

Sl. No. 1

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH**

(Virtual Hearing)

PRESENT: SHRI RAJEEV BHARDWAJ – MEMBER (JUDICIAL)

: SHRI SANJAY PURI – MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 23.04.2024 AT 01:30 P.M.

TC/CP. Nos.	CA/IA No.	Section / Rule	Name of Parties
CP(IB)/12/95/AMR/2022		95 of IBC	Central Bank of India V. K. Mohan Rao & Segno Ceramics Private Limited (under Liquidation)

ORDER

Present: Ms. GVL Meghana, Proxy counsel for the FC
Mr. Lakshmi Sravan, Proxy counsel for the PG.
Mr. P.V.S Kalki Murthy, RP present in person.

Orders pronounced. CP(IB)/12/95/AMR/2022 is admitted and recorded vide separate sheets.

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**SANJAY PURI
MEMBER (TECHNICAL)**

Sd/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**

Date of Order: 23.04.2024

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH**

CP (IB) No.12/95/AMR/2022

[Under Section 60(2) and 95 of the Insolvency and Bankruptcy Code, 2016 r/w Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

BETWEEN:

**CENTRAL BANK OF INDIA
Represented by its Authorised Signatory
Mr. Syed Kamal Mohiuddin Central Office
at Chandermukhi Nariman Point,
Mumbai - 400 021 Branch at
SAM Branch at
Bank Street. Koti, Hyderabad.**

.....Petitioner/Financial Creditor

AND

**1. Mr. K. Mohan Rao
Flat No.301, DJ Ratnam Towers
6/13, Brodipet, Guntur-522 002.
Andhra Pradesh.**

.....Respondent No.1

**2. Segno Ceramics Private Limited (under Liquidation)
Survey No.175-177/5, Vemavaram Post,
Ballikurava Mandal, Prakasam Dist
Andhra Pradesh – 523301**

.....Respondent No.2

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CORAM:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Sri Sanjay Puri, Hon'ble Member (Technical)

Appearance:

For Petitioner/Financial Creditor : Mr. V.V.S.N Raju, Advocate

For R.1/ Personal Guarantor : Dr. SV Rama Krishna, Advocate

1. This Petition has been filed by Central Bank of India, (hereinafter referred to as 'FC/Petitioner') for initiating the Insolvency Resolution Process against the Personal Guarantor, Mr. K. Mohan Rao (hereinafter referred to as 'PG/R1'), of Segno Ceramics Pvt Ltd., (hereinafter referred to as 'CD/R2') under Section 60(2) and Section 95 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

2. Brief facts, necessary to dispose of the present application, as stated, are that:

2.1 The Petitioner advanced various credit facilities to the CD by way of in the form of cash credits and term loans facilities aggregating to Rs.43.00 Crore during the year 2012 initially. The said credit facilities were renewed, enhanced and revised to Rs.29.08 Crores from time to time during the years 2012 to 2019. The Respondent No.2, after fully availing the said credit facilities, failed to adhere to the repayment terms of the sanctioned credit facilities, resulting in the Loan accounts becoming irregular.

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- 2.2 The PG stood as Guarantor for the repayment of the loan by executing a Personal Guarantee Agreement dated 21.08.2012, 07.10.2014 and 06.10.2017.
- 2.3 However, the CD failed to adhere to the terms and conditions of the Agreement and as a result, the account was classified as NPA on 29.05.2019. On 04.07.2019, notice under Section 13(2) of SARFAESI Act was issued to the CD as well as Personal Guarantors.
- 2.4 On 13.10.2021, the guarantee executed by the PG, the Respondent No.1 herein, was invoked by FC by making a demand vide Form B Demand Notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 on Respondent No. 1 for a making the payment of Rs.37,51,24,213.83 + Interest and charges from 13.10.2021 as per the PG Agreement executed by him. However, the PG herein neglected and failed to make the payment.
- 2.5 The cause of action for this petition arose first on 04.07.2019 when a legal notice was served by the Applicant Bank upon Respondent No.1 and Respondent No.2 together with the other Guarantors and Directors demanding repayment of debt due. As the Respondent herein failed to pay the amount the cause of action is continuing. It is settled legal position that the cause of action against Guarantors who executed continuing Guarantee arises on the date of demand. As the Respondent herein failed to pay the amount the cause of action is continuing. It is

