtor. The Applicant has equal participation in Board with two nominees of Applicant and two of promoters. Special rights were conferred on the Applicant and therefore virtually no decision can be taken without the consent of Applicant. Joint operation of Bank Account of Corporate Debtor by Applicant and KVR Group, Applicant to operate and manage the factory, Applicant gets 40% of PBIT and KVR

Group entitled to balance 60% PBIT after payment of interest are stipulated in the agreements.

II. The events of default are failure to comply with negative covenants and acting in a manner which results in forced exit of Bafna despite performance in accordance with agreement. The two events which are projected as default events have not occurred even remotely. In fact it is the Applicant who is now coercing for his money, failing which he can usurp the factory which is worth more than Rs.60 Crores by 1/3rd investment value by seeking for CIRP.

III. The remedies for the Applicant under Term Sheet in the event of dispute is to refer the matter to arbitration and continue to remain in the Company and receive profits.

IV. Clauses 7 to 10 of the Business Management Agreement (BMA) show the participation of Applicant in the business of the Company and their role in decision making of the Company and the fact that Applicant is responsible for operations of the Company. All the agreements shall be read together.

V. On the date of filing of the application, the deposit has not matured and was not due at all. The recall of this deposit has

been made in entirety by Applicant alleging breach of Shareholders Agreement (SHA). The applicant has acted in a manner prejudicial to the Company by stopping the production since September, 2019, by preventing any decision being taken by Board as there is deadlock, by continuing to remain a shareholder and by ensuring deadlock in affairs of the Corporate Debtor and by not agreeing for the arbitration for the last two years.

VI. Applicant was appointed to Board and Bank signatories were changed in February, 2019. Applicant did not bring full money for share allotment. Share allotment was made to the Applicant. Applicant has been running operations of the Company.

VII. Applicant did not submit accounts from January, 2019 till July, 2019. The Corporate Debtor was patiently waiting for the same. The Corporate Debtor requested for Business Plan and for Profit and Loss Account, which resulted in disputes.

VIII. In the email dated 07.08.2019, the Financial Creditor informed that the Corporate Debtor is well aware of the fact that, to earn profit is the motto of the deal.

IX. Further, the notice dated 04.09.2019 is addressed by the Applicant deliberately. Each of allegations of breach was replied and demonstrated. This reply was also suppressed.

X. Suppressing the said notice the Financial Creditor issued notice dated 18.10.2019, for which the reply dated 13.11.2019 by the Corporate Debtor was issued.

With regard to the transfer of funds from Axis Bank to PNB Account without knowledge of the Applicant, it is stated that both the accounts are under joint signatory operation and there cannot be any unilateral transfer by KVR Group.

Regarding failure to alter MOA and AoA and failure to enter name of the Applicant in Register of Members, it is stated that shares are allotted on 28.02.2019 and there is no breach. Clauses in AoA were not altered as balance payment of Rs.12.55 Crores was received only in July. None of conditions precedent have been breached and the allegation is vague. No board meeting can be convened unless Applicant's nominee is present. When Board meeting was called applicant rushed to Bombay High Court and filed application under Section 9 of Arbitration and Conciliation

Act, 1996 and sought for order of restraint and while passing the interim order, Bombay High Court directed the applicant to co-operate with KVR Group in paying employees which has not been done till date by Applicant.

With regard to entering into related party transaction with Ratnam Jute Pvt Ltd, belonging to the Corporate Debtor, it is stated that the transaction referred by Applicant relates to period prior to entering to SSHA, ICD Agreement and BMA. No change is made in the signatories of Axis Bank.

Regarding inspection of books of accounts, it is stated that the Applicant has been maintaining books of account after it is managing the factory.

With regard to provision of audited accounts, it is stated that it is a joint responsibility of both the parties.

With regard to sharing of profits, it is stated that till date no accounts have been prepared and no money can be transferred by the Corporate Debtor as accounts are jointly operated.

With regard to preparation of Annual Business Plan, it is stated that the Applicant manages business and decides on annual production targets.

XI. The Corporate Debtor has in fact several disputes with the Applicant which are:

a) Failure by Applicant to finalise Annual Business Plan and accounts since January, 2019.

b) Wrongful stoppage of Factory since September, 2019,

c) Failure by Applicant to infuse working capital,

d) Deliberately acting in a manner prejudicial to the interest of the Corporate Debtor ,

e) Compensation for suspension of operations since September, 2019.

