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

IA 153/2017 With C.P. (I.B) No. 39/7/NCLT/AHM/2017

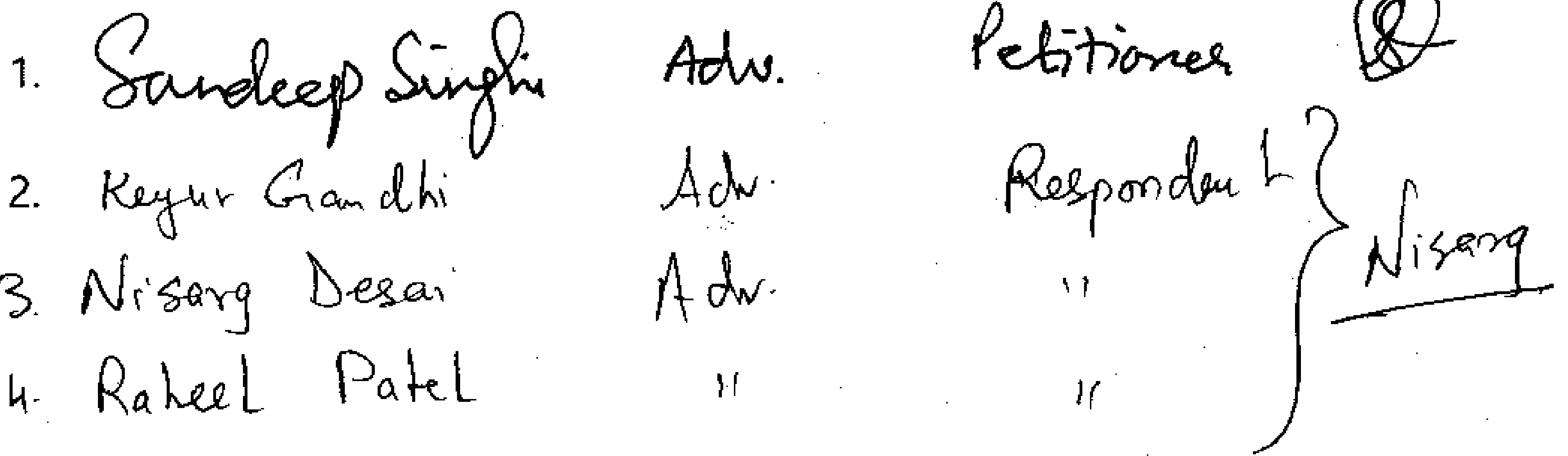
Coram: **Present: Hon'ble Mr. BIKKI RAVEENDRA BABU**
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 02.08.2017

Name of the Company: Standard Chartered Bank Ltd.
V/s.
Essar Steels Ltd.

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

S.NO. NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE



ORDER

Learned Advocate Mr. Sandeep Singhi present for Financial Creditor/ Applicant. Learned Advocate Mr. Keyur Gandhi with Learned Advocate Mr. Nirag Desai with Learned Advocate Mr. Raheel Patel present for Respondent.

Common order pronounced in open Court. Vide separate sheet.

BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Dated this the 2nd day of August, 2017.

BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH

C.P. No.(I.B) 39/7/NCLT/AHM/2017

In the matter of:

Standard Chartered Bank
1, Basinghall Avenue,
London,
England-EC2V 5DD : Applicant.
[Financial Creditor]

Versus

Essar Steel India Limited
Essar House, 27 Km,
Surat Hazira Road
Hazira,
Surat-394 270
Gujarat State. : Respondent.
[Corporate Debtor].

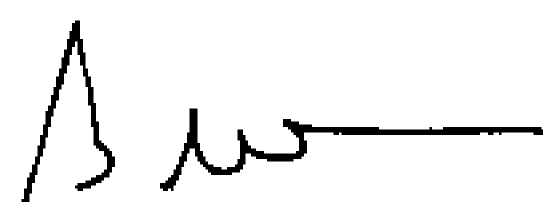
C.P. No.(I.B) 40/7/NCLT/AHM/2017

In the matter of:

State Bank of India
Corporate Centre at
State Bank of India
State Bank Bhavan
Madame Cama Road,
Nariman Point,
Mumbai,
Maharashtra-400021
India

Corporate Banking Branch at
State Bank of India
Corporate Accounts Group Branch
The Capital, A Wing,
16th Floor, Bandra Kurla Complex,
Bandra East,
Mumbai-400051,
India. : Applicant.
[Financial Creditor]

Versus



Essar Steel India Limited
Essar House, 27 Km,
Surat Hazira Road
Hazira,
Surat-394 270
Gujarat State. : Respondent.
[Corporate Debtor.

Common Order delivered on 2nd August, 2017.

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

Appearance:

Shri Kamal Trivedi, learned Senior Counsel with Shri Rasesh Sanjanwala, learned Senior Advocate, Shri Sandeep Singhi, learned Advocate, with Shri Siddharth Joshi and Shri Vinay Bairagra, learned Advocates for M/s. Singhi & Co. for Applicant in C.P. No.(I.B) 39/7/NCLT/AHM/2017.

Shri Ravi Kadam, learned Senior Counsel with Shri Anshin Desai, learned Senior Counsel with Shri Ameya Gokhale, learned Advocate with Shri Nirag Pathak, learned Advocate with Shri Umang Singh, learned Advocate with Ms. Grishma Ahuja, learned Advocate with Shri Shalin Jani, learned Advocate with Shri Sapan Gupta, learned Advocates for M/s. Shardul Amarchand Mangaldas, Advocates for Applicant in C.P. No.(I.B) 40/7/NCLT/AHM/2017.

Shri Saurabh Soparkar, learned Senior Counsel with Shri Mihir Thakore, learned Senior Advocate with Shri Keyur Gandhi, learned Advocate with Shri Raheel Patel, learned Advocate and Shri Nisarg Desai, learned Advocates for Respondent in CP (IB) no. 39/2017 and CP(IB) no. 40/2017.

COMMON ORDER

1. Standard Chartered Bank (SCB) and State Bank of India (SBI) initiated Corporate Insolvency Resolution Process under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") read with Rule 4 and 9(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for

brevity sake "IBR") in respect of ESSAR Steel India Limited (for brevity sake "ESSAR").

