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**NATIONAL COMPANY LAW TRIBUNAL
COURT - 2, AHMEDABAD BENCH**

A. COMPANY PETITION IB-232/AHM/2018 with IA 496 of 2019

(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:

IDBI Bank Limited. Applicant/Financial Creditor

Vs.

JBF Petrochemicals Ltd. Respondent/Corporate Debtor

B. COMPANY PETITION IB-226/AHM/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the Matter of:

Sundyne International SA Applicant/Operational Creditor

Vs.

JBF Petrochemicals Ltd. Respondent/Corporate Debtor

Order Pronounced on: 28.01.2022

Coram:

**Dr. Deepti Mukesh, Hon'ble Member(Judicial)
Kaushalendra Kumar Singh, Hon'ble Member (Technical)**



MEMO OF PARTIES

1. COMPANY PETITION IB-232/AHM/2018

IDBI Bank Limited.

IDBI Tower
WTC Complex, Cuffe Parade
MUMBAI 400 005

... **Applicant/Financial Creditor**

Vs.

JBF Petrochemicals Limited

Survey No. 273
Village Athola
Dadra Nagar Haveli
Silvassa 396 230

... **Respondent/Corporate Debtor**

Appearance:

For the Applicant : Mr. Navin Pahwa, Sr. Advocate
For the Respondent : Mr. Maulik Nanavati, Advocate

2. Interlocutory Application-496/AHM/2019

JBF Petrochemicals Limited

Survey No. 273
Village Athola
Dadra Nagar Haveli
Silvassa 396 230

... **Applicant/ Corporate Debtor**

Vs.

IDBI Bank Limited.

IDBI Tower
WTC Complex, Cuffe Parade
MUMBAI 400 005

... **Respondent/Financial Creditor**

Appearance:

For the Applicant : Mr. Maulik Nanavati, Advocate
For the Respondent : Mr. Navin Pahwa, Sr. Advocate



3. COMPANY PETITION IB-226/AHM/2019

SUNDYNE INTERNATIONAL S.A.

307, Abhishree Adroit,
Besides Gwalia sweets,
Mansi Cross Roads,
Vastrapur, Ahmedabad-380015

... **Applicant/ Corporate Debtor**

Vs.

JBF Petrochemicals Limited

Survey No. 271
Village Athola
Dadra Nagar Haveli
Silvassa 396 230

... **Respondent/Corporate Debtor**

Appearance:

For the Applicant : Mr. Samiron Borkatakey, Adv.

For the Respondent : Mr. Maulik Nanavati, Adv.

ORDER

Kaushalendra Kumar Singh, Member (Technical)

Background:

An application under Section 7 of IBC, 2016, numbered as CP(IB) 232 of 2018 has been filed by the Financial Creditor viz. IDBI Bank Limited against the Corporate Debtor viz. JBF Petrochemicals Limited to initiate the Corporate Insolvency Resolution Process. In the context of this application, the Corporate Debtor JBF Petrochemicals Limited has filed an Interlocutory Application numbered as IA 496 of 2019 challenging therewith the maintainability of the application filed under Section 7 of IBC in CP(IB) 232 of 2018 saying that the Financial Creditor had filed the said application in pursuance of the RBI Circular dated 12.02.2018 for initiating corporate Insolvency Resolution Process against it whereas the said RBI Circular has been declared as ultra-virus by the Hon'ble Supreme Court vide its order dated 02.04.2019 in the case of Dharani Sugars & Chemicals Limited [(2019) 5 SCC 480] and thereby all proceedings which have been initiated in



pursuance of the said RBI Circular will have to be declared as non-est and as such the application filed under Section 7 of IBC in CP(IB) 232 of 2018 would not be maintainable. The Corporate Debtor had also filed its detailed objections to oppose the application filed under Section 7 of IBC. It is pleaded therein that as per the RBI Circular dated 12.02.2018, the application under Section 7 of the IBC could have been filed against the large stressed borrowers only after expiry of the time-line of 180 days prescribed therein for resorting to corrective measures and to put in place a credible resolution plan; and whereas in the present case, the application under Section 7 was filed much before the completion of 180 days.

A number of applications have also been filed under Section 9 of the IBC against the said Corporate Debtor JBF Petrochemicals Limited. One of such application is numbered as CP(IB) 226 of 2019 which is filed by the Operational Creditor viz. Sundyne International SA. The applications filed under Section 7 of IBC in CP(IB) 232 of 2018 together with IA 496 of 2019 and under section 9 of IBC in CP(IB) 226 of 2019 have been heard and for convenience, all these applications are disposed of and decided through this common order.