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a settled legal position that the cause of action against Guarantors who executed continuing Guarantee arises on the date of demand. The same was elaborately explained by the Hon'ble Supreme Court in the matter of **Margaret Lalita Samuel vs Indo Commercial Bank Ltd (1979) 2 SCC 396**. Hence the cause of action arose on 04.07.2019 and 13.10.2021 and as such it is continuing till date

- 2.6 The limitation period commenced for filing this application as per the Hon'ble Supreme Court in Miscellaneous Application No. 665 of 2021 in *Suo Moto Writ © No.3 of 2020* in para 8.
3. The R1 vide filing Counter has contended and contested the averments of the petition by making the following submissions:

- 3.1. It is submitted that PG was one of the founder subscribers to the MoA and AoA of the Respondent No. 2 Company in the year 2011, having nominal shareholding of only 7% and was designated as managing Director and after stabilization of the operations, he resigned as Director of CD on 18.05.2016 and approved by the full Board of Directors. Following PG's resignation as Director, he sought release from his obligations and collateral security. The bank, acknowledging this, recorded the request in its internal communication dated 30.03.2019. Notably, the renewal of working capital facilities and term loans in the same communication occurred without the knowledge or consent of Respondent No.1. This action, according to the doctrine of novation, discharged PG's personal guarantee. Therefore, no liability can be imposed on Respondent No.1.

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- 3.2. It is submitted that the FC has been engaging directly with the new Managing Director, Mr. Nara Hari Prasad, following Respondent No.1's resignation as Director on 20.05.2016. During Respondent No.1's tenure, the CD Company's operations were successfully conducted without any defaults. However, it wasn't until May 2019, three years later, that the Respondent No.2 Company's account became Non-Performing Asset (NPA) in the books of the Applicant. This occurrence cannot be attributed to Respondent No.1, as the responsibility lies with the new management and the FC itself, which renewed the working capital facilities annually, monitored the end-use supervision, and undertook proper assessments for renewal. The failure of the Lender Bank to adhere to LENDER'S LIABILITY as mandated by the RBI raises serious questions about its performance in this matter.
- 3.3. It is claimed that the petitioner bank is currently attempting to capitalize on its own negligence by failing to release the guarantee obligation and collateral security, despite the long-standing request made by Respondent No.1. Notably, there was no rejection of Respondent No.1's request in this regard. Therefore, according to the doctrine of estoppel, the Petitioner Bank is barred from invoking any personal guarantee or collateral security, and they should be released immediately.

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3.4. In addition to the basic facts of the matter, there are several grounds on which the present Petition CP(IB) 12/95/AMR/2022 filed under Section 95 of the Insolvency and Bankruptcy Code, 2016, is not maintainable. These grounds are enumerated as follows:

- a. Form B is fundamentally flawed as it inaccurately refers to Respondent No.1/alleged PG as a "suspended Director" knowing fully well that he has resigned long back in 2016 cannot be considered as "suspended Director" under IBC, 2016. Further, the Petitioner bank also referred the CD, M/s. Segno Ceramics Pvt. Ltd., if it is "under liquidation" but there are no orders to this effect in fact the Resolution Plan was approved and Successful Resolution Applicant took over the company,
- b. No limited notice under Section 95 of the IBC, 2016, was provided by the Hon'ble Adjudicating Authority to Respondent No.1/ PG, which contravenes the legal precedent established by the Hon'ble NCLAT, New Delhi, in the case of Ravi Ajit Kulkarni vs. State Bank of India, decided on 12.08.2021. Therefore, the admission is subject to reconsideration.

"Para 47. In substance, once the application is "filed" (as per Section 95, 96 read with Rule 10) the Adjudicating Authority has to act on it, and following principles of natural justice, give limited notice to PG to appear referring to the Interim Moratorium that has commenced as per terms of Section 96. Then the next stage is appointing Resolution Professional as per Section 97 read with Rules and Regulations. Third stage will be Resolution Professional

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acting in terms of Section 99 and submitting Report. At the fourth stage comes in adjudication of the application under Section 100 which ought to be decided by giving hearing to parties keeping in view application, evidence collected and report under Section 99”.