2. SCB is a Banking Corporation incorporated in England by a Royal Charter, 1853 with its Registered Office in London, England. SCB is a leading International Banking Group and has been carrying on operations in India for over 150 years.

3. SBI was constituted under the Statutory Enactment of the State Bank of India Act, 1955. SBI with the sanction of the Central Government and Reserve Bank of India has acquired by way of amalgamation the business including the assets and liabilities of all of its associate Banks which are State Bank of Bikaner and Jaipur, State Bank of Hyderabad, State Bank of Mysore, State Bank of Patiala, State Bank of Travancore with effect from 1st April, 2017. The Corporate Centre of SBI is in Mumbai.

4. ESSAR is an Unlisted Public Company incorporated on 1st June, 1976 under the Companies Act, 1956 with its Registered Office at Essar House, Surat. The Objects for which ESSAR was constituted as set out in its Memorandum of Association, inter alia, include to carry on business of constructional engineers, mechanical engineers, Iron Founders, Public Works and general Contractors, Constructors, Builders, dealers in bridges Steel Frames, Buildings, steel, iron, structures of all kinds, iron and steel converters, smiths, wood workers, painters, electrical engineers and electricians and dredgers.

5. The Application filed by SCB discloses that it has provided a loan in an amount of US $ 413,000,000 to Essar Steel Offshore Limited ('ESOL') which was disbursed to ESOL on January 3, 2014. The said loan is secured, inter alia, by the Guarantee of the ESSAR (Corporate Debtor).

6. Pursuant to the Facility Agreement dated 3rd January 2014, as amended on 7th February, 2014, SCB provided a loan of US

Dollars 413,000,000 to ESOL to refinance its then existing loan facility of US $ 431.1 Million on the terms and conditions contained therein. ESOL is a Company incorporated under the Laws of Mauritius with its Registered Office at Essar House, Mauritius and it is a wholly owned subsidiary of ESSAR. In terms of Clause 17 of the Facility Agreement, ESSAR provided a guarantee for the repayment of the term loan facility under the Facility Agreement. The Guarantee has been acknowledged and recorded as a 'Contingent Liability' in ESSAR's Annual Reports for the years 2014-15 and 2015-16. On 7.12.2015, SCB issued notice demanding immediate payment of amounts due under the Facility Agreement. SCB also issued a statutory notice of demand under Section 434(1)(a) of the 1956 Companies Act to ESSAR on 18th April , 2016 once again demanding the immediate repayment of the entire amount outstanding under the Facility Agreement. ESSAR has been unable to service its overall debt aggregating to an amount of approximately Rs. 450,000,000,000. As per Clause 17.1 of the Facility Agreement, ESSAR agreed to act as a guarantor in relation to the loan and other amounts due and payable under the Facility Agreement and, inter alia, irrevocably and unconditionally agreed that ESSAR undertakes with each Secured Party that whenever another Obligor or a Security Provider does not pay any amount when due under or in connection with any Secured Document, that Guarantor shall immediately on demand pay that amount as if it was the principal obligor. ESSAR also waives any right to proceed against or enforce any other rights as per Clause 17.5 of Facility Agreement.

7. According to SCB, ESOL failed to pay the amounts specified in Clauses 6.1, 8.2., 8.3., 11.1, 11.2 and 12 of the Facility Agreement. It is stated by SCB that an "Event of Default" as defined in Clause 23.1 of the Facility Agreement has occurred and is continuing. ESOL's default in repayment under the Facility Agreement started in January 2015. On 15th September, 2015, SCB also issued notice to ESOL marking copies to ESSAR. On 7.12.2015, SCB served a notice of demand on ESOL stating the amounts due.

On 7.12.2015 SCB also issued a demand notice to ESSAR. ESSAR failed to respond or to pay under the demand notice. SCB on 18.4.2016 issued a notice under Section 434 (1)(a) of the Companies Act, 1956. ESSAR neglected to pay the amount within 21 days of the statutory notice. As on 22nd June, 2017, the following were the outstanding amounts;

a) US $ 413,000,000 towards principal amount of the loan;

b) US $ 30,160,545.83 towards accrued interest of the loan; and

(c) US $ 95,187,481.61 towards all other outstanding amounts due and payable under the Facility Agreement.

SCB stated that ESSAR has no bona fide, valid or legal defence in respect of the amounts payable to the SCB. SCB also issued further notice on 17th November, 2015 stating that ESSAR is implementing a scheme between it and its Secured Creditors without prior approval of SCB. Thereafter, on 10th December, 2015, ESSAR wrote a letter to SCB requesting for a meeting of the Steering Committee of the ESSAR's Indian Lenders to discuss about the dues payable to SCB. On 24th January, 2017, ESSAR issued a letter to SCB suggesting a Debt Restructuring Proposal pursuant to which the outstanding amount would be paid at the end of 25 years along with interest at 1% per annum. SCB rejected the said Restructuring Proposal. SCB also wrote a letter dated 22nd February, 2017 to SBI stating that Debt Restructuring Proposal was carried out without involvement and consent of SCB. SBI gave reply on 15th March, 2017 stating that Lenders of ESSAR did not give their consent to the ESSAR for issuing the Guarantee under the Facility Agreement. ESSAR issued a letter dated 4th April, 2017 to the SCB acknowledging the debt owed under the Guarantee. SCB by letter dated 7th April, 2017 stated that the consent of the lenders of the ESSAR is not necessary to enforce the Guarantee given by ESSAR. It is the case of SCB that it was never invited to the Joint Lenders Forum ("JLF") and it was precluded from participating in the JLF. SCB stated that ESSAR failed to

respondent to the demands of the SCB and therefore it initiated Corporate Insolvency Resolution Process in respect of ESSAR in the public interest and for the benefit of all the creditors of ESSAR.

8. SCB filed true copy of Facility Agreement dated 3rd January, 2014; true copy of Amendment Letter dated 2nd February 2014 amending Facility Agreement dated 3rd January, 2014; true copy of Statement of Accounts; true copy of Annual Report of ESSAR for the years 2014-15 and 2015-16, and copies of notices. SCB also proposed the name of Interim Insolvency Resolution Professional and filed his Written Communication.