1. IA 496 of 2019 IN CP(IB) 232 of 2018

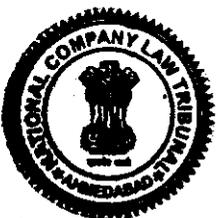
1.1 This Interlocutory Application numbered as IA 496 of 2019 has been filed by the Corporate Debtor JBF Petrochemicals Limited [**JBF Petro**] challenging the maintainability of the application filed on 11th may 2018 [CP (IB) 232 of 2018] under Section 7 of IBC, 2016 by the Financial Creditor IDBI Bank Limited [**IDBI Bank**] against it for initiating Corporate Insolvency Resolution Process on the ground that the application under section 7 was filed in pursuance of RBI Circular dated 12.02.2018 which was later declared as ultra-virus by the Hon'ble Supreme Court's order dated 02.04.2019 in Dharani Sugars (supra) and thereby any proceedings which were initiated in pursuance of said RBI Circular will also have to be declared as non-est.



1.2 The relevant facts and issues involved, as narrated by the Corporate Debtor in its application and presented / argued by Learned Advocate Mr. Maulik Nanavati are summarised hereunder:

(i) The Financial Creditor IDBI Bank along with the other consortium lenders viz. Overseas Bank, Bank of Baroda and Union Bank of India cumulatively granted exposure to the extent of USD 464 million to the Corporate Debtor for its project. The project pertains to construction, development and setting up of a plant for manufacture of 1.25 million ton per annum (154 ton per hour) of purified terephalic Acid (**PTA**) which would be amongst the largest of its kind in India. The said project is based on process technology developed by globally reputed British Petroleum (BP) which was licensed for the first time in India. The PTA is the essential raw-material for making polyester and is extensively used in producing textiles, packaging and film products.

(ii) The cost of the said project was then estimated to be about USD 603.81 million. Under the facility agreement, the Financial Creditor IDBI Bank was described as the original lender / agent and IDBI Trusteeship Services Limited was described as the Security Trustee. The first facility agreement dated 11.05.2012 was entered between the Corporate Debtor and the Financial Creditor IDBI Bank under which the Financial Creditor had agreed to partly finance the said project by granting an external commercial borrowing term loan of USD 416 million. Thereafter, the Corporate Debtor entered into a foreign currency facility agreement dated 14.02.2013 with EXIM Bank, Financial Creditor in its capacity as agent and IDBI Trusteeship Services Limited as Security Trustee whereby Financial Creditor down sold its exposure to an extent of USD 60 million to EXIM Bank. In view thereof, another agreement between the corporate debtor and the IDBI bank was entered on the same day on 14.02.2013 [referred as First Amendment to facility Agreement]. Following that, Financial Creditor further down sold and / or assigned the debt to the extent of USD 130 million to three other banks being Indian Overseas Bank (USD 50



million), Bank of Baroda (USD 50 million) and Union Bank of India (USD 30 million). Accordingly, the total exposure of Financial Creditor IDBI Bank Limited got reduced to 226 million and the same was recorded by way of a supplemental facility agreement dated 15.04.2015. Later, an additional amount to the extent of USD 41.04 million was granted on account of cost over run and the same was recorded in second amendment agreement to the facility agreement dated 31.03.2016. Out of USD 41.04 million, the Financial Creditor IDBI Bank contributed USD 26 million and the balance was contributed by other lender banks. This way, the total amount borrowed by the Corporate Debtor from Financial Creditor IDBI Bank was a sum of USD 252 million [416 - 60 - 130 + 26]. The total amount of the term loan provided by the lenders Bank amounted to USD 457.04 million [416 + 41.04].

(iii) Initially the scheduled date of commercial operation (**SCOD**) was contemplated on 01.10.2014. Later the SCOD was extended to 01.04.2017. The repayment schedule for the principal amount was also extended and the first installment for the principal amount was due on 01.04.2018. The interest component was payable 6 monthly. The Corporate Debtor had made regular undisrupted payment of interest component every 6 months from October 2013 to march 2017 amounting USD 46.72 million.