- c. Serious objections are raised regarding the report dated 13.04.2022, filed by the Resolution Professional under Section 99 of the IBC, 2016, due to various erroneous statements contained therein. Viz, there are numerous serious errors in the calculations, a lack of application of mind, and a failure to examine the facts on record properly by the Resolution Professional (RP). The RP has inaccurately shown "ZEROS" as dues from the CD in all accounts in the Books of the Petitioner Bank. Given this, the question of invoking any personal guarantee does not arise.
4. In the rejoinder, the Petitioner reaffirms and reasserts the contentions presented in the petition. Additionally, they counter the arguments presented by R1 in their counter.
 - 4.1. It is contended that R1/PG, as stated in the counter, claims that since he resigned as the Director of the CD, he is not liable to make any payments. Furthermore, the Respondent has asserted that he was "under the impression" that the Bank had released him from his obligations, this claim is denied by the FC. It is submitted that the Petitioner has never released him from his obligations.
 - 4.2. It is submitted that a guarantee need not solely be provided by the management of a CD but may be furnished by any individual. As long

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as the guarantee remains valid, irrespective of the guarantor's relationship with the CD or its management, they shall remain liable for any defaults committed by the CD. Numerous legal precedents have established that a guarantee agreement is an independent contract, enforceable whenever the CD defaults. In the current scenario, as the guarantor has not been discharged, they remain liable to cover any defaults by the CD, and their resignation from the directorship does not absolve them of their duties as a Personal Guarantor. It is immaterial whether the default occurred during or after the termination of R1's directorship; the guarantor remains responsible for repayment.

- 4.3. It has been asserted that the petitioner has never issued any letter or provided notification to the Guarantor indicating that he has been relieved of his liability. Thus, any assumption that Respondent No. 1 has been discharged from any liability is flawed.
- 4.4. It is argued by R1 in his counter citing pages 103 and 104 of the Application to assert that he is not liable as a personal guarantor for the loan extended to the CD. However, it is important to note that the original guarantee was provided by R1 in both 2012 and 2014 for the loans granted to the CD. Pages 103 and 104 pertain to the loan facilities renewed in 2018-19, for which Respondent No.1's Personal Guarantee was not obtained anew. Thus, the absence of Respondent No.1's name as a personal guarantor in these specific documents does not automatically discharge any liability that has already been established against R1.

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- 4.5. It is submitted that R1 has cited three grounds on which he argued this application as not maintainable. Firstly, he claim to have been referred to as a "Suspended Director," and the CD labeled as "under liquidation." The petitioner firmly denies these allegations, stating that neither the guarantor was referred to as a suspended guarantor nor was the CD labeled as under liquidation in the notice. R1 is challenged to provide evidence supporting their claims. Furthermore, any clerical or typographical error in the Form B demand Notice does not negate a guarantor's liability, as the purpose of the notice is to call for the unpaid debt due from the CD. Secondly, Respondent No.1 argues that no limited notice was given by the adjudicating authority. It is submitted that the appointment of the Resolution Professional does not violate the principles of natural justice, as established by legal precedent and affirmed by the Tribunal's order dated 01.04.2022. Respondent No.1's mention of this ground is perceived as an attempt to delay the adjudication process. Lastly, Respondent No.1 raises objections against the report of the Resolution Professional. Therefore, the Applicant refrains from commenting on this ground.
5. We have heard the Learned Counsels for both sides and perused the record.
6. In the case at hand, R1, as a guarantor, undertook a binding obligation to ensure the repayment of credit facilities extended by the petitioner Bank to the Principal Debtor/CD by executing the form of Guarantee for Advances & Credit dated 21.08.2012, 07.10.2014. However, following the CD's default on the loan terms, resulting in the classification of accounts as NPA on

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29.05.2019, R1 failed to fulfil his commitment despite the Bank's demand made on 04.07.2019. The relevant clauses of the Agreement are as follows:

"7 This guarantee shall not be revoked by me/us and shall remain in force till all the amounts due and payable to you by the principal(s) are paid up in full inclusive of interest, charges etc. I/We further specifically agree that this guarantee shall continue to remain in force and I/we shall continue be able there under for all the amounts due and payable to you by the principle/s even though the principle/s has/have not renewed the documents and even though the amounts due from the principal/s gets time barred and you cannot recover the same from principal/s by filling a suit or any Legal proceedings against the principal/s.

"10. I/we agree that if the principal's shall be found not be liable to you in law for the advance made or credits given by you to him/them/it by reason of his/their its incapacity to borrow or to contract or for any other reason, I/We shall nevertheless be liable as principal debtor/s to pay to you the sums that would have been recoverable by you from me/us as guarantors, the principal/s has been liable for the advances and credits."

7. R1's claims that his resignation from the position of Director from the CD exempted from further liability under PG agreement. However, the contention that he was under an impression of being released from his obligations by the Bank is rejected by the FC, who has confirmed the absence of any such release.

It is firmly established as a legal principle that a guarantee need not exclusively emanate from the management of a CD but may be provided by any individual. Accordingly, the validity of a guarantee extends the liability of the guarantor to encompass any defaults committed by the CD. Notably, a guarantee agreement operates autonomously and retains enforceability upon any default

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by the CD, regardless of the guarantor's association with the CD or its management. Furthermore, it is distinguished that resignation from directorship does not absolve Respondent No.1 of his obligations as a PG, rendering him still liable for any outstanding obligations. The absence of any correspondence or notification to the PG by the petitioner indicating a release from liability, highlights the baseless nature of any presumption of discharge from such obligations.

Hence, in light of the foregoing, Respondent No.1 remains bound by the terms of the Guarantee Agreement and is consequently liable for any outstanding obligations stemming from the CD's default, with no legal basis for assuming exemption from such obligations.

8. R1's argument pertaining to the renewal of loan facilities in the fiscal year 2018-19, as detailed on pages 103-104 of the Application, without the procurement of his Personal Guarantee afresh, is duly noted. It is acknowledged that Respondent No.1 initially provided his guarantee for loans disbursed to the CD through guarantee agreements dated 21.08.2012 and 04.09.2014, encompassing advances and general credit. The relevant para of the agreement is as follows :

"7. The guarantee shall not be revoked by me and shall remain in force till all the amounts due and payable to you by the Principal/s are paid up in full inclusive of interest, charges, etc. I/we further specifically agree that this guarantee shall continue to remain in force and we shall continue to be liable thereunder for all the amounts due and payable by the principal(s) even though the Principal/s has/have not renewed the documents and even though the amounts from the Principal/s get time barred and cannot recover the same from Principal by filing suit or legal proceedings against the Principal/s."

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Furthermore, it is emphasized that the absence of Respondent No.1's name as a guarantor in subsequent documents does not absolve him of any established liability. As per the terms delineated in the guarantee agreement, the liability remains intact regardless of such alterations. Hence, Respondent No.1's contention asserting automatic discharge from liability due to changes in the terms of the original loan amounts is deemed untenable in light of the explicit provisions governing the duration and continuity of their guarantee as per the agreement.

9. The submission of a One Time Settlement (OTS) proposal by the PG, as evidenced by emails issued by him to FC and documented on pages 124 to 126 of the Application, unequivocally establishes the liability in the matter. Drawing from the legal precedent set forth in **Tejas Khandhar Vs Bank of Baroda (NCLAT Delhi) Company Appeal (AT) (Insolvency) No. 371 of 2020**, wherein the Appellate Tribunal considered view that the OTS proposal falls within the definition of the ambit of 'acknowledgement of debt' as envisaged under Section 18 of the Limitation Act, 1963. Consequently, it is evident that R1, through the submission of an OTS proposal for settlement, has effectively acknowledged his liability towards the dues of the CD. This acknowledgment further solidifies his obligation and serves as compelling evidence of their liability.
10. R1 contends that he has been referred to as a "Suspended Director," and the CD has been labeled as "Under Liquidation" in the Form B Demand Notice. However, upon careful examination of the Form B Demand Notice, as presented on page 151 of the application, it is observed that the notice neither

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designates the guarantor as a suspended guarantor nor categorizes the CD as under liquidation. Furthermore, even in the hypothetical scenario where there may exist a clerical or typographical error within the Form B Demand Notice, it is imperative to emphasize that such an error shall not serve as grounds to deny the liability of a guarantor. The substance and intent of the notice, rather than any incidental errors, should be the focal point in determining the liabilities of the guarantor.

11. Respondent PG argues that no limited notice was given by the Adjudicating Authority. However, it is affirmed that the appointment of the Resolution Professional does not violate the principles of natural justice, as established by legal precedent and affirmed by the Tribunal's order dated 01.04.2022. This Bench, vide orders dated 01.04.2022, citing relevant judicial pronouncements, unequivocally determined that the absence of an opportunity for the Debtor to make submissions prior to the appointment of the Insolvency Resolution Professional (IRP) does not constitute a violation of the principles of natural justice. In this regard the judgment of Hon'ble Supreme Court dated November, 2023 in the case of **Surendra B. Jiwrajka vs. Omkara Assets Reconstruction Private Limited (Special Leave Petition (CIVIL) 16464/2021)** is relevant. The Hon'ble Supreme Court in the said case, held that the provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution and cleared the wires of Section 94 and Section 95 of the IB Code, 2016. The Hon'ble SC held that these provisions (Section 95 to 100 IBC) cannot be held as unconstitutional for not affording an opportunity of

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hearing to the personal guarantors before the insolvency petition filed by creditors is admitted against them and the moratorium is automatically applied against them as soon as the insolvency petition is filed. Further, the Hon'ble SC emphasized that reading an adjudicatory role into these sections would undermine the structured timelines established by the legislature. Such a judicial reconfiguration would tantamount to rewriting legislative.

12. As the R1 herein failed to pay the amount due, the cause of action is continuing. It is a settled legal position that the cause of action against Guarantors who executed continuing Guarantee arises on the date of demand. The same was elaborately explained by the Hon'ble Supreme Court in the matter of **Margaret Lalita Samuel vs. Indo Commercial Bank Limited (1979) 2 SCC 396.**

In the above case, a continuing guarantee was executed by the Appellant 'Margaret Lalita Samuel' in which she guaranteed to the Bank for repayment of all money which shall at any time shall be due to the Bank by the Company. Bank has filed a suit for recovery of amount by the Guarantor in which one of the defence was raised of the limitation. The Hon'ble Supreme Court in the above judgment while considering the question of limitation made following observations in Para 10:

10. The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would

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only run from the date of breach, under Article 115 of the schedule to the Limitation Act, 1908.....

The cause of action arose on 04.07.2019 and 13.10.2021 when FC issued a demand notice under section 13(2) of SARFAESI and subsequently after issuing demand vide Form B Demand Notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 and as such it is continuing till date. The limitation period commenced for filing this application as per the Hon'ble Supreme Court in Miscellaneous Application No 665 of 2021 in Suo Moto Writ (C) No 3 of 2020

"8. I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply"

13. There is no other material point to address as the liability of the PG is proved from the documents on record.

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14. The RP in his report dated 13.04.2022 has recommended for initiation of the insolvency resolution process against R1.

ORDER

1. Therefore, by exercising powers under Section 100 of the Code, we pass the following orders:
 - i. The Petition CP (IB) No. 12/95/AMR/2022 filed under the provisions of Section 95 of IBC, 2016 is hereby admitted.
2. Consequently, the Insolvency Resolution Process is hereby initiated against the Personal Guarantor, Mr. K. Mohan Rao and the moratorium is declared, which begins with effect from the date of admission of the petition and shall cease to have effect at the end of the period of 180 days, as provided under Section 101 of IBC, 2016. During the interim- moratorium period:
 - i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
 - ii. The creditors shall not initiate any legal action or legal proceedings in respect of any debt;
 - iii. the debtor shall not transfer, alienate, encumber or dispose of any of her assets or her legal rights or beneficial interest therein;
 - iv. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

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- v. The Resolution Professional i.e. Dr. P V S Kaliki Murthy, having Registration No. IBBI/IPA 003/IP-N00367/2021-2022/13871 having office at Flat No.501, Rajyalakshmi Heavens, Road No.3, Ashok Nagar, Eluru – 534002, Andhra Pradesh, who was appointed vide order dated 01.04.2022 is directed to cause public notice published on behalf of the Adjudicating Authority within 7 days of uploading of this Order on the website of NCLT, Amaravati, inviting claims from all creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102 (2) of IBC, 2016. The publication of notice shall be made in newspapers, one in English and other in vernacular (Telugu) which have wide circulation in the State where the Debtor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed on our website by the Registry and the other shall be affixed in the premises of this Adjudicating Authority.
- vi. The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The debtor shall prepare, in consultation with the resolution professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs as provided under Section 105 which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this

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Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106.

- vii. In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of creditors should be summoned, he shall specify the details as provided under Section 106 (3). The date of meeting shall not be less than fourteen days or more than 28 days from the date of submission of the Report under Sub-Section (1) of Section 106, for which atleast 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107.
- viii. The meeting of the creditors shall be conducted in accordance with the provisions of sections 109, 110 and 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and submit the same to the Authority, copies of which shall be provided to the guarantor and the creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

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SANJAY PURI
MEMBER (TECHNICAL)

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RAJEEV BHARADWAJ
MEMBER (JUDICIAL)