9. It is the case of SBI that the total debt of Rs. 14860,82,00,000, granted to the ESSAR by SBI is as follows;

a) Term Loan – Rs. 4000,00,00,000
b) Term Loan (5/25) * – Rs.2195,00,00,000
c) Corporate Loan 1 – Rs.2585,00,00,000
d) Corporate Loan 2 – Rs. 1516,00,00,000
e) EPBG Facility – USD 237.05 Million
(Rs. 1528,97,00,000).
f) Working Capital Facility Rs. 4738,00,00,000
g) Derivative Facility – Rs. Rs. 331,60,00,000.

[* Term Loan under 5/25 scheme is carved out from existing loans and hence not included in the total amount].

10. SBI filed details of case of disbursements and revival letters upto 7th July, 2016. SBI also filed financial debt documents, records and evidence of default in accordance with Banker's Books Evidence Act, 1891. SBI also filed Certificates of Registration of charges SBI also filed copies of Common Loan Agreement, SBLC Facility Agreement, Guarantee Facility Agreement, Working Capital Facility Agreement, Amended and Restated Working Capital Facility Agreement etc. SBI also filed Minutes of Meeting of JLF whereby SBI

was authorised by other Banks of JLF to file CIR Application. SBI also proposed the name of Interim Insolvency Resolution Professional and filed his Written Communication.

11. The case of ESSAR, as can be seen from the objections in both the Applications, is as follows;

11.1. ESSAR stated that it is not a wilful defaulter. ESSAR stated that there is no diversion of funds, fraud or malfeasance. According to the ESSAR, ESSAR has set up several plants across the Country for the purpose of providing customized steel products to the consumers by investing Rs. 50,000 Crores. All the manufacturing facilities of ESSAR are world class facilities capable of manufacturing various steel products conforming to International standards and used in core and critical sectors such as infrastructure, oil & gas, automobiles and defense. ESSAR invested heavily on its manufacturing units to the extent mentioned herein below;

a) Beneficiation Plant at Kirandul (8 mtpa)
b) Slurry Pipeline btween Kirandul and Vishakhapatnam (267 kms.)
c) Pelletization Plant at Vishakhapatnam (8 mtpa)
d) Beneficiation Plant at Dabuna (8 mtpa)
e) Slurry Pipeline between Dabuna and Paradip (253 kms)
f) Pelletization Plant at Paradip (6 mtpa)
g) Pelletization Plant at Paradip (6 mtpa) – under construction.

<u>Hazira Steel Complex</u>

h) HBI/DRI (Gas based) Plant (6.7 mtpa)
i) Blast Furnace (1.74 mtpa)
j) Corex Plants (2 nos.) (1.76 Mtpa)
k) Compact Strip Mill (3.5 Mtpa)
l) Plate Mill (1.5 Mtpa)
m) Pipe Mill (0.6 Mtpa)
n) Steel Service Centres at 7 locations across the country.
o) Retail Hypermart at 19 locations across the country.

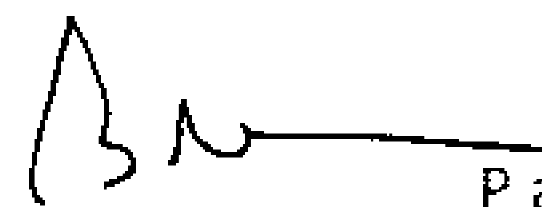
11.2. ESSAR had commenced its manufacturing activities from the year 1989 and has been consistently increasing production

volumes at its natural gas based facilities at Hazira, Gujarat for the period between financial years 1990-2000 to 2010-2011. ESSAR recorded Profit After Tax in 16 years except for the period of 4 years, i.e., from Financial Years 1998-1999 to 2001-2002 and Financial Year 2010-2011 where the Company had incurred losses on account of external factors. ESSAR set up its Gas Based Plant on the basis of assurances of Gas supply given by the Government of India. Due to non-supply of natural gas, ESSAR had fatal and severe consequences on its operations. In March, 2011, Government of India arbitrarily and suddenly without notice categorized the steel sector from priority sector to non-core sector and issued directions to the contractors of KG-D6 Field to cut off the supply of natural gas on a disproportionate basis in case of shortage of supply of gas from the Field. Due to that the operations of ESSAR have been gravely affected. ESSAR in between 2011 and 2016, incurred a loss of approximately Rs. 26,000 Crores on account of arbitrary decision of the Government of India. During the years 2011-2012 to 2015-2016, the Natural Gas available in the open market other than Government allocation was available at a very high price making it commercially unviable for ESSAR or any gas based Steel unit. The anti-social elements damaged the Kirandul-Vizag Slurry Pipeline which was used for transporting iron ore fines in slurry form to the Pellet Plant in a cost effective and environmentally friendly manner. Therefore, it was not operational between March 2010 to December 2010 and May 2012 to January 2014. The Pipeline has been repaired and has been in operation from January 2014. Due to that also ESSAR has incurred losses.

11.3. Further, according to the ESSAR, entire steel sector in India was undergoing major crisis in the year 2014 and 2015 which was primarily due to the dumping of steel by various countries such as China, Japan, Republic of Korea and Russia amongst others. The Government of India took various measures through various Ministries to support the Indian Steel Industry. ESSAR gave the

chronological sequence of various initiatives taken by the Government in Annexure-R/11.

11.4. Further, it is the case of the ESSAR that the operations of the ESSAR are very complex involving large number of stakeholders including suppliers, creditors, employees, promoters, customers, Government exchequer over and above the financial creditors. ESSAR is on the path of improvement to carry on the operations at 80% capacity. Further, it is stated by ESSAR that Debt Resolution Process was undertaken and there were discussions between the Lenders and ESSAR till 13th June, 2017 on the day on which Reserve Bank of India (RBI) issued a Press Release. ESSAR stated that the directions given by RBI to SBI triggered the reference before National Company Law Tribunal. According to ESSAR, Resolution Process has two risks. First, the process of formulation of Debt Resolution Process will have to be reinitiated and further time will be lost due to fresh start. The second one is potential risk to the operations and value of the Company under the hands of IRP. ESSAR also stated that if the Company is in the hands of IRP who is an individual person it is difficult for him to oversee such complex operations in a short period of 180 days. Further, according to the ESSAR, the funding supported by the creditors and suppliers which were available to the Company under the stewardship of Board of Directors and promoters may not be available to IRP. According to the ESSAR, promoters, lenders, employees, creditors, suppliers, customers have invested time, efforts and resources to revive the Company and implement a satisfactory Debt Resolution Plan and if at this stage the Insolvency Resolution Plan is invoked it would adversely affect the interest of the Company and all its stakeholders. It is further stated that in view of Section 13 and 16 of the IBC, the appointment of IRP shall be made only after the admission of the petition within 14 days. Further, it is stated by ESSAR that there are 4500 people working in the Company and all would be affected in case of commencement of Insolvency Resolution Process. It is also stated that National Company Law



Tribunal has got discretion not to admit the petition in view of language used in Section 7.