(iv) The trial run for the plant was conducted in march 2017 and Corporate Debtor was in the process of complying with the technical specifications i.e. by taking routine checks and removing deficiencies based on technical guidelines for sustainable satisfactory technical performance. At this juncture there was a need to infuse funds towards working capital, purchase of spare part, payment to vendor for rendering technical expertise and supplies etc.

(v) The interest component of an amount of USD 8.14 million for the period 01.04.2017 to 30.09.2017 was due to the Financial Creditor on 01.10.2017. However, the Corporate Debtor was unable to service the

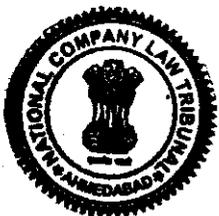


interest amount on the term loan w.e.f. 01.10.2017 due to circumstances beyond its control including cost over-run, delayed availability of infrastructure like new port facility, and delayed execution by renowned global agencies etc. As such in October 2017, the account of the Corporate Debtor was under financial stress.

(vi) The account of Corporate Debtor was classified as SMA – 2 as on 29.11.2017 due to non-servicing of interest on terms loan w.e.f. 01.10.2017. In view thereof, a joint lenders forum (**JLF**) was constituted for formulating a corrective action plan.

(vii) In the context various meetings of JLF were held. In the first JLF meeting held on 12.12.2017, an offer from Reliance Industries Limited (**RIL**) to take over the project was discussed. While the discussions were on-going to resolve the loans by exploring options for restructuring and investment through change in management by way of invocation of the “*outside strategic debt restructuring scheme*” (**OSDR / SDR Scheme**) under the extant RBI circulars, the RBI issued a circular on 12.02.2018 revising the frame work for the resolution of stressed assets in view of the enactment of Insolvency and Bankruptcy Code 2016. Through the said circular, the RBI decided to substitute the then existing guidelines with a harmonized and simplified generic frame work for resolution of stressed assets.

(viii) Following the issuance of RBI circular, a meeting of JLF (Being the consortium of lenders to the Corporate Debtor in terms of the RBI circular) was convened on 21.02.2018. In that meeting, the representative of IDBI Bank informed the members of the forum / consortium that RIL which was allowed exclusivity period upto 18.02.2018 for making their ‘binding offer’ was keen to pursue the transaction and has sought extension of time upto March 27.03.2018 to conclude the transaction. Thereafter in a meeting held on 14.03.2018 and 22.03.2018, KKR Jupiter Investors Pte. Ltd (**KKR**) expressed interest to resolve the stress with a proposal for settling 100 percent of the principal outstanding. In another JLF meeting held on 23.03.2018,



the reliance offer and the KKR proposal were discussed. The lenders were aggregable in principal to implement the resolution plan involving change in management with OTS offer of minimum 100 per cent principal, provided the same was paid by 31.03.2018. However, on the same day the Financial Creditor recalled its entire debt to the tune of USD 259.68 million. Further on the same day on 23.03.2018, a notice of invocation of pledge was issued by the security trustee IDBI trusteeship services Ltd calling for the payment of dues to the tune of USD 14.76 million, owing to the failure of the Corporate Debtor to meet its repayment obligation. These payments were to be made within three days from the date of notice, failing which the pledge created over shares held by JBF Global in the Corporate Debtor were to be invoked. In reply to the recall notice, the Corporate Debtor vide letter dated 26.03.2018 requested the Financial Creditor to allow it to avail the timelines stipulated under the said RBI circular dated 12.02.2018 for enabling it to finalize modalities. While the Corporate Debtor was making best endeavours to establish its accounts and achieve resolution, two new investors i.e. edelweiss and Indian oil corporation also evinced interest to take over the said project. However, the Financial Creditor issued another notice dated 31.03.2018, referring to the recall notice and setting out details of default subsisting on the part of Corporate Debtor to repay the entire loan amount.

(ix) Following that, the Corporate Debtor entered into a binding term sheet dated 05.05.2018 with KKR for the purpose of resolution and restructuring of the account of the Corporate Debtor. The resolution plan was proposed to be implemented together with restructuring the debt owed to the various lenders, including Financial Creditor. While the resolution plan was under consideration, the Financial Creditor in contravention of the timelines stipulated under the said RBI circular, proceeded to file the application on 11.05.2018 under Section 7 of IBC for initiating insolvency proceedings. It is the case of the Financial Creditor that it has not contravened the said RBI circular dated



12.02.2018 as the timelines of 180 days given therein was merely an outer limit. Being aggrieved by the conduct of the Financial Creditor, the Corporate Debtor vide its letter dated 17.05.2018 once again proposed to implement the resolution plan in compliance with the said circular and requested the lenders to provide the requisite consent for the resolution plan. However, the Financial Creditor by letter dated 02.06.2018 refused to give consent without assigning any reasons or ground. Following that on 10.08.2018, the Corporate Debtor filed writ petition No.3527 of 2018, before the Hon'ble Bombay High Court challenging the arbitrary action of the Financial Creditor including the premature initiation of the insolvency proceeding under the IBC with the main prayer for directing the Corporate Debtor to withdraw the said insolvency petition [CP (IB) 232 of 2018] and to engage a discussion in good faith with the Corporate Debtor and / or their investors to arrive at possible financing solutions for the loan default and to provide a reasonable time frame of 180 days for such discussion as has been mandated under the said RBI circular.

(x) On 08.10.2018, the Corporate Debtor filed its objections to the present insolvency proceedings in CP (IB) 232 of 2018. One of the primary grounds of challenge was that the insolvency proceedings is not maintainable as it contravenes the time line of 180 days laid out in the said RBI circular. The rationale behind providing the time line of 180 days was to afford an opportunity to the Corporate Debtor and lenders to work closely to evolve a workable resolution plan and implement the same within 180 days. It was only in the event that resolution plan failed that the formal structured insolvency resolution process under the IBC would takeover.

(xi) the Financial Creditor filed its affidavit in rejoinder dated 18.01.2018 [in CP (IB) 232 of 2018] inter alia contending the following.

- (a) The said circular states that the lenders are free to file proceedings under the code even without first attempting resolution outside the code.



- (b) Footnote 8 of the said circular clarifies that timeline of 180 days is only an outer time limits by which the banks mandatorily have to initiate proceedings under the code.
- (c) The Financial Creditor denied that the insolvency proceeding was filed in breach of the said circular.
- (d) The said circular specifically states that the timeline provided therein are not mandatory and that the creditors may initiate proceedings under the code without waiting for 180 days to expire.
- (e) It is not the intention of the said circular to differ or prevent the rights of the Financial Creditor to utilize the mechanism provided under the code prior to the timeline of 180 days.
- (f) The Financial Creditor under the said circular and code has the liberty to file proceedings in case of a default and has accordingly availed its right and remedy.
- (g) Footnote 8 gives express permission to a creditor to file proceedings under the code even before the expiry of 180 days period provided therein.

(xii) Being aggrieved by the said RBI's 12th February circular, which withdrew the OSDR / SDR mechanism, the Corporate Debtor filed writ petition (civil) No.159 of 2019 before the Hon'ble Supreme Court inter alia assailing the legalities and validity of the said circular. The Corporate Debtor was adversely affected by the said circular as it derailed the OSDR mechanism which was under implementation prior to the issuance of the said circular. The main reliefs sought were to declare the said circular as arbitrary, bad in law and unconstitutional; to restrain the lenders for initiating / continuation of insolvency and recovery proceedings; to restrain any proceedings under IBC. On 13.02.2019 the Hon'ble Supreme Court was pleased to direct all parties to maintain status quo until final adjudication of the said writ petition. In the interregnum period from 07.03.2019 to 14.03.2019, similar writ



petitions challenging the said circular were argued at length before the Hon'ble Supreme Court and the issue was decided by its judgment and order dated 02.04.2019 [Dharani Sugar and Chemicals Ltd. Vs Union of India, 2019 SCC Online SC 460] whereby the Hon'ble Supreme Court has declared the said RBI 12th February circular as ultra-virus as a whole and having no effect in law and declared the insolvency proceedings based on the said circular as non-est. The said judgment held as under:

"45... For these reasons also, the impugned circular will have to be declared as ultra-virus as a whole, and be declared to be of no effect in law. Consequently, all actions taken under the said circular, including actions by which the insolvency code had been triggered must fall along with the said circular. As a result, all cases in which debtors have been proceeded against by Financial Creditors under Section 7 of the Insolvency Code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est."

(xiii) On 05.07.2019 i.e. after judgment was passed quashing the said circular and declaring the insolvency proceedings filed based on the said circulars as non-est, the Financial Creditor for the first time sought to contend the following by way of its counter affidavit in its writ petition (civil) no. 159 /2019 before the Hon'ble Supreme Court :

- (a) The said circular had no pertinence in the trigger of the insolvency proceedings by the Financial Creditor;
- (b) The resolution plan contemplating change of management was independent of the said circular;
- (c) The present insolvency proceedings filed by the Financial Creditor was under the exercise of its statutory right and such right "*could have*" been exercised independent of the said circular.

(xiv) The Hon'ble Supreme Court disposed of the writ petition [159 / 2019] vide its order dated 19.07.2019 by recording that the National Company Law Tribunal is free to consider as to whether insolvency



proceedings were initiated pursuant to the RBI's circular dated 12.02.2018.

(xv) It is an admitted position that the present insolvency proceeding has proceeded with and arise out of the said circular and the same is evident from the following:

- (a) The OSDR which was being implemented to resolve the stressed account of the Corporate Debtor was scrapped because of the said circular;
- (b) The lenders granted their in- principle approval to continue with the resolution plan envisaging change in ownership under the said circular;
- (c) The Corporate Debtor had at several occasions requested the Financial Creditor to assist in implementing the resolution plan under the said circular. The Financial Creditor had in fact rejected the resolution plan submitted under the said circular;
- (d) The Financial Creditor has proceeded with the insolvency proceedings by contending that it was in consonance with the said circular as the time lines provided thereunder were merely outer limits;
- (e) The Financial Creditor has taken shelter of footnote 8 of the said circular to justify its action of initiating the Insolvency proceedings prior to the timelines stipulated in the said circular;
- (f) The Corporate Debtor has filed WP no. 3547 of 2018 before the Hon'ble Bombay High Court impugning the action of the Financial Creditor in initiating the insolvency proceedings prior to the timelines stipulated in the said circular. In the proceedings pending before the Hon'ble Bombay High court, the Financial Creditor has at no point in time contended that the insolvency proceedings were filed independent of the said circular. In fact, the Financial



Creditor admitted that 1st March, 2018 was taken as the reference date under the said circular and 180 days expired on 27.08.2018 and thus sought to contend that the relevant prayer (c) of the writ petition had become infructuous;

- (g) Prior to the said judgment, Financial Creditor did not, at any point in time, contend that the insolvency proceedings were filed independent of the said circular. In-fact the Financial Creditor has heavily relied upon and acted under the said circular.

1.3 In view of the aforesaid facts and issues raised thereupon, the Corporate Debtor has sought the following reliefs;

(i) The company petition no 232 of 2018 filed under Section 7 of the IBC 2016 by the Financial Creditor ought to be dismissed as non-est in terms of judgment dated 02.04.2019 passed by the hon'ble Supreme court of India in Dharani sugars and Chemical Ltd. [2019 SCC online SC 460];

(ii) During the pendency of the company petition no 232 of 2018, the Financial Creditor be directed to offer inspection or produce the minutes of the meetings held from December 2017 to till date, internal notes and correspondences exchanged between the consortium of lenders from 01.12.2017 to 31.07.2019 to the Corporate Debtor as sought in their letter dated 30th July 2019.

1.4 In its affidavit in reply dated 16.08.2019 filed by the financial creditor which is placed on record, and as argued by learned senior advocate for the financial creditor Shri Navin Pahwa, it has been submitted that the present interlocutory application [IA 496 / 2019] have been filed by the Corporate Debtor with the sole intention to delay and impede the proceedings underway under Section 7 petition, and to obstruct and curtail the statutory rights of the Financial Creditor under the IBC; that the Corporate Debtor has made several such unsuccessful attempt in the past; that the Corporate Debtor has



once again approached this tribunal with similar intent in order to obfuscate the defaults in its payment obligations. It is further submitted that similar contentions regarding the maintainability of the section 7 petition were raised by the Corporate Debtor in the main petition [CP (IB) 232 of 2018] by way of written objections; and also vide another interlocutory application (IA No. 307 of 2018) which this Hon'ble tribunal has already disposed of; that vide order dated 19.08.2018, by taking cognizance of the fact that the Corporate Debtor had already raised similar issues of maintainability in the past, this tribunal had observed as under:

"The learned lawyer for the respondent is requesting for adjournment on the ground that he needs some time to file some preliminary objection with regard to the maintainability. On perusal of the record, it is found that he has already filed detailed objection and a ground of maintainability has already been taken on the objection. Even otherwise while deciding the application, this adjudicating authority must see the maintainability of the application before proceeding further. Under such circumstances, I found no reason to adjourn the case on the ground of the filing of any application with regard to the maintainability".

It is further submitted that the Corporate Debtor had simultaneously proceeded to raise similar contentions in relation to the maintainability of the Section 7 petition in different writ petitions filed before various other judicial fora, including the Hon'ble Bombay High Court, the Hon'ble Gujarat High Court, The Hon'ble National Company Law Appellate Tribunal; that the Corporate Debtor had also filed writ petition before the Hon'ble Supreme Court [WP (civil) No.159 of 2019] challenging therewith the validity of RBI's circular dated 12.02.2018 entitled as "*Resolution of stressed assets – revised framework*", [**12th Feb circular**] and correspondingly, the initiation of Section 7 petition as allegedly being under the terms of the 12th February circular; that the filing of the supreme Court writ petition by the Corporate Debtor also seems to have been done as an afterthought, given that this was done only after an order was passed by the Hon'ble NCLAT on 28.01.2019 observing that the matter had been pending for a prolonged period of time, and directing that this tribunal hear and decide the matter within three weeks therefrom.

It is also submitted that in order to circumvent the deadline laid down by the Hon'ble NCLAT, the Corporate Debtor mischievously approached the Hon'ble



Supreme Court by filing the above referred writ petition, in order to have this matter listed along with the other matters challenging the validity of the 12th Feb circular, although it was clear that the instant Section 7 petition had nothing to do with the 12th Feb Circular and was completely unconnected to such other matters listed before the Hon'ble Supreme Court. It is further submitted that as the Hon'ble Supreme Court had previously declared the 12th Feb Circular unconstitutional and invalid vide its judgment dated 02.04.2019 in the case of Dharani Sugars and chemicals Ltd. (supra), it had vide its order in the Supreme Court writ petition (159 of 2019) dated 19.07.2019 directed this tribunal to adjudicate on the issue of whether the Section 7 petition was indeed initiated under the terms of the 12th Feb Circular and whether these proceedings were valid in light of the decision of Hon'ble Supreme Court in Dharani Sugars (Supra); that by having obtained the Supreme Court order, the Corporate Debtor has approached this tribunal by filing this interlocutory application 496 of 2019 alleging that the Section 7 petition was filed by the Financial Creditor pursuant to the terms of the 12th Feb Circular; and that the contentions so raised is both baseless and frivolous, simply constitutes another attempt by the Corporate Debtor to derail the admission of Section 7 petition, which has been pending since long. It has been further submitted that as the factum of the occurrence of the default is not in dispute by the Corporate Debtor, the Corporate Debtor had chosen to raise false and frivolous objections with the sole intention to delay the admission of the Section 7 petition.

The various issues as raised by the Corporate Debtor in this interlocutory application has been replied para wise and the same are also summarized here under;

- (i) The corporate debtor has not demonstrated in any manner that section 7 petition was filed pursuant to the 12th Feb circular. The fact that the corporate debtor is simply shooting in the dark with the hope of finding a possible escape from the inevitable admission of a CIRP against it is clear from the fact that, vide the application, the Corporate Debtor is seeking inspection of the minutes of meetings of the Financial



Creditor and the other lenders to find any information that it could use to support its case that the section 7 petition is connected in any manner to the 12th Feb circular.

(ii) The section 7 petition was not initiated pursuant to the terms of the 12th Feb circular as contended by the Corporate Debtor; and that the filing of the same was based on a commercial decision taken by the joint lenders forum of the Corporate Debtor (as existed at the time) to initiate insolvency proceedings against the Corporate Debtor, given that it had remained in default for a prolonged period of time, and that no resolution of its account and debt seemed forthcoming or possible. The fact that the decision to file the section 7 petition was a commercial one is supported by the fact that the consortium of lenders (i.e. erstwhile joint lenders forum) of the Corporate Debtor in its meeting held on 14.03.2018 and 22.03.2018 unanimously agreed that in the event that no resolution of the account of the Corporate Debtor was effected by 31.03.2018, the account would be referred to IBC.

(iii) A bare perusal of the minutes of the meeting of the consortium of lenders dated 14.03.2018 makes it apparent that decision to initiate insolvency proceedings against the Corporate Debtor was in no way connected to the 12th Feb circular. During this meeting, the consortium of lenders had categorically stated that in case the two proposals for resolution (given by KKR and RIL) did not fructify, then it would be commercially prudent and necessary to refer the matter to the Tribunal under the provisions of the IBC. The relevant extract from the minutes of the meeting dated 14.03.2018 is replicated hereunder:

"2. Shri Gupta welcomed the participants. After confirmation of the minutes of the last JLM held on 21.03.2018, he informed that reliance industries limited (RIL) which had been allowed time upto 27.03.2018 to make its offer for acquisition of JBF Petro, was yet to submit its final offer. Shri Gupta informed that based on discussion with RIL officers, it appears that the due diligence process was complete; however, they are yet to conclude their discussions with other stakeholders viz. Shri Bhagirath Arya and KKR. Shri Gupta informed that IDBI Bank officials had again met with KKR but they were still deliberating on the



valuations. KKR has informally expressed that in case the lenders are agreeable for acceptance of 100% principal outstanding and waiver interest and other dues. Lenders were of the view that the proposal needs to be improved at least to cover the interest upto 30.09.2017 which had fallen due on 01.10.2017. However, they were agreeable to favorably consider offer for 100% principal outstanding provided the transaction is closed by 31.03.2018. Another meeting is scheduled with KKR on 19.03.2018 to improve on the offer so as to pursue with them for recovery of entire principal and interest and other dues. Consortium members observed that based on the initial discussion with RIL on 12.12.2018, it had appeared that the transaction would be closed immediately. However, considerable time has since lapsed and there has been no progress.

3. *Shri Rakesh Gothi, Director, JBF Petro, informed lenders that the company's plant was shut down since COD in April, 2017, due to various technical reasons. The plant was now kept in the preservation mode under the guidance of the technical consultant (Technip and BP).*

4. *Considering that time was the essence, consortium lenders were of the unanimous view that in case there was no resolution in the account by 31.03.2018, it could be referred to NCLT, without holding any more JLM."*

That from these minutes, it is clear that members of the JLF took a commercial decision to refer the Corporate Debtor to IBC, owing to the fact that a possible resolution for the Corporate Debtor was nowhere in sight.

(iv) It is an admitted position by the Corporate Debtor that it has defaulted on its payment to the Financial Creditor and its other lenders. This is also evident from the balance confirmation letter that was issued by the Corporate Debtor on 05.04.2018, wherein it had acknowledged its outstanding balance of USD 268.28 millions which was payable to the Financial Creditor as on 31.03.2018. As the factum of the existence of the default itself forms sufficient basis for the admission of the section 7 petition, the Corporate Debtor is attempting use of the 12th Feb circular as a shield to circumvent the initiation of a CIRP against it.

(v) The Corporate Debtor has clearly also failed to understand the scope and applicability of the decision of the Hon'ble Supreme Court in



Dharani Sugars (supra), which deemed the 12th Feb circular to be invalid, as well as the types of proceedings that are impacted by the judgment. The operative part of the judgement is given as under:

*“Consequently, all actions taken under the said circular, including actions by which the insolvency code has been triggered must fall alongwith the said circular. As a result, all cases in which debtors have been proceeded against by Financial Creditor under section 7 of the IBC, 2016, **only** because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est.”*

That from the above, it is clear that Hon’ble Supreme Court declared only such proceedings initiated under the IBC to be non-est which were initiated **only because of the 12th Feb circular**. The section 7 petition was filed on 11.05.2018 i.e. only two months after the issuance of the 12th Feb circular. Under the terms of the 12th Feb circular, for accounts having aggregate debt exposure of more than Rs.2000 crores (INR 20 billion), a six-month window was provided to effectuate a resolution of such accounts, post which the lenders were mandated to initiate an insolvency proceeding against the relevant Corporate Debtor. It is thus clear that the only situation where lenders can be said to have initiated an insolvency proceeding **“only because of the operation”** of the 12th Feb circular is where the time period of six month from the relevant reference date expired and the lenders were thus mandated to initiate proceedings under the IBC as per the terms of the 12th Feb circular. If the insolvency proceeding was initiated prior to the expiry of these six months window, it is clear that the same would be pursuant to a commercial decision taken by the lenders, and not only because of the applicability or operation of the 12th Feb circular.

(vi) The Corporate Debtor has alleged that the recall of the loan by the financial creditor was premature and was done wrongfully. This contention was already raised by the Corporate Debtor in its written objections and has been duly responded to and rebutted in the affidavit in rejoinder filed on 18.01.2019. That the Corporate Debtor has