XII. Corporate Debtor made reference to Arbitration, the applicant has been stalling the arbitration by refusing to appoint its nominee. The Corporate Debtor has filed Arbitration Petition which is pending before the High Court. Based on the above submissions the Corporate Debtor seeks the Tribunal to dismiss the Application.

6. The Corporate Debtor in its written arguments has framed certain points for consideration, the same shall be framed as the points for consideration for Tribunal with slight modification.

I. Whether the debt is a Financial Debt and whether the Transaction is in the nature of investment or Financial Debt and whether the Transaction which is linked to profits sharing can be termed as a Transaction with time value for money.

II. Whether the Applicant can break the transaction which is of composite nature and sue under ICD when cause of action for breach is in SSHA and BMA.

III. Whether the Applicant has created deadlock situation and whether the Applicant using the said situation to prejudice the Corporate Debtor.

IV. Whether there is any debt due and whether such due is disputed and crystallised.

V. To what result.

I. **Whether the debt is a Financial Debt and whether the Transaction is in the nature of investment or Financial**

Debt and whether the Transaction which is linked to profits sharing can be termed as a Transaction with time value for money.

The agreement under which the clause pertaining to the deposit is recited is the Inter Corporate Deposit Agreement (ICDA). The name of the agreement itself suggests that the applicant has made a deposit with the Corporate Debtor. For the sake of better appreciation, the relevant clause under the said agreement is reproduced hereunder:

"Clause 5 :- Deposit Period:

(a) The deposit period shall mean such period falling between the date of deposit as mentioned in Clause 4 and the date on which the KVRIPL repays the Deposit Amount. KVRPIL agrees to repay 50% deposit amount at the end of 36th month from the date of credit in its account, together with accrued interest as provided in Clause (6) of the ICD Agreement.

(b) The balance amount of 50% shall be kept with KVRIPL as Interest Free Security Deposit as per the terms of Shareholder Agreement entered between the parties on 29.12.2019, which is from the beginning of the 37th month upto 180 months from the date of this Agreement or such earlier date as may be mutually accepted by both the parties. Depositor shall not recall the deposit at any time

before the expiry of 36 months from the date of disbursal of the deposit unless there is breach of any of the conditions of either shareholder and share subscription agreement, Business Management Agreement or this agreement."

The first clause clearly recites that the 50% of the deposit shall be returned with accrued interest and the said 50% of the deposit amount is to be returned at the end of the 36th month together with the accrued interest. Clause 5 (b) would indicate that the interest is not only for the 50% of the deposit mentioned under Clause 5 (a) but also to the rest of the 50% amount which is agreed to be kept upto 180 months. It is agreed to be kept as interest free security deposit but the said interest free security deposit shall start from the 37th month which gives a clear understanding that upto 36 months the whole of the deposit shall carry interest as specified in the agreement, which is 6% mentioned under Clause-6 of the said agreement. The recital that the deposit shall be recalled if there is any breach in the conditions of the agreement pertains to both the amounts specified under Clauses (a) & (b) which can be understood from the concluding part of Clause (b) of Clause-5 of the agreement wherein it is mentioned that the depositor shall not recall the deposit at any time before the expiry of 36 months. The 36th

month's period is mentioned under Clause-A which would imply that the said 50% of the deposit also is liable for withdrawal in case of the breach of the conditions of the agreement.

In support of the contention that an investor would also be a Financial Creditor, the Counsel for the Financial Creditor relies on a judgment of the Supreme Court reported in ***(2019) 4 SCC 17 between Swiss Ribbons Private Limited and another Vs. Union of India & others***. It was held therein that the Financial Creditors generally lend finance on a term loan or for working capital while Operational Creditors are relatable to supply of goods. Financial Creditors are from the very beginning involved with assessing viability of Corporate Debtor and engage a restructuring of loan as well as a reorganization of the Corporate Debtor's business when there is financial stress which Operational Creditors do not and cannot do. The term investor is not defined under the Code. Whether the deposit or investment is in the form of the financial debt or otherwise is the aspect which needs examination to qualify or disqualify the investment for financial debt. Financial debt is defined under Section 5 (8) of IBC, 2016 as a debt along with interest, if any, which is disbursed against the

consideration for the time value of money and includes the money borrowed against the payment of interest. There is already an observation that till 36 months entire deposit made by the Financial Creditor is agreed as carrying interest hence, the deposit made by the Financial Creditor qualifies as financial debt undoubtedly.

II. **Whether the Applicant can break the transaction which is of composite nature and sue under ICD when cause of action for breach is in SSSHA and BMA.**

The contention of the Corporate Debtor is that all the agreements i.e., Share Subscription and Shareholders Agreement (SSSHA), Business Management Agreement (BMA) & Inter Corporate Deposit Agreement (ICDA) have to be read together, since they are composite transactions. There is no quarrel with the said contention. But the contention that the ICDA cannot be invoked for the violation of the clauses under the other agreements can be dismissed on the premise of the clear recital in clause 5(b) of the ICDA which says that the breach of any of the conditions of either SSSHA, BMA or ICDA would permit the depositor to recall the deposit before the expiry of 36 months. As contended the Financial Creditor is reading all the agreements together

and invoking the ICDA. Hence, if the Financial Creditor succeeds in proving that there is breach of any of the agreements he would be entitled for recalling the deposit under clauses (a) & (b) of Clause-5 of ICDA.

III. **Whether the Applicant has created deadlock situation and whether the Applicant using the said situation to prejudice the Corporate Debtor.**

The contention of the Corporate Debtor is that the applicant has created the deadlock situation of the Corporate Debtor and is using the said situation to prejudice the Corporate Debtor. From the material available on record, it is evident that there are disputes between the parties, apart from the dispute pertaining to the deposit under the ICD agreement and that the parties have moved the court for appointment of an arbitrator and that the arbitrator was appointed and the matter is pending before the arbitrator. But, the Counsel for the Corporate Debtor does not succeed in showing that the existence of dispute between the parties would deprive the Financial Creditor from invoking the clause under the any of the agreements which impose an obligation on the Corporate Debtor. The dispute under the agreements can be resolved by either parties, by invoking

the jurisdiction of the respective courts and authorities. If the dispute is arbitrable, the arbitration clause under agreements can be invoked, as was done earlier. But in this case the Financial Creditor invokes the jurisdiction of this Tribunal under Section 7 of IBC, since this Tribunal alone has jurisdiction to decide an application filed under any of the provisions of IBC. The Counsel relies on the judgment reported in ***(2021) 2 SCC 1 between Vidya Drolia and others Vs Durga Trading Corporation,*** in support of his contention that NCLT is the sole authority that has the power to order Corporate Insolvency Resolution Process in case of default by the Corporate Debtor. At Para 77 the Supreme Court, in the above said case, held that the above principles to determine non-arbitrability, which are mentioned therein would make it apparent that insolvency or intracompany disputes have to be addressed by a Centralised Forum, the Court or a Special Forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. It is held that they are also actions in *rem*.

There is no dispute that the actions in *rem* cannot be resolved by an arbitrator and that the issues pertaining to it

are not arbitrable. The only contention is that an application under Section 7 of IBC is not a proceeding in rem, and is a proceeding in *personam*. In answer to the said contention by the Counsel for the Corporate Debtor, the Counsel for the Financial Creditor relies on the Judgment of ***Supreme Court reported in (2019) 4 SCC 17 between Swiss Ribbons Private Limited and another Vs. Union of India & others,*** wherein it is held that once the code gets triggered by admission of a Creditor's Petition under Sections 7 to 9 of IBC, 2016, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in *rem.* But the contention that before admission, the Application under Section 7 of IBC stands to be a proceeding in *personam* still stands unanswered. In answer to the said contention the counsel for the Financial Creditor relies on the judgment of Supreme Court reported in ***(2011) 5 SCC 532 between Booz Allen and Hammilton ILC Vs SBI Home Finance Limited and others***, wherein, it was held that all disputes relating to rights in *rem* are required to be adjudicated by the Court and Public Tribunals being unsuited for (private) arbitration. It also held that though the disputes in question were covered by arbitration clause, they not being arbitrable as they related to rights in *rem,* cannot

be referred to arbitration. It would be an absurd interpretation to say that the application before admission should be filed before the arbitrator and once the arbitrator admits the said application it becomes a proceeding in rem and then alone the jurisdiction of this tribunal can be invoked, since, the arbitrator does not have jurisdiction to entertain an Application under Section 7 of IBC or any of the provisions of IBC. Hence, when the jurisdiction of deciding an application under Section 7 is exclusively vested with NCLT and the admission of such application would be a proceeding in *rem*, resolving of the said dispute would not be within the realm of an arbitrator.

The parties have entered into the agreements which contain mutual obligations and suitable remedies are provided for each of the parties with regard to the non-fulfilment of obligations by any of the parties. The Corporate Debtor has approached respective Forums for the non-fulfilment of obligations by the Financial Creditor and same liberty would be available to the Financial Creditor to invoke the jurisdiction of the appropriate forum in case of the non-fulfilment of obligations by the Corporate Debtor, which in this case is the recalling of the ICD for the breaches committed by the Corporate Debtor. Hence, even if there is

any deadlock created by the Financial Creditor it cannot be pitted against the right of the Financial Creditor to recall the ICD, as the ICD agreement vests such right with the Financial Creditor. Such right of the Financial Creditor is not made contingent with any other obligation. This Tribunal does not have jurisdiction to adjudicate on the issue of the deadlock created by the Financial Creditor if any, unless any nexus is shown between the said deadlock and the rights of the Financial Creditor to invoke IBC in respect of a clause under the agreement.

IV. **Whether there is any debt due and whether such due is disputed and crystallised.**

That the amount given by the Financial Creditor is a deposit is not in dispute and cannot be disputed, as the agreement itself recites that the amount is a deposit. That the amount is given for time value of money is also clear from the Clause of interest in the ICDA. But, whether the said deposit has become due for repayment and whether the Corporate Debtor has committed any default, are the questions which now have to be decided. As per Clause 5 (b) of the ICDA if the Financial Creditor succeeds in proving that the Corporate Debtor has committed breach of

the conditions of any of the agreements, the deposit becomes due to be paid to the Financial Creditor. The breaches that are alleged are that instructions were given to the Axis Bank by the Corporate Debtor without Financial Creditor's knowledge. The Share Subscription and Shareholders Agreement (SSSHA) which is executed on 29.12.2018, which is the date of the ICD under Clause 10 (1)(iv) specifies that all the parties agree that instruction on bank account operations may be altered with the written consent of all the parties, shall be jointly operated by the investor and the promoter and neither the promoter nor the investor shall delay or refuse to sign and or authorise online payment, draw for payment of business debts, business expenditure of the Company.

Clause (A) (10) of the ICD Agreement states that the Bank account of the Corporate Debtor ought to be operated jointly by the Financial Creditor and the promoters of the Corporate Debtor, but the promoters violated the same. In support of the said breaches, an email by the representative of the Corporate Debtor to the Axis Bank, to transfer all amounts in Axis Bank to PNB Bank is filed. There are exchange of mails on 30.08.2019 between the representative of the Corporate Debtor and the Financial Creditor, wherein

Financial Creditor stated that he did not transfer from Axis Bank Account to PNB Account. An email dated 30.09.2019 by the Financial Creditor to the Chairman of Corporate Debtor, informing him that the Axis Bank account has been frozen is also filed. Another email on the same date, by the Chairman of the Corporate Debtor stating that Financial Creditor knew all transactions had to be routed through PNB is also filed. A letter dated 04.09.2019 by the Financial Creditor alleging breach on account of sending instructions to Axis Bank without Financial Creditor's knowledge is placed on record. Apart from the above, the withdrawals made by the promoters of the Corporate Debtor from Axis Bank account without Financial Creditor's knowledge is also filed. With regard to the above breach, the contention of the Respondents is that no such breach has taken place and that the Financial Creditor is in know of the transfer of funds from Axis Bank to PNB account and that both the accounts are under joint signatory operation. Except stating that the Financial Creditor is in know of transfer of funds, absolutely there is no evidence showing the same. On the other hand, the Financial Creditor has filed the copies of the mails exchanged between the parties which would show that the Financial Creditor has been taking objection for the

transfer of the account from Axis Bank to Punjab National Bank (PNB).

In the mail dated 29.08.2019 which is addressed by Mr.Srinivasa Rao, Senior Manager of the Corporate Debtor, he requested the Axis Bank to close the account and transfer the balance to PNB Bank. The mail does not anywhere disclose that the said instruction is being given with the consent of the Financial Creditor. It is addressed only by the representative of the Corporate Debtor. A mail dated 30.08.2019 also is with regard to the request to transfer the existing funds available in the account of the Corporate Debtor which is in the same Bank, to the account mentioned therein which is in the PNB. The said letter is addressed by Mr.Keshava Rao from the Corporate Debtor Company. On the same day there is a mail sent by Mr.Praful Bafna of the Financial Creditor to Mr.Keshav Rao questioning his authority to put the above mail without his consent and as to how he can instruct the Bank directly without his consent. He also instructed Mr.Keshav Rao not to transfer any amount till he reaches Rajam. In a mail on the same day which is subsequent to the above mail, which is by one Mr.Srikrishna Purohit of the Financial Creditor, he questioned Mr.Keshav as to what that was and stated that he

has never given him such instructions. A note that it is not appreciated from a person of his repute is also made. A warning is also given to be careful at least when he is dealing with Mr.Srikrishna Purohit. Hence when such is the response from the Financial Creditor with regard to the transfer of account from Axis Bank to PNB, unless a concrete proof is produced that consent was given by the Financial Creditor and that later on he has resided from the said consent, it cannot be accepted that the transfer of account from Axis Bank to PNB is done with the consent of Financial Creditor and consequently the same would amount to a clear breach of the terms of the agreement.

The next alleged breach is with regard to the alteration of the Articles of Association (AoA). Clause 4 (iii) (a) (2) & (4) of the SSSHA. Agreement stipulates that the Memorandum of Association (MoA) and Articles of Association (AoA) shall be altered making provision for issuing and allotting Equity Share with differential voting shares and enter the name of investor in the Company's register of shareholders as holder of Series B Equity Shares and to deliver the certified copies of the same to the Investor. It also stipulates that the authorised share capital should be increased by the AoA and Series B Equity Shares to be

allotted to the Investor and to deliver the original share certificate relating to the investor equity shares.

In reply to the said breach, the Counsel for the Corporate Debtor submits that the shares were allotted on 28.02.2019 and the Clauses in the AoA were not altered, as balance payment of Rs.12.54 Crores was received only in July. The contention is that one Mr.Sheetal Rajahansa appointed by the Applicant was taking care of these Companies and they are aware about the same. The SSSHA Agreement was entered into on 29.12.2018 and the shares were allotted not earlier than 28.02.2019 i.e., within 2 months from the date of the agreement. But the AoA were not altered as agreed and the reason stated is that the payment to be made by the Applicant is not made and that the same was made only in July. This application is filed on 25.10.2019. Even if it is accepted that the amount was received only in July, the agreement stands violated for not amending the AoA even after receiving the said amount and within the reasonable time from receiving the amount. Notice, as stipulated in SSSHA at Clause 15 (1) (a), is given. Even after the notice the same was not cured. The contention that the person appointed by the Applicant was taking care of these compliances cannot be an excuse, as none of the

agreements stipulate that the AoA have to be altered at the instance of the person appointed by the investor. Moreover in all the agreements the obligations that have to be fulfilled by the Corporate Debtor are undertaken to be fulfilled without the intervention of the Financial Creditor. The stringency of this obligation can be evidenced from Clause 9 of the SSSHA, wherein it is recited that if any of the provisions in Clause 4 (iii) are not complied with and if it is not otherwise agreed by the investor, the Company and promoters shall cause the Company immediately to repay the investment amount and ICD amount to the investor along with an interest @12% PA being payable on the investment amount and ICD amount. After such repayment of the full invest amount and ICD amount by the Company to the investor, the non-executive nominee director of the investor appointed pursuant to the said amendment shall immediately resign and the investor shall return the Company any original share certificate delivered to it and thereafter, the agreement shall stand terminated. What is recited in Clause 4 (iii) is as under:

"Completion Obligations of the Company and the promoters:

a) *On the Completion Date simultaneously with the receipt of the Investment amount by the Company in the manner set out above, the Company shall, and the Promoters shall exercise all rights and powers available to them to procure that the Company shall, in addition to any other matters to be attended to or incidental to the allotment of the Investor Equity Shares:*

   1) *Hold a meeting of the Board and a general meeting of the Company and pass all requisite resolutions to approve/authorise: (A) the allotment of Series B Equity Shares to Investor with differential voting rights: (B) the appointment of the individual nominated by Investor in writing as the Non-Executive Nominee Director of Investor; (C) the adoption of the new reinstated and amended Articles of Association for the Company, in the form annexed hereto as Exhibit 2;*

   2) *Alter the Memorandum of Association and Articles of Association to make provision for issuing and allotting issuing Equity share with differential voting rights.*

3) *Alter Memorandum and Articles of Association to increase the Authorised capital of the company to Rs.24,45,00,000/- issue and allot the Series B Equity Shares to Investor and deliver original share certificates relating to the Investor Equity Shares.*

4) *Enter the name of Investor in the Company's register of shareholders as the holder of the Series B Equity Shares and deliver duly certified copies of the same to investor.*"

The contention that no Board meeting could be convened unless Applicant's nominee is present is not merited. The Corporate Debtor ought to have approached the Appropriate Forum and obtained orders injuncting the Financial Creditor from proceeding further in executing his rights under IBC. It is stated that when the board meeting was called, the Applicant rushed to Bombay High Court and filed an application under Section 9 of Arbitration and Conciliation Act, and sought for orders of restraint and the Bombay High Court, while passing interim order, directed the Applicant to cooperate with the KVR Group in paying

employees which has not been done till date by the Applicant. But no such order is placed on record. Apart from all the above, the copy of the ledger account of the Corporate Debtor evidences that the promoters and related parties of the Corporate Debtor have withdrawn various amounts without the consent of the Financial Creditor. There is no dispute with regard to the said withdrawals and no cogent explanation is offered for the said withdrawals which are done unilaterally.

The next breach alleged is that the person from the Financial Creditor was not allowed to enter into the paper plant and he was stopped by the HR Manager of the Corporate Debtor. There was a mail dated 07.10.2019 by one Mr.Avshesh Maheswari bringing it to the notice of the Corporate Debtor that on 07.10.2019 at about 11.30 Am he went to the paper mills but he was not allowed at the main gate by the HR Manager, Mr.Prasad and that Mr.Prasad informed him that he is obstructing him as per the instructions of Mr.KVR sir. When he asked Mr.Prasad for the letter issued by Mr.KVR sir, he said that it is only a verbal instruction. No cogent explanation was given for the said allegation hence the same stands proved. But it is not a

breach of Clause 12 (IV) (xiv) of SSSHA as contended in the written submissions since the said Clause is as follows:

> *"**Clause 12 (IV) (xiv)**: Appointment, removal and conditions of employment of the company secretary or any Director or senior executive including key managerial personnel of the Company (Other than the appointment or removal of Directors of the Company in accordance with the Articles of Association."*

The next breach alleged is with regard to withdrawing from 60% of profits by promoters without first servicing the loans, as stipulated in Clause -A (7) of the BMA.

The above breach pertaining to the BMA is with regard to Clause – A (7) which stipulates that 60% of the profits ought to be used for paying the loan instalments only after which the promoters of the Corporate Debtor could draw remunerations. But the allegation is that the promoters of the Corporate Debtor drew huge remunerations without first servicing the loans availed by the Corporate Debtor. There is absolutely no cogent explanation coming from the Financial Creditor. Hence the same would amount to a breach of the agreement.

Clause – A (17) & A (18) of the BMA are also alleged to have been violated which are to the effect that the promoters should cooperate with the Financial Creditor to prepare a business plan. There is absolutely no clear explanation coming from the Corporate Debtor with regard to the said allegations. Hence when there are more than many breaches committed by the Corporate Debtor, the invocation of Clause 5 of ICD Agreement, to recall the deposit, cannot be said to be against the tenor of the agreements between the parties. There is a notice issued to the Corporate Debtor recalling the ICD hence the contention that the ICD is not recalled stands nullified. By virtue of recalling the ICD the deposit given by the Financial Creditor becomes due for payment and the failure of the Corporate Debtor to repay the said debt, amounts to default with in the meaning of Section 3 (12) of IBC, 2016.

V. **To what result.**

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

i. Mr. Purusottam Behera, **(Registration No. IBBI/IPA-002/IP-N00940/2019-2020/12993)**, having office at Headway Resolution and Insolvency Services Pvt Ltd (IPE), 708, Raheja Centre, 7th Floor, Free Press Marg, Nariman Point, Mumbai, Maharashtra-400021; e-mail: **purusosbbj@yahoo.com**; Mobile: +917718851633 is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu

राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal
Amaravati Bench

01/03/2022

Deputy Registrar / Assistant Registrar / Court Officer
National Company Law Tribunal, Amaravati Bench

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