12. For initiation of Corporate Insolvency Resolution Process against a Corporate Debtor under Section 7 of the IBC, it is essential that a default must occur in respect of financial debt owed to Applicant/Financial Creditor.

13. Here, SCB and SBI are the Applicants. There is no dispute about the fact that SCB and SBI are Financial Creditors. There is no dispute about the fact that amounts due to SCB and SBI are 'financial debts'. ESSAR did not even dispute the debt due to SCB and SBI. It is the case of ESSAR that it has submitted proposals for restructuring of its debts to the Lenders for approval and Lenders held several meetings with ESSAR from time to time and suggested certain modifications to the said proposals. After several meetings and exchange of communications, ESSAR in the month of January 2017 finally submitted to the Lenders the boundary conditions that were acceptable to it for their approval. Lenders informed ESSAR that yield applicable for buy-back of shares by the promoters should be increased from 14% as proposed by ESSAR to 18%. Finally ESSAR agreed to pay the yield at 16%. During such period Sections 35AA and 35 AB were inserted in the Banking Regulation Act, 1949 by an Ordinance issued by the Central Government. RBI vide its powers under Section 35AA issued directions to the SBI to initiate Corporate Insolvency Resolution Process.

14. The first and foremost objection raised by the ESSAR is that the Application filed by SBI is not signed by a competent person. On this aspect, learned Senior Counsel appearing for ESSAR referred to the letter issued by Chairman, SBI on 16th June, 2017 which is at Page No. 80 of the Application. In that letter, Chairman, SBI referring to Section 27 of the State Bank of India Act, authorised all officers on whom signing powers have been conferred vide Notification dated 27th March, 2017 to sign applications etc., in the proceedings that

are going to be filed before National Company Law Tribunal under the provisions of the IB Code. Referring to Section 27 of the SBI Act, learned Senior Counsel appearing for ESSAR contended that unless there is general or special directions given by the Central Board of the Bank, the Chairman cannot exercise powers authorising the officers to sign the pleadings before the National Company Law Tribunal.

15. This contention of the learned Senior Counsel appearing for the ESSAR has been answered by the learned Senior Counsel appearing for SBI by referring to Regulations 76 and 77 of The State Bank of India General Regulations, 1955. Regulation 76 of SBI General Regulations says, the Managing Directors, the Deputy Managing Directors, the Chief General Managers and such other officers and employees of the State Bank as the SBI may authorise in this behalf by notification in the Gazette of India are severally empowered for and on behalf of SBI to sign all documents, instruments, accounts, receipts, letters and advices connected with the current or authorised business of the State Bank. Regulation 77 of the said Regulations says, that Plaints, written statements, petitions and applications may be signed and verified on behalf of the SBI by the Chairman or by any officer or employee empowered by or under the Regulation 76. Along with the Application the Applicant filed a Gazette Notification dated 2nd May, 1987 wherein it is stated that all the officers in the Grades of SMGS-IV and above are empowered to sign all documents pursuant to Regulation 76.1 of State Bank of India General Regulations. On this aspect, learned Senior Counsel appearing for SBI cited the following decisions;

1. ***State Bank of India Vs. Earnest Traders Exporters, Importers & Commission Agents,***
   reported in ***1997 (41) DRJ.***

2. ***State Bank of India Vs. Kashmir Art Printing Press, Sirsa and Others,***
   reported in ***1981 SCC OnLine P&H 37.***

In the above said two decisions, the Hon'ble High Courts, after considering Regulations 76 and 77 of the State Bank of India General Regulations, 1955 and Gazette Notifications, held that Manager of the Bank could be duly authorised to sign and verify the pleadings and also would be entitled to institute suits for and on behalf of the State Bank of India. In the case on hand, the officers who have signed in the Applications are above IV Grade. Therefore, the objection raised by the learned Senior Counsel for ESSAR regarding the competency of the person who signed the Application is not a valid objection. In view of the above discussion, Mr. Kshitij Mohan, Deputy General Manager is having valid authority to sign the Application and is competent to file the Application for and on behalf of SBI.

16. The contention raised by the learned Senior Counsel for the SCB is, that the word "may" used in Section 7 (5)(a) of the Code shall be read as "shall" but not as "may" in the context of initiation of Corporate Insolvency Resolution Process, Adjudicating Authority having satisfied about the other requirements. In support of his contention, he relied upon the following decisions;

1. ***Bachahan Devi And Another Vs. Nagar Nigam, Gorakhpur And Another,***
   reported in ***<u>(2008) 12 Supreme Court Cases 372.</u>***
   Relevant Paras 18 to 21.

2. ***Sarla Goel And Others Vs. Kishan Chand,***
   reported in ***<u>(2009) 7 Supreme Court Cases 658.</u>***

In both the decisions, it is held that "in order to find out whether the words "may" or "shall" are used in a directory or in a mandatory sense, the intent of the Legislature should be looked into along with the pertinent circumstances."

17. On the other hand, learned Senior Counsel, appearing for ESSAR, contended that the Legislature in its wisdom used the word

"may" in Section 7(5)(a), whereas in the same Code in Section 9(5) and 10(4), used the word "shall" in respect of admission of Applications for initiation of Corporate Insolvency Resolution Process. He further contended that the intention of the Legislature in case of Operational Creditor, Corporate Debtor, and Corporate Applicant, the Adjudicating Authority, subject to fulfilment of other conditions, shall admit the Application, but in case of Application by Financial Creditor the Adjudicating Authority has got discretion either to admit the Application for initiation of Insolvency Resolution Process or reject the same.

18. There is no dispute about the proposition of law that in order to give appropriate meaning to the words "may" and "shall" used by the Legislature, the intent of the particular enactment and the attendant circumstances must be taken into consideration. The Hon'ble High Court of Gujarat, vide Judgment in the matter of Essar Steel India Limited and Another vs. Reserve Bank of India and Others, in Special Civil Application No. 12434 of 2017, held that admission of an Insolvency Application filed by Financial Creditor is not a routine order and the Adjudicating Authority shall apply its mind to all the factual details and then pass an order. This Adjudicating Authority is of the view that the order of admission of an Application for initiation of Corporate Insolvency Resolution Process is a judicial order which should be according to the provisions of the Code, principles of natural justice, and taking the consequences of the order into consideration. Therefore, there this Adjudicating Authority shall exercise its discretion in either admitting or rejecting the Insolvency Resolution Applications. It is needless to say that discretionary power has to be exercised in a judicious manner taking into consideration all the facts and circumstances of the case, the provisions of the applicable laws and the object of the Insolvency and Bankruptcy Code. This Adjudicating Authority shall look into the aspect of the occurrence of default, and, while doing so, shall take into consideration various factual and legal pleas raised by both parties in order to record its satisfaction.

Therefore, the argument of the learned Senior Counsel for the SCB, that the word "may" in Section 5(a) shall be read as "shall" and therefore it is mandatory on the part of the Adjudicating Authority to admit all the Insolvency Resolution Applications filed by the Financial Creditors, if they are complete, do not merit acceptance.

19. Learned Senior Counsel appearing for the ESSAR, depending upon certain observations made by the Honourable High of Gujarat in Special Civil Application No. 12434 of 2017, contended that the Adjudicating Authority shall take into consideration the Debt Reconstruction Scheme and the complex situation that arises in case of admission of this Application and whether Interim Resolution Professional (IRP) can manage the affairs of the Company or not.

20. On the other hand, learned Senior Counsel appearing for the SCB and SBI vehemently contended that the Special Civil Application filed by ESSAR against RBI, SCB and SBI was dismissed without granting any relief and the Hon'ble High Court only observed to take certain facts into consideration and decide the same in accordance with law. Learned Senior Counsel appearing for SCB and SBI relied upon the decision of the Hon'ble National Company Law Appellate Tribunal, on 17th January, 2017, in ***Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017*** in the matter of ***M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr,*** and contended that in an application under Section 7 of the Code, the Adjudicating Authority is required to ascertain existence of default from the records of information utility or on the basis of other evidence furnished by the Financial Creditor. It is also contended that Adjudicating Authority has to satisfy whether a default has occurred, whether the application is complete, and whether any disciplinary proceeding is pending against the proposed Insolvency Resolution Professional. Learned Senior Counsel appearing for the SCB and SBI contended that once the Adjudicating Authority is satisfied about the aforesaid

aspects the Application shall be admitted and Insolvency Resolution Process shall commence.

21. Following are the observations made by the Hon'ble High Court in Special Civil Application No. 12434 of 2017. In Para 27, it is observed;

> *"27. ....The emphasis on opinion or necessity can be looked into by NCLT because discussion on factual merits would otherwise prejudice the either side and, therefore, I have avoided to discuss the factual details to ascertain that whether there was actual necessity to initiate proceedings under the Code or not...."*

In Para No. 35, the Hon'ble High Court has observed;

> *"35. .....The adjudicating authority i.e., NCLT is not bound to admit the petition as a matter of rule but it has to be decided in accordance with law for which generally reasonable opportunity needs to be extended to all concerned."*

The Hon'ble High Court has further observed in Para No.39.2) and 3) as under;

> *"2) It is undisputed fact that filing of such application itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the company, which is requested to be taken into insolvency by any such person. Therefore, the adjudicating authority being NCLT herein, which is constituted in place of the Company Court, needs to decide on its own based upon*

factual details that whether the insolvency petition is required to be entertained as such or not."

"3) For the purpose, adjudicating authority, certainly requires to extend hearing and reasonable opportunity to the company to explain that why such an application should not be entertained. In other words, filing of an application may not result into mechanical admission of application as seen and posed by RBI in impugned press release. It would be a decision based on judicial discretion by the adjudicating authority to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it. To that extent, prayers 7(b) and (c) cannot be granted."

The Hon'ble High Court of Gujarat, while dealing with the submissions of the ESSAR, in Para No. 39.12) at Page 77 observed as follows;

"12) However, before concluding the petition, one has to deal with the submission of the petitioner that considering the provisions of Insolvency and Bankruptcy Code, 2016, filing of petition would result into admitting the petition within 14 days being mandate of the NCLT under the Act, and it would result into drastic impact on the day to day functioning of the company and its process of restructuring the affairs of the company so as to survive. It is contended that on admission of the petition under Insolvency and Bankruptcy Code, 2016, if Interim Resolution Professionals are to be appointed mechanically, without considering the facts and circumstances and without offering an opportunity to finalise the restructuring plan, which is at the advance stage, and thereby, if control of the Board of Directors is withdrawn, then, suppliers would not continue to supply raw-materials, which would result into closure of all units and thereby, retrenchment of 4500 employees' for no

valid reasons, more particularly when company is functioning at its 80% capacity and doing well to cope-up with the competitive market against non-availability of gas (fuel) from Government and against dumping of similar product from foreign countries whereby there is imbalance in production because of final profit. Though it may seem to be an attractive argument, in my humble opinion, at this stage, in a petition under Article 226 of the Constitution of India, I do not wish to explore all such issues and to determine anything precisely because, ultimately, all such issues would be raised before NCLT, which has to ascertain that whether there is reason to admit the insolvency resolution process immediately or not."

21.1. The Hon'ble High Court, at the end of Para 39.12, observed as follows;

> *".....However, at the cost of repetition, it is made clear that factual details and on-going process of restructuring plan and other details would be taken care of by NCLT before taking any decision on merits."*

22. The following are the findings of the Hon'ble National Company Law Appellate Tribunal, in Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017 (supra);

"82. As discussed in the previous paragraphs, for initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, 2016, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy –

(a) Whether a default has occurred;

(b) Whether an application is complete; and

(c) *Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.*

83. Once it is satisfied it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

84. Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan or other members cannot be accepted and fit to be rejected."

23. In the case on hand, from the material placed on record by SCB and SBI, it is clear that it is established that ESSAR has committed default in repayment of financial debt to SCB and SBI. The Applications filed by the SCB and SBI are complete in all respects. As can be seen from the Written Communications of proposed Interim Resolution Professionals filed by the SCB and SBI, no disciplinary proceedings are pending against them. In view of the Judgment of the Hon'ble National Company Law Appellate Tribunal (supra), this Adjudicating Authority need not look into any other factor. In fact, in the Judgment of the National Company Law Appellate Tribunal (supra), one of the defences raised by the Corporate Debtor therein was that the Corporate Debtor is entitled for protection having granted the benefit under MRU Act, 1956. The Hon'ble Appellate Tribunal, referring to Section 4 of the MRU Act, held that the protection under the MRU Act is limited to the acts

listed in the schedule. The Hon'ble Appellate Tribunal also held that in view of Section 238 of the IB Code it would prevail over Sections 3 and 4 of MRU Act. The Hon'ble Appellate Tribunal also held that the Adjudicating Authority need not consider the Master Restructuring Agreement dated 8th September, 2014.

24. However, the Hon'ble High Court of Gujarat in Special Civil Application No. 12434 of 2017 observed that this Adjudicating Authority shall take into the fact situation including the process of Debt Restructuring Plan. Therefore, I proceed to consider whether Debt Restructuring Process or Debt Restructuring Plan is going to absolve the ESSAR, Corporate Debtor from the Insolvency Resolution Process. From the material placed on record, it is in the year 2014 that Debt Reconstructing Process commenced. For one reason or the other, the Debt Reconstructing Process has not been finalised till today or till the date of filing of the Applications. It is not a case where ESSAR owed monies to Lenders in the previous year. The Lenders are there from the beginning of the ESSAR Company. As contended by the learned Senior Counsel for ESSAR there are several reasons that prevented the ESSAR from discharging the debts. No doubt, there are no allegations of siphoning of funds, diversion of funds or fraud. But, the fact remains that except showing a little progress in the last financial year, there appears to be no scope for the ESSAR to repay its debts till 25 years or in a span of 25 years. Therefore, the Debt Restructuring Process, which is going on for the last two years, may not be a factor not to enter into Insolvency Resolution Process. It is pertinent to mention here, that even in the Corporate Insolvency Resolution Plan, Debt Restructuring Plan can be taken into consideration by the Committee of Creditors as one of the Resolution Plans, if submitted by any of the Resolution Applicants. Therefore, commencement of Insolvency Resolution Process cannot be construed as putting an end to the Debt Restructuring Process which has been commenced. The apprehension of ESSAR, that, to again start Debt Restructuring Process would consume lot of time, appears to be not acceptable for

the reason that Insolvency Resolution Plan is a time bound programme. There is no scope for the stakeholders to prolong the process without taking a decision and without finalising the Resolution Plan. Therefore, on the ground that when a Debt Restructuring Process is going on there is no need to commence the Insolvency Resolution Process under the IBC does not hold the field. It is contended by the learned Senior Counsel appearing for ESSAR that it is not possible for the Interim Resolution Professional, within a short period to manage the several units of the Company and to convince the customers and other lenders in the absence of Board of Directors. If Insolvency Resolution Process is commenced by appointing Interim Resolution Professional, no doubt the Board of Directors would be suspended. That does not mean the entire machinery of the Company is suspended. Even after appointment of IRP, all the employees of the Company, top to bottom, would continue to function under the control of IRP instead of the Board of Directors. Therefore, the apprehension of ESSAR that suspension of Board of Directors may cause prejudice to the interest of the Company and the stakeholders may not be correct. The Object of the IBC is to chalk out a Resolution Plan to revive the Company, but not to liquidate the Company straightway. It is needless to say that a company like ESSAR need not be liquidated and there are several other alternatives to revive the Company. If all the eligible Creditors sit together; evolve a Resolution Plan, it would help not only the Company, its stakeholders, Steel Industry, and ultimately the economy of India. In chalking out such Resolution Plan, mainly the Lenders, must sacrifice to a great extent which makes the Company to revive. If a Resolution Plan is chalked out with such objectives in mind, the Resolution Plan will certainly help the Company and it would come out of the present situation. Therefore, as opined by the Hon'ble High Court of Gujarat, taking all the material facts, and the Debt Restructuring Plan, and the objects of the IB Code, into consideration this Adjudicating Authority is of the view that it is only the Resolution Plan that would make the ESSAR Company survive which course would safeguard the interest of all the stakeholders of the Company.

Therefore, there is no need for an apprehension that Resolution Plan is going to be detrimental to the interest of the Company. The finding of this Authority, after taking into all factual aspects, the complex activities of ESSAR, the ongoing Debt Restructuring Process, is that both Applications merit admission.

25. In view of the above discussion, this Adjudicating Authority is of the considered view that the Applications filed by the SCB and SBI are complete, there is occurrence of default in respect of financial debts, and there are no disciplinary proceedings pending against the Insolvency Resolution Professionals proposed by both the Applicants, i.e., SCB and SBI. Hence, this Adjudicating Authority is hereby admitting both the Applications filed by SCB and SBI.

26. In case of admission of an Application under Section 7 of the Code, the Corporate Insolvency Resolution Process commences. Section 13 of the code says that after the admission of the Application under Section 7, the Authority shall declare moratorium, cause public announcement of initiation of Corporate Insolvency Resolution Process, and call for submission of claims under Section 15 of the Code, and appoint Interim Resolution Professional in the manner laid down in Section 16. The learned Senior Counsel appearing for ESSAR vehemently contended that there is no need to appoint Interim Resolution Professional on the same day on which date admission order is passed and it can be passed within 14 days of the admission of the Applications. In this context, learned Senior Counsel appearing for ESSAR referred to Section 16 sub-section (1). He also referred to Sections 14 and 15 of the Code. He contended that Section 14 where under moratorium is declared it should be on the insolvency commencement date. Learned Senior Counsel, referring to Section 15 contended that public announcement of Corporate Insolvency Resolution Process under Section 13(b) shall be only after the appointment of Interim Resolution Professional since the publication shall contain details of Interim Resolution Professional. In that premise, learned Counsel contended that it is

only moratorium under Section 14 that has to be declared on the date of commencement of Insolvency Resolution Process, i.e., on the date of the admission of the Application under Section 7 but the appointment of Interim Insolvency Resolution Professional and the public announcement can be deferred. No doubt, a reading of Sections 13, 14, 15 and 16 (1) of the Code goes to show that Adjudicating Authority need not appoint the Interim Resolution Professional on the same day on which Application under Section 7, 9 or 10 is admitted. But, there is no provision which bars the Adjudicating Authority from appointing Interim Resolution Professional on the same day on which the admission order was passed and simultaneously with the admission order. In an application filed under Section 9, in case if the Operational Creditor did not give the name of the IRP, then the Adjudicating Authority, availing the 14 days' time provided under Section 16(1), can appoint the Interim Resolution Professional within 14 days from the date of admission order. Suppose in a given case there is some omission in the Written Communication or there is some difficulty in the appointment of the recommended IRP, in such cases the Adjudicating Authority may appoint IRP even in an application under Section 7 not on the date of order of admission, but on a subsequent date, but before 14 days from the date of admission. Therefore, there must be facts and circumstances that warrant the Adjudicating Authority to defer the appointment of IRP in an application filed under Section 7 of the Code. In the case on hand, no such circumstance exists which warrant deferring the appointment of Interim Resolution Professional to some other date but not on the date of admission order. Learned Counsel appearing for ESSAR contended that ESSAR can go in appeal against the admission order, and if the appointment of Interim Resolution Professional is deferred, then the interest of the Company would not be jeopardised. I am unable to agree with the contention of the learned Senior Counsel for the Interim Resolution Professional for the reason that no two stages or no two separate hearings are contemplated under the Code, namely, the first stage is admission and the second stage is appointment of Interim

Resolution Professional. The object of the Code is to complete the entire process in a time bound programme. When such is the object of the Code, without any compelling circumstances, there is no need to defer the appointment of Interim Resolution Professional only to give an opportunity to the Corporate Debtor to agitate the decision of this Adjudicating Authority twice in two Appeals. The Corporate Debtor is entitled to prefer an Appeal against the order of admission and also against the appointment of Interim Resolution Professional. If both the orders, namely admission order and the order appointing Interim Resolution Professional are made separate, then the Corporate Debtor will file two Appeals at two stages and thereby gain more time, which is not the object of the Code. Therefore, the Code enjoins upon this Authority to declare Moratorium; to make public announcement of initiation of Corporate Insolvency Resolution Process; and to appoint Interim Resolution Professional on the date of commencement of Insolvency Resolution Process as Rule and the exception is differing the appointment of Interim Resolution Professional to some other date that depend upon the facts of the case.

27. In the case on hand, SCB and SBI filed two separate Applications under Section 7 of the Code. Both the Applications are being disposed of by this Common Order because both the Applications are filed against one Corporate Debtor. In both the Applications, there are certain similar contentions. In the case of SCB, the direction of the RBI is not applicable, whereas in the case of SBI, there is a direction from RBI to file Application under Section 7 to SBI. The direction given by RBI to SBI to file Application under Section 7 is held to be valid by the Hon'ble High Court in the Judgment delivered in Special Civil Application No. 12434 of 2017 filed by ESSAR. Even otherwise, SBI, being a Financial Creditor, by itself is competent to file an Application under Section 7 of the Code. SBI along with its application filed Minutes recorded by the Joint Lenders Forum dated 22nd June, 2017 whereby the SBI was

authorised by other Banks of JLF to initiate Corporate Insolvency Resolution Process.

27.1. In the said Minutes, the Joint Lenders Forum decided to recommend the name of one Shri Satish Kumar Gupta supported by A & M as Interim Resolution Professional in the Application.

28. SCB also proposed the name of Shri Dinkar Venkatasubramanian as Interim Resolution Professional. It is contended by the learned Senior Counsel appearing for the SCB that it is the SCB that initiated the proceedings even before the SBI filed the Application. Learned Senior Counsel appearing for SCB also referred to the definition of 'initiation date' in Section 5(11) of the Code. As per Section 5(11) of the Code, "initiation date" means the date on which the Financial Creditor, Corporate Applicant or the Operational Creditor, as the case may be, makes the application to the Adjudicating Authority for initiating Corporate Insolvency Resolution Process. No doubt, among the two Applications, the Application filed by SCB, i.e. CP (IB) No. 39 of 2017 is earlier in point of time than the Application of SBI.

29. Learned Senior Counsel appearing for SCB also contended that the criteria of value of the Creditors is not the guideline for appointing the Interim Resolution Professional. He contended that even if one Creditor recommends the name of Interim Resolution Professional, he shall be appointed irrespective of the fact that other Creditors together recommended another name of Interim Resolution Professional.

30. On the other hand, learned Senior Counsel appearing for SBI contended that before recommending the name of Interim Resolution Professional, SBI has undertaken lot of exercise in the Joint Lenders Forum Committee Meeting held on 22.6.2017. The JLF called for quotations from the Resolution Professionals including their experience. The JLF also considered the presentations given by

the Insolvency Resolution Professionals. The JLF, after considering the profiles of various Interim Resolution Professionals, proposed the name of Shri Satish Kumar Gupta. He further contended that the value of debt of the JLF is far more than the value of the debt of SCB and therefore it is appropriate to appoint the Interim Resolution Professional as recommended by JLF which authorised the SBI to present the Application as Single Creditor.

31. In the light of the above said contentions, now it has to be seen whether the proposed Interim Resolution Professional proposed by the SCB can be appointed or whether the Interim Resolution Professional proposed by the SBI can be appointed.

32. The contention of the learned Senior Counsel, appearing for SCB, that the Interim Resolution Professional proposed by SCB has to be appointed on the ground that SCB's Application is prior in point of time, in my considered view, is not an argument that merit acceptance. If the date of initiation of the Corporate Insolvency Resolution Process is taken as criteria, if two Applications by two different Creditors for initiation of Corporate Insolvency Resolution Process were filed on one day, then it has to be seen which Application was presented first in point of time on the same day. Therefore, the date of initiation of Insolvency Resolution Process cannot be taken as a yardstick or as a guideline for appointing Interim Resolution Professional. By this Common Order, this Adjudicating Authority admitted both the Applications. Both the Financial Creditors recommended the names of Interim Professionals. The material placed on record by SBI in the form of Minutes of the Meeting dated 22.6.2017 clearly indicate that a lot of exercise has been undertaken by the SBI before recommending the name of Mr. Satish Kumar Gupta. Further, the Joint Lenders Forum authorised the SBI to initiate the Insolvency Resolution Process. The debts due to JLF is more in value than the debt due to SCB. Therefore, this Adjudicating Authority, taking those aspects into consideration, is of the considered view that it is just to appoint Mr.

Satish Kumar Gupta Address Flat no. 17012, Building no. 17, Kohinoor City, Phase 2, off LBS road, Mumbai- 400070, Maharashtra, India, Email Address: satishg196@yahoo.co.in. as "Interim Insolvency Resolution Professional", to commence Corporate Insolvency Resolution Process in respect of ESSAR.

33. From the discussion in the foregoing paragraphs, the following are the findings of this Adjudicating Authority;

(i) SBI, as a 'Financial Creditor', is entitled to invoke Section 7 of the Code irrespective of direction given by RBI (the direction given by RBI to SBI is held to be valid by the Hon'ble High Court of Gujarat in Special Civil Application No. 12434 of 2017 filed by ESSAR against RBI, SBI, SCB);

(ii) The Application filed by SBI is signed by duly Authorised Person and he is entitled to file the Application;

(iii) The Corporate Debtor committed default in payment of financial debt to Financial Creditors SCB and SBI;

(iv) The Applications filed by SCB and SBI are complete in all aspects;

(v) No disciplinary proceedings are pending against IRPs proposed by SCB AND SBI;

(vi) The factual details, such as the Debt Resolution Process with JLF, the complex activities of Corporate Debtor, and consequences of appointment of Insolvency Resolution Professional, do not come in the way of commencement of Corporate Insolvency Resolution Process, more so, Corporate Insolvency Resolution Process is in the interest of Corporate Debtor and all its stakeholders;

(vii) The Interim Resolution Professional, proposed by SBI, which is authorised by JLF, is the most suitable person to act as "Interim Resolution Professional";

(viii) SCB, SBI and other Creditors are entitled to file claims before the Interim Resolution Professional appointed;

(ix) SBI shall make a public announcement of the commencement of Corporate Insolvency Resolution Process and call for submission of claims under Section 15 of the Code;

(x) The Committee of Creditors may take into consideration the Debt Restructuring Process between Corporate Debtor and the Lenders, if proposed by Resolution Applicant subject to approval of the Committee of Creditors as per the provisions of the Code, Rules and Regulations in force.

34. In view of the above said findings, CP No.(IB) 39/7/NCLT/AHM/2017 filed by SCB and CP No.(IB) 40 /7/NCLT/AHM/2017 filed by SBI are admitted. This Adjudicating Authority hereby appoints Mr. Satish Kumar Gupta, as "Interim Insolvency Resolution Professional", residing at Flat No. 17012, Building No. 17, Kohinoor City, Phase 2, Off LBS Road, Mumbai-400070, Maharashtra, India, and having Registration No. IBBI/IPA-001/IPP00023/2016-2017/10056. SBI is directed to make public announcement about the commencement of Corporate Insolvency Resolution Process and call for submission of claims under Section 15 of the Code.

35. SCB and SBI are entitled to file their claims before the Interim Resolution Professional.

36. This Adjudicating Authority hereby declare moratorium under Section 13(1)(a) of the Code prohibiting the following as laid down in Section 14 of the Code;

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

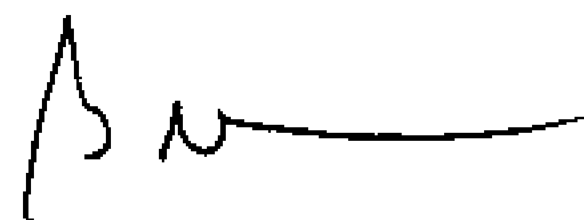
(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(i) The moratorium order in respect of (a), (b), (c) and (d) above shall not apply to the transactions notified by the Central Government.

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



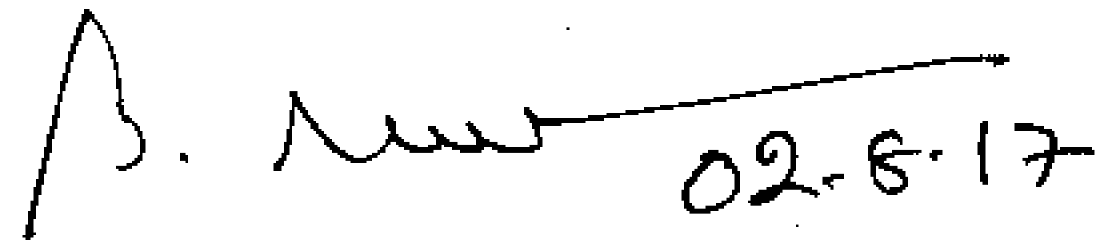
(iii) The applicant SBI shall also make public announcement about initiation of 'Corporate Insolvency Resolution Process', as required by Section 13(1)(b) of the Code and call for submission of claims under section 15 of the code.

37. This order of moratorium shall be in force from the date of order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14.

38. Both the Applications, CP No.(IB) 39 of 2017 and CP No. (IB) 40 of 2017 are disposed of accordingly.

39. IA No. 153 of 2017 filed by SCB in CP No. (IB) 39 of 2017 is disposed of as infructuous.

40. Communicate a copy of this Common Order to both the Applicant Financial Creditors, SCB and SBI, Corporate Debtor, and to the Interim Insolvency Resolution Professional.

Signature: 

Sri Bikki Raveendra Babu, Member (Judicial).
Adjudicating Authority.