

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-II**

CP (IB) No.3846/MB-II/2019

Along with

IA No.396/2020

in

CP (IB) No.3846/MB-II/2019

Under section 7 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

India Resurgence ARC Private Limited

[CIN: U67190MH2016PTC272471]

Having its registered office at –

304, Piramal Tower (3rd Floor)

Peninsula Corporate Park

Ganpatrao Kadam Marg, Lower Parel

Mumbai 400 013

... Financial Creditor

Versus

Indian Steel Corporation Limited

[CIN: U27100MH2004PLC144559]

Having its registered office at –

No.611, Tulsiani Chambers

Nariman Point

Mumbai 400 021

... Corporate Debtor

Order pronounced on 06.05.2020

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Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Financial Creditor : Mr Ravi Kadam, Sr Advocate
Mr Chetan Kapadia
Mr Sitesh Mukherjee
Mr Vividh Tandon
Ms Ritika Ajitsaria
i/b Trilegal, Advocates

For the Corporate Debtor : Mr Janak Dwarkadass, Sr Advocate
Mr Prateek Seksaria
Mr Shyam Kapadia
Ms Komal Khushalani
Mr Shadab Jan
Ms Prerna Wagh
Mr Yash Tembe
i/b Crawford Bayley & Co,
Advocates

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 ("IBC") by India Resurgence ARC Private Limited [CIN: U67190MH2016PTC-272471] (*"the Financial Creditor"*), a private company limited by shares and registered on 29.01.2016 under the Companies Act, 2013 with the Registrar of Companies (RoC), Maharashtra, Mumbai, seeking to

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initiate Corporate Insolvency Resolution Process (CIRP) against Indian Steel Corporation Limited ("*the Corporate Debtor*").

2. The Corporate Debtor is an unlisted public company limited by shares and incorporated on 16.02.2004 under the Companies Act, 1956, with RoC, Maharashtra, Mumbai. Its CIN is U27100MH2004PLC144559. Its registered office is at No.611, Tulsiani Chambers, Nariman Point, Mumbai 400 021, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

IA No.396/2020

3. This Interlocutory Application (IA) was filed by the Corporate Debtor challenging the maintainability of the main Company Petition bearing CP (IB) No.3846/2019. The contentions raised in the said IA are in *pari materia* with the reply of the Corporate Debtor in the main CP. These are taken up together for disposal.
4. For convenience, the parties are referred to as per their array in the main Company Petition.

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5. The present petition was filed before this Adjudicating Authority claiming the Corporate Debtor failed to make payment of a sum of ₹1487.59 crore as on 30.09.2019 [**Exhibit ZZ, page 908, Vol.V**]. The Financial Creditor states that it acquired the debt by way of an Assignment Agreement dated 03.05.2019 executed with State Bank of India (SBI) [**Exhibit QQ, page 709, Vol.IV**]. The debt also

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included loans extended to the Corporate Debtor by the erstwhile associate banks of SBI, *viz.*, State Bank of Indore (in 2010), State Bank of Saurashtra (in 2013), State Bank of Bikaner & Jaipur, State Bank of Hyderabad, State Bank of Mysore, State Bank of Patiala and State Bank of Travancore (all in 2017).

6. The case of the Financial Creditor is as follows: -

(a) A consortium of ten banks (*which included SBI and its erstwhile associate banks, Jammu & Kashmir Bank & Punjab National Bank*) extended Term Loan Facility to the Corporate Debtor under a Joint Agreement for Term Loan dated 09.09.2008 [**Exhibit 'F', page 53, Vol.I**] to the extent of ₹663 crore as follows: -

Sl No	Name of the Bank	Amount (in crore rupees)
1.	State Bank of Indore	25
2.	State Bank of India	175
3.	State Bank of Travancore	80
4.	State Bank of Patiala	75
5.	State Bank of Hyderabad	85
6.	State Bank of Mysore	50
7.	State Bank of Saurashtra	55
8.	State Bank of Bikaner & Jaipur	25
9.	Jammu & Kashmir Bank	63

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Sl No	Name of the Bank	Amount (in crore rupees)
10.	Punjab National Bank	30
	Total	663

- (b) Separately, a second and different consortium of nine banks advanced Working Capital Credit facilities amounting to ₹1829.86 crore to the Corporate Debtor under a Working Capital Consortium Agreement dated 22.06.2013 [**Exhibit ‘K’**, **page 162, Vol.I**], as follows:

Sl No	Name of the Bank	Amount (in crore rupees)
1.	State Bank of India	290.60
2.	State Bank of Travancore	127.50
3.	State Bank of Patiala	153.00
4.	State Bank of Hyderabad	82.50
5.	State Bank of Bikaner & Jaipur	246.00
6.	Jammu & Kashmir Bank	145.00
7.	Punjab National Bank	485.00
8.	Corporation Bank	100.00
9.	IDBI Bank	200.00
	Total	1829.60

- (c) The Term Loan Facility and the Working Capital Credit Facility are together referred to in this order as **“Facilities.”**
- (d) These Facilities were restructured and renewed from time to time by SBI and its erstwhile associate banks [**Exhibit ‘W’, page 363, Vol.II; Exhibit ‘Z’, page 411, Vol.III; and Exhibit ‘NN’, page 635, Vol.IV**].
- (e) The principal sum due to SBI (*including the loans extended by the erstwhile associate banks*) under the Facilities amount to ₹1469.60 crore (₹570 crore towards Term Loan and ₹899.60 crore towards Working Capital).
- (f) The facilities were secured by way of hypothecation over the movables and mortgage over the immovable properties of the Corporate Debtor. They were further secured by deeds of personal guarantee of Mr Kailash Shahra (*promoter-director of the Corporate Debtor*). The Mortgage Deed dated 02.02.2017 has been placed on record at **Exhibit ‘GG’, page 475, Vol.III**. They have also been recorded as a charge with RoC Mumbai [**Exhibit ‘HH’, page 516, Vol.III**];
- (g) Additionally, four related entities of the Corporate Debtor collectively referred to as **‘Corporate Guarantors’** – (i) Ruchi Growth Fund Private Limited; (ii) Ruchi Real Estate Developers Private Limited; (iii) Rohini Forex Private Limited; and (iv) Ruchi Stock and Securities Private Limited –executed Deeds of Corporate Guarantee (**‘Corporate Guarantees’**)

dated 20.01.2014 [**Exhibit ‘Y’, page 383, Vol.II**] towards repayment of sums upto ₹450.11 crore due to SBI under the Facilities. The Corporate Guarantors also pledged in favour of SBI, the equity shares of the Corporate Debtor held by them (representing fifteen percent of the Corporate Debtor’s equity shareholding held in them).

- (h) The underlying agreements pertaining to the Facilities as well as personal guarantee of Mr Kailash Shahra, promoter-director of the Corporate Debtor, were renewed and reaffirmed for the purposes of section 18 of the Limitation Act, 1963, by way of revival letter dated 30.04.2017 [**Exhibit ‘DD’, page 451, Vol.III**]. The Corporate Guarantors also renewed the Corporate Guarantees extended by them *vide* letters dated 10.01.2017 [**Exhibit ‘BB’, page 443, Vol.III**].
- (i) The Corporate Debtor acknowledged its liability to SBI by the following: -
- (1) Balance Confirmation Letter dated 31.03.2017 [**Exhibit ‘SS’, page 741, Vol.IV**];
 - (2) Email dated 29.04.2019 [**Exhibit ‘TT’, page 742, Vol.IV**];
 - (3) Email dated 02.05.2019 [**Exhibit ‘UU’, page 745, Vol.IV**].

Each of these documents recorded the outstanding amounts as on that date, along with interest and charges due from the Corporate Debtor to SBI.

- (j) The debt owed to SBI is also recorded in the audited financial statements of the Corporate Debtor for the financial year 2017-18 [**Exhibit ‘WW’, page 755, Vol.IV**].
7. Around 2014, the Corporate Debtor defaulted on repayment of amounts due and payable in respect of the Facilities. Therefore, the account of the Corporate Debtor was classified as a Non-Performing Asset (NPA) by SBI and its erstwhile associate banks on 21.05.2016, with effect from 31.03.2014.
8. The Corporate Debtor came up with a One-Time Settlement (OTS) in March 2018, whereby it promised to settle the outstandings due to SBI and its associate banks in a sum of ₹400 crore against the dues of ₹1192.01 crore as on 31.03.2018. However, even thereafter, the Corporate Debtor failed to pay the proposed settlement amount, leading to the failure of the OTS. Thereafter, SBI issued recall notice dated 25.07.2018, calling upon the Corporate Debtor to repay the entire outstanding amount of ₹1219.88 crore due and payable as on 25.07.2018 [**Exhibit ‘OO’, page 669, Vol.IV**].
9. SBI thereafter initiated proceedings in OA No.1189/2018 before the Debts Recovery Tribunal (DRT), Jabalpur, on 18.09.2018, claiming an amount of ₹1240.46 crore. These proceedings are still continuing.
10. On 20.03.2019, the Financial Creditor initiated a non-binding Term Sheet (**‘Term Sheet’**) with the Corporate Debtor, which contemplated a mechanism to facilitate the sale of the Corporate

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Debtor to a third-party investor by providing for a stand-still period, if the Corporate Debtor completed certain conditions precedent, within seven business days. However, the Corporate Debtor failed to fulfil the conditions precedent, resulting in failure of any potential sale of the Corporate Debtor. As a result, the stand-still period contemplated in the non-binding term sheet never came into effect.

11. Thereafter, the Financial Creditor issued a Demand Notice dated 23.08.2019 to the Corporate Debtor, the Corporate Guarantors and Mr Kailash Shahra, the promoter-director, asking them to pay the entire amount due and payable under the Facilities amounting to ₹1465.48 crore as on that date, within seven days from the date of receipt of the Demand Notice [**Exhibit 'XX', page 899, Vol.V**].
12. Under the Assignment Agreement dated 03.05.2019, the Financial Creditor herein has taken over the debts of SBI.
13. In its reply dated 16.12.2019 filed on 17.12.2019, the Corporate Debtor has set up the following defence: -
 - (a) The Petition is an abuse of process. It is in breach of Inter-Creditor Agreements dated 09.09.2008 [**Exhibit 'G'**] and 22.06.2013 [**Exhibit 'M'**]. The Financial Creditor, being one of the assignees of the consortium lenders, does not have any *locus* to unilaterally file the present petition. Only the lead bank has the power and the authority to institute proceedings against the Corporate Debtor. The Financial Creditor cannot, without consulting the other lenders, cannot file the present petition in breach of the binding agreements.

- (b) The date of default cannot be common for all accounts.
- (c) The debt in question is a time-barred debt as the present proceedings have been filed after three years from the alleged date of default;
- (d) The Petition itself is incomplete. The date of default has been deliberately concealed in Form I, Part IV, and the working computation provided in **Exhibit 'ZZ'**. Further, out of a total of seventeen accounts, the Financial Creditor has failed to provide bank statements of four accounts held with the erstwhile State Bank of Bikaner & Jaipur.
- (e) The Petition has been filed in haste in order to bypass the mechanism laid down in *Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019*. As per the Directions, the lenders of the Corporate Debtor have to undertake a *prima facie* review of the Corporate Debtor's accounts during the review period, which would commence on 01.01.2020 (**"Review Period"**). During this review period of 30 days, lenders may decide on resolution strategy, including the nature of resolution plan, the approach for implementation of resolution plan, etc.
- (f) The documents attached by the Financial Creditor are inadequately stamped as per the Maharashtra Stamp Act, 1958. Therefore, this Adjudicating Authority cannot consider, act upon, or give effect to such insufficiently stamped documents as evidence of any transactions alleged by the Financial Creditor.
- (g) The Financial Creditor has incorrectly claimed as well as capitalised the interest component in breach of RBI guidelines.

Interest should not be calculated after the date of NPA. On an account turning NPA, banks should reverse the interest already charged and not collected by debiting Profit and Loss account and stop further provision of interest. However, banks may continue to record such accrued interest in a Memorandum account in their books.

14. The Financial Creditor has filed an affidavit in rejoinder, *inter alia* enclosing therewith fourteen documents, including financial statements of the Corporate Debtor for the year 2018-19, the restructuring proposals submitted by the Corporate Debtor, and the emails purportedly acknowledging the liability of the Corporate Debtor.

Arguments of Mr Ravi Kadam, Learned Senior Counsel for the Financial Creditor

I. The case of the Financial Creditor

15. Mr Ravi Kadam, Learned Senior Counsel appearing for the Financial Creditor, reiterated the averments of the Financial Creditor and stated as follows: -
 - (a) SBI assigned its exposure (*including exposure of its erstwhile associate banks*) under an Assignment Agreement dated 03.05.2019 **[Exhibit QQ, page 709, Vol.IV]** in favour of the Financial Creditor. The modification of existing securities and charges in favour of the Financial Creditor has also been recorded and registered with RoC Mumbai **[Exhibit RR, page 737, Vol.IV]**. Therefore, the Financial Creditor (India Resurgence ARC Private Limited) stepped into the shoes of SBI with all attendant

right, title and interest. The principal sum due to SBI and its erstwhile associate banks under the Facilities amounts to ₹1469.60 crore.

- (b) The Corporate Debtor did submit restructuring proposals in 2015. The consortium lenders considered the proposals and restructured the debts. However, on account of continuing default by the Corporate Debtor, the loan account was classified as NPA by SBI and its erstwhile associate banks on 21.05.2016, but it took effect from 31.03.2014, being a case of failed restructuring **[para 15 at p.33, Vol.I]**.
- (c) The Corporate Debtor has consistently failed to honour its commitments, leading to initiation of proceedings in OA No.1189/2018 before the DRT, Jabalpur, on 18.10.2018.

II. Scope of enquiry in a section 7 petition

- 16. Mr Ravi Kadam, learned Senior Counsel, took us through the judgment of the Hon'ble Supreme Court in ***Innoventive Industries Limited v ICICI Bank Limited***,¹ and submitted that the scope of enquiry in a section 7 petition is restricted only to look at the existence of debt and default, and once the same is proven, the Petition must be admitted.
- 17. In the present case, the Corporate Debtor has, in multiple documents, unconditionally accepted the existence of debt and

¹ AIR 2017 SC 4084

default. It is significant to note that the Corporate Debtor has not contested the existence of debt or default in its reply.

III. On the limitation challenge raised by the Corporate Debtor

18. The Corporate Debtor had raised the issue of limitation. debt was classified as NPA by SBI on 21.05.2016 but with effect from 31.03.2014. Hence, the date of default would have been 01.01.2014, *i.e.*, ninety days prior to the effective date of NPA classification. The period of default, as per the Corporate Debtor, therefore ended on 31.12.2016. The Corporate Debtor had raised the issue of limitation and stated that the petition is barred by limitation.
19. In response to the challenge on limitation, Mr Ravi Kadam submitted that the company petition has been filed with documents and information sufficient to prove the existence of both 'debt' and 'default', which are the two ingredients required to successfully maintain a petition under section 7 of the IBC. The rejoinder is nothing but a statement of defence to the position taken by the Corporate Debtor in its reply, and for this reason, must be considered by this Adjudicating Authority in its entirety while determining whether to admit the present petition.
20. Mr Ravi Kadam further submitted that the present petition is not barred by limitation, since the Corporate Debtor has made innumerable part payments between 2014 and 2018 towards the outstanding dues of the Financial Creditor **[Exhibit 'BBB', page**

938, Vol.V]. Each such part payment has the effect of commencing a fresh limitation period in terms of section 19 of the Limitation Act. Therefore, at the very least, the limitation period stands extended till 22.03.2021, *i.e.*, three years from the date of last payment (23.03.2018) [**Exhibit ‘BBB’, page 1494, Vol.VIII**]. Additionally, the period of limitation started afresh in terms of section 18 of the Limitation Act, 1963, on each date when the debt was duly admitted and acknowledged by the Corporate Debtor.

21. Even assuming that the Corporate Debtor’s best case on this issue is that the default occurred on 01.01.2014, there are continuous part-payments, revival letters and acknowledgements in balance sheets and various correspondence issued by the Corporate Debtor between 2013 and 2019, which will bring the present petition within the scope of limitation.

IV. On the petition being in breach of the inter se agreements

22. On the contention that the present petition is in breach of Inter Creditor Agreements between the consortium lenders, Mr Ravi Kadam submitted that the inter creditor agreements provide for a mechanism for enforcement proceedings and do not, in any manner, regulate initiation of insolvency or winding up proceedings under various statutes.
23. Mr Ravi Kadam further submitted that in any view of the matter, the Corporate Debtor is not entitled to take benefit of such inter creditor agreements, since it is not privy to the contract.

24. In this regard, Mr Ravi Kadam submitted that the Hon'ble NCLAT has, in its judgment dated 31.01.2020 in ***Oriental Bank of Commerce v Ruchi Global Limited***,² stated in para 8 on page 4 that as follows: -

“In our view the Agreement between inter se the banks, the Corporate Debtor cannot take benefit of the clauses in the Agreement, which are binding only the banks. If there is a default by any member of the Consortium, it would be a matter for the other banks to be aggrieved with and the Corporate Debtor cannot take benefit of the same to raise grievance. If the Appellant Bank did not act in tune with the Consortium Agreement, it may be a matter of consideration for other bank/s of the Consortium and/or Reserve Bank of India. However, there is nothing which bars filing of section 7 of IBC Application by the Appellant. Even if there was clause that the Bank which wants to take action should give notice of 30 days, if notice was not given, that would be a matter for the Lead Bank to look into. That does not create bar for the Appellant Bank to move Application under section 7 of IBC.”

V. On the RBI Directions

25. Mr Ravi Kadam submitted that the ***Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019***, the same are applicable only to the following entities: -

- (a) Scheduled Commercial Banks (excluding Regional Rural Banks);

² Company Appeal (AT) (Insolvency) No.387/2019

- (b) All India Term Financial Institutions such as NABARD, NHB, Exim Bank and SIDBI;
- (c) Small Finance Banks; and
- (d) Systemically Important Non-Deposit taking Non-Banking Financial Companies and Deposit Taking Non-Banking Financial Companies.

Since the present Financial Creditor is an Asset Reconstruction Company (ARC), it does not fall within any of the four categories. Therefore, it is not bound by the Directions.

VI. On interest being claimed after classification of the Corporate Debtor's account as NPA

26. Mr Ravi Kadam submitted that the RBI's Master Circular on this score merely seeks to set accounting standards and practices. It does not take away the right of a lender to charge interest under a loan agreement in the total amount claimed just because the account has been classified as an NPA.

VII. On the petition being abuse of process

27. Mr Ravi Kadam submitted that the Term Sheet of 20.03.2019 to the effect that the Financial Creditor is entitled to receive ₹440 crore from the Corporate Debtor by 31.03.2020 as full and final discharge of the debt owed to the Financial Creditor, is not borne out by the contents of the Term Sheet itself, since the same was for "discussion purposes" only and was non-binding in nature. Further, the stand-still period contemplated under the Term Sheet was subject to

certain conditions precedent being fulfilled by the Corporate Debtor. The non-binding in principle Term Sheet never came into force and was never implemented as the conditions precedent were not completed.

VIII. On documents not being adequately stamped

28. The Corporate Debtor has emphasised that the underlying financial documents were not adequately stamped and therefore this Adjudicating Authority should not take cognisance of the same.
29. In this regard, Mr Ravi Kadam stated that in terms of section 7 of the IBC, only the existence of debt and default are required to be proved, and once the same is proven, the petition should be admitted. Technical defects such as adequacy of stamp duty cannot be a bar to admission of the petition under section 7, particularly when the Corporate Debtor itself has not disputed the existence of the financial debt in the present case or the existence of a default in relation thereto and has further acknowledged its liability in its audited financial statements and other documents that are placed on record.
30. Amongst other things, Mr Ravi Kadam submitted that the Memorandum of Creation of Mortgage dated 02.02.2017 is the principal instrument within the meaning of section 4(1) of the Maharashtra Stamp Act, 1958, and therefore, the other documents shall be chargeable only with a nominal fee, if any. In any event, Mr Ravi Kadam submitted, the inadequacy of the stamp duty will

not render the documents void, nor will it relieve the Corporate Debtor from its liabilities. It is merely a curable defect.

Arguments of Mr Janak Dwarkadas, Learned Senior Counsel for the Corporate Debtor

I. On the petition being an abuse of process

31. Mr Janak Dwarkadas, learned Senior Counsel appearing for the Corporate Debtor, opened his arguments and submitted that Financial Creditor is an Asset Reconstruction Company (ARC)/ assignee of SBI, and claims a debt of ₹1487.60 crore. The ARC has paid ₹360 crore under the Assignment Agreement of 03.05.2019. The Term Sheet signed on 20.03.2019 records an agreement that if the ARC got ₹360 crore multiplied by an Internal Rate of Return (IRR) of 1.22 before 31.03.2020 (270 days), then there would be sufficient satisfaction. The date of 31.03.2020 is yet to pass. He submits that the Corporate Debtor is in a position to make this payment of ₹440 crore. The CFO of the Corporate Debtor, Mr Manish Patidar, is present in court and corroborates this statement.
32. Mr Janak Dwarkadas further submitted that the Corporate Debtor is a running company. There are employees, investors, other creditors, etc. Punjab National Bank, one of the consortium lenders, is opposed to this Petition. This is a proceeding *in rem* as held by the Hon'ble Supreme Court in ***Swiss Ribbons Private Limited v Union of India***.³

³ (2019) 4 SCC 17, decided on 25.01.2019

33. Mr Janak Dwarkadas further submitted that the Financial Creditor is an ARC, who are in the business of acquiring debts for a discounted value. The Financial Creditor has preferred this petition with ulterior motives. Under rule 11 of NCLT Rules, 2016, this Tribunal is vested with inherent power to dismiss the petition if it is found to be an abuse of process.

II. Petition is time-barred

34. Mr Janak Dwarkadas submitted that under section 7 of the IBC, the Corporate Debtor is entitled to point out that the debt is not due. That would make it not payable in law. Section 3 of the Limitation Act, 1963, states that the court should look into the aspect of limitation even if this defence is not raised.
35. Mr Janak Dwarkadas submitted that the Financial Creditor's own case is that the date of default is 31.12.2013. We should not look into the Rejoinder to see if there is an answer to the Limitation aspect. There is no acknowledgement referred to in the Petition within the three years commencing from 31.12.2013. Documents referred to in paras 8, 9, 10 & 11 of the Brief Note are all documents executed after the three-year period. The Petition makes no reference to this acknowledgement at all. The Adjudicating Authority ought not to look into the documents put in the Rejoinder after the reply has been put in and the Financial Creditor has been caught out, he submitted.

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36. Mr Janak Dwarkadas further submitted that in case the Corporate Debtor had not appeared at all, the Petition would not have been allowed by this Tribunal since *ex facie* this Tribunal would not have been satisfied that the Petition is not time-barred. He referred to the documents mentioned at page 37 of the Petition and submitted that all of those documents were beyond the three-year period of limitation. As per their own statements and documents in the petition, there is not a single document that would extend limitation in terms of section 18 of the Limitation Act, 1963.

III. The Petition is incomplete

37. Mr Janak Dwarkadas submits that Financial Creditor failed to annex bank statements for four accounts which were with the erstwhile State Bank of Bikaner & Jaipur. The Certificate issued under the Bankers' Books Evidence Act, 1891 is also incorrect.
38. Mr Dwarkadas further submits that the threshold of proof is much higher in a section 7 Petition. The Petition must be complete in all respects for enabling the Tribunal to pass an order *in rem* upon such Petition. If this is not done, then the Financial Creditor cannot be allowed to rectify the deficiencies by way of additional documents in the Rejoinder. The only two pleadings contemplated are the petition and the response. There is no provision for a rejoinder.

IV. Date of default cannot be common for all accounts

39. Mr Janak Dwarkadas further pointed out that on 21.05.2016, the account of the Corporate Debtor was classified as NPA. However,

being a case of failed restructuring, the accounts were declared to be NPA with effect from 31.03.2014. State Bank of Bikaner & Jaipur did not restructure the accounts. Therefore, there cannot be uniform date of default for all banks.

40. There is no declaration of default in respect of State Bank of Bikaner & Jaipur. Therefore, the Financial Creditor cannot maintain a petition on this account also.

V. Petition is in breach of Inter Creditor Agreement

41. Mr Janak Dwarkadas pointed out that the Financial Creditor is not the assignee of all the loans granted by the banks and financial institutions to the respondent. All subsisting contracts and deeds are to be acted upon fully and effectually by the Financial Creditor. Punjab National Bank should have been in the forefront since it is the lead bank and it alone had the authority to file actions and proceedings against the respondent on behalf of the entire consortium. It would have been appropriate that the Lead Bank take a call on the matter. All of these banks are public banks. No purpose would be served by pushing the company into CIRP.
42. At this stage, the Bench posed a query to Mr Janak Dwarkadas: “*Can a contractual obligation override a statute?*” To this, Mr Janak Dwarkadas replied that the contract is not contrary to public policy. It should not be that one of the lenders breaks ranks and contends that it is not bound by the Inter Creditor Agreement (ICA) entered

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into by and between the consortium banks. If this is permitted, then there the very purpose of the ICA would stand defeated.

43. Mr Janak Dwarkadas further submitted that in the present case, Punjab National Bank (PNB) has offered a separate OTS. If the present petition is admitted, then that OTS would be in jeopardy.
44. Counsel for PNB is present in court and he submits that he would obtain instructions in the matter.

VI. Insufficient Stamp Duty - the principal financial documents are not admissible in evidence

45. Mr Janak Dwarkadas submitted that the financial documents under which the lending took place, and under which the obligation to repay has arisen, are dated 09.09.2008 (Term Loan Facility Agreement) and 22.06.2013 (Working Capital Consortium Agreement). These are the principal agreements and they have not been adequately stamped. Additionally, documents relating to personal guarantees, corporate guarantees, non-disposal of shares and memorandum of creation of mortgage were also signed, which are listed at pages 10-12 of the Reply. Mr Janak Dwarkadas submitted that a mortgage executed as an additional security, cannot and should not be treated as the principal financial documents, especially when they are not contemporaneous documents but separately by a considerable length of time.
46. Further, section 30A of the Maharashtra Stamp Act, 1958, casts an obligation on the financial institution to pay proper stamp duty.

The stamp duty should be paid by the person who is relying on the document. In *Garware Wall Ropes Limited v Coastal Marine Constructions and Engineering Limited*,⁴ the Hon'ble Supreme Court held in para 22 that a document insufficiently stamped is not enforceable.

47. In the present case, the documents were executed out of the State of Maharashtra. Therefore, section 3(b) of the Maharashtra Stamp Act, 1958 applies.⁵ The Affidavit in Reply at page 11 mentions the place of execution of the documents. Eight of them were executed in Indore and one in Ahmedabad. The Financial Creditor brought them into the State of Maharashtra. Therefore, it was under an obligation to pay the relevant stamp duty as per the Maharashtra Stamp Act, 1958.
48. The Memorandum of Creation of Mortgage dated 02.02.2017 cannot be the principal document, since it came into being only on 02.02.2017, whereas the obligation to repay arose out of the documents executed on 09.09.2008 (*Term Loan Facility Agreement*) and 22.06.2013 (*Working Capital Consortium Agreement*).

⁴ (2019) 9 SCC 209

⁵ Section 3(b) of the Maharashtra Stamp Act reads as follows: - Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefor respectively, that is to say, - (b) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in this State.

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49. Section 4 of the Maharashtra Stamp Act, 1958, has no application since it applies only to development agreement, sale, lease, mortgage or settlement. The instruments because of which the debt is sought to be recovered is not the mortgage deed. This deed is just an entry that the title documents have been deposited. Where several instruments are employed for completing the mortgage, then the principal instrument alone shall be chargeable.
50. Mr Janak Dwarkadas submitted that this principle cannot be applied to this situation, where the principal documents were executed on 09.09.2008 (Term Loan Facility Agreement) and 22.06.2013 (Working Capital Consortium Agreement). The mortgage document [**Exhibit GG, p.475, Vol.III**] states at p.476 & 479 that it was being executed “*in order to create security*” Thus, the mortgage was being executed to secure the term loan and the working capital facility. This cannot be stretched to become the principal document. The mortgage was executed by way of additional security to the principal documents, not the other way round. Therefore, the mortgage deed by itself does not make the petitioner fall within the definition of the term, “financial creditor.”
51. Countering the arguments of Mr Ravi Kadam that all that the petitioning Financial Creditor needed to do was to establish a default or evidence of default in terms of section 7 of the IBC, Mr Janak Dwarkadas submitted that this argument overlooks the position that section 7(3)(a) is not an independent provision. Section 7 starts with the term, “*A Financial Creditor*” “*Financial*

Creditor” has been defined in section 5(7) as a person to whom a financial debt is owed. *“Financial debt”* is defined in section 5(8) – it is an inclusive definition which means a debt along interest. Section 3(11) defines *“debt”* to mean a liability or obligation in respect of a claim which is due from any person.

52. Mr Janak Dwarkadas submitted that it is for the Financial Creditor to satisfy the Tribunal that there is a financial debt owed to the financial creditor. The existence of a debt is therefore a *sine qua non* to the maintainability of the Petition under section 7. The default is a consequence to the existence of a debt. A record of default is secondary and consequential to the existence of a financial debt. In the absence of financial debt, there will be no question of default in payment of the financial debt. There is distinction between evidence of debt and evidence of default and one cannot be confused for the other, Mr Dwarkadas submitted.

Arguments of Mr Ravi Kadam, Learned Senior Counsel for the Financial Creditor, in rejoinder

On abuse of process

53. Mr Ravi Kadam submitted in his arguments in rejoinder that the question whether the Petitioner was a Financial Creditor was never in dispute. Further, the Stamp Act is concerned only with the admissibility of the documents, not with existence of a default. The law is not that these documents do not exist.

54. On the abuse of process argument, Mr Ravi Kadam denied the arguments in toto and submitted that the Term Sheet (p.161 of reply) was only for discussion purposes, and non-binding. There were conditions precedent that were observed only in the breach. Further, it was for the Financial Creditor to decide what would be the Internal Rate of Return (IRR) for the investment that it would be making, and it was not for the Corporate Debtor to decide on behalf of the Petitioner.

On Limitation

55. Mr Ravi Kadam submitted that there were part payments made which have the effect of extending the limitation in terms of section 19 of the Limitation Act. The part payments have been mentioned in the petition itself, and not in the rejoinder. In his reply arguments, the learned Senior Counsel for the Corporate Debtor has not addressed the issue of part payments at all. Mr Ravi Kadam drew our attention to page 1080 [**Vol.6 of the Petition**] and page 1100 [**Vol.6 of the Petition**] in regard to such part payments. The part payments made are good enough to extend the limitation under section 19 of the Limitation Act, 1963.
56. Mr Ravi Kadam further submitted that originally the date of default was 31.12.2013. Thereafter, there was a restructuring that was allowed [**Para 11 at p.28 of the petition**] and the credit limits under the facilities were restructured and renewed. Restructuring was implemented with effect from 08.06.2015. The proposal for restructuring from the Corporate Debtor is placed at page 69 of the

affidavit in rejoinder [**Exhibit ‘C’** of the Rejoinder], whereby the letter dated 19.12.2014 from the Corporate Debtor addressed to IDBI Bank has been placed on record.

57. Mr Ravi Kadam further submitted that the revival letters are part of the petition and also in the rejoinder. The part payments made in pursuance of restructuring proposals are not effaced because of setting the clock back to 31.12.2013 in terms of RBI's guidelines. The part payments will inure to the facilities granted by the financial creditor. Independently, there are revival letters at page 124 of the Rejoinder (31.05.2015).

On breach of inter se agreement

58. Mr Ravi Kadam submitted that the *Inter Se* Agreement is amongst the consortium lenders. The Corporate Debtor is not privy to those contracts. Therefore, it is not for the Corporate Debtor to take advantage of the provisions contained in these contracts.

On stamp duty

59. Mr Ravi Kadam submitted that under section 7, it is no doubt true that the petitioner has to establish that it is a Financial Creditor, that there is a debt due, and that there is a default by the Corporate Debtor. The Financial Creditor can show that it is a Financial Creditor on the basis of the Mortgage Deed dated 02.02.2017 [**Exhibit ‘GG’, p.475, Vol.III of the petition**]. He drew our attention to rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and regulation 8 of the

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Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations. The existence of a debt may be proved on the basis of regulation 8(2)(b)(6) *ibid* – the word “including” means that this is disjunctive.

60. Mr Ravi Kadam further referred to the ratio in the following authorities: -

(a) ***Edelweiss Asset Reconstruction Company Limited v Sejal Glass Limited***,⁷ wherein it has been stated as follows: -

“26. With regard to the other objection on the agreements being not duly stamped, it is noted that the Corporate Debtor itself has repeatedly relied and acted upon the said agreements, viz., in its affidavit in reply dated 06.02.2018 filed on behalf of Sejal Glass Limited in Company Petition No.943/2014 in the High Court of Judicature at Bombay and again in its standalone financial statements for the period 01.04.2016 to 31.03.2017.

“27. Therefore, even if the agreements as alleged are not admissible as an evidence of debt and default, there are several other documents that show the admission by the Corporate Debtor of the debt that it owes to

⁶ (2) The existence of debt due to the financial creditor may be proved on the basis of -

- (a) the records available with an information utility, if any; or
- (b) other relevant documents, **including** -
 - (i) a financial contract supported by financial statements as evidence of the debt;
 - (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
 - (iii) financial statements showing that the debt has not been paid; or
 - (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

⁷ CP No.1799/2018, order dated 13.02.2019 passed by NCLT Mumbai Bench.

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the petitioner, viz., its letter dated 14.05.2016 and its affidavit in reply dated 06.02.2018 filed in the Hon'ble Bombay High Court."

(b) In ***Standard Chartered Bank v Ruchi Soya Industries Limited***,⁸ this Tribunal framed the question whether facility agreements have been inadequately stamped as stated by the Corporate Debtor, if so, whether this petition can be admitted basing on such inadequately stamped agreement. This Tribunal held that the facility agreement alone is not the document to prove this case, there is surplus material to prove that debt and default are in existence whereby, this argument is not sufficient enough to deny the claim of the petitioner herein.

61. Mr Ravi Kadam, Learned Senior Counsel, also referred to para (xii) at p.15 of the judgment of the NCLT Kolkata Bench in ***Alliance Broadband Services v Manthan Broadband***.⁹ However, on facts, this judgment is not of relevance here, because Maharashtra's Stamp Act has provisions in terms of section 30A thereof, whereby duty has been cast on the financial institutions to pay the proper stamp duty.
62. Further, Balance sheets signed by the Directors of the Corporate Debtor would be binding. There are letters admitting the debt, admitting the default, asking for restructuring, etc. It is near impossible for the Corporate Debtor to deny the existence of a financial relationship.

⁸ CP No.1371 & 1372/2017 dated 15.12.2017 by the NCLT Mumbai Bench

⁹ MANU/NC/7518/2019 dated 18.09.2019

Closing arguments on the side of the Corporate Debtor

63. Mr Prateek Seksaria, Learned Counsel for the Corporate Debtor, had a point to make with reference to the status of the Petitioner. He submitted that all secured creditors are not necessarily financial creditors. It may simply be a case of debt as defined under section 3(10) of the IBC. He placed on record the judgment in ***Anuj Jain (Interim Resolution Professional for Jaypee Infratech Limited) v Axis Bank Limited***.¹⁰ He submitted that in that case, the Hon'ble Supreme Court had held that mortgagors etc. cannot be treated as financial creditors.
64. Further, section 7(3) of the IBC requires the Financial Creditor to furnish a record of default with the Information Utility or such other evidence of default as may be specified in the regulations. Mr Prateek Seksaria submitted that there is no covenant to repay in terms of the Mortgage Deed. Those emanate from earlier documents. The question then is how the petitioner has established its status as a financial creditor in terms of the original Company Petition.
65. Mr Prateek Seksaria, Learned Counsel, also drew our attention to regulation 8¹¹ of the Insolvency and Bankruptcy Board of India

¹⁰ 2020 SCC OnLine SC 237 decided on 26.02.2020

¹¹ **8. Claims by financial creditors.**—

- (1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule: Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.
- (2) The existence of debt due to the financial creditor may be proved on the basis of –

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and submitted that it should satisfy clause (i), clause (ii), and clause [(iii) or (iv)] of regulation 8(2)(b). The word “or” is restricted only to clauses (iii) or (iv) and cannot be stretched to mean any one of clauses (i), (ii), (iii) or (iv).

66. Further, Mr Prateek Seksaria submitted that the first balance sheet the Financial Creditor relies on is the acknowledgement found in the balance sheet for the year 2017-18 **[pp.755-905-Vol.4 & Vol.5]** & 2018-19 **[Exhibit ‘H’ to the Rejoinder – p.166]**. This balance sheet cannot have the effect of extending the limitation within the meaning of section 18 of the Limitation Act, 1963. The Petitioner is an ARC which has been assigned a debt by the financial creditor. There was term loan facility by a consortium of ten different bankers which lent money. The second facility is a working capital credit facility which was by nine lenders who formed a consortium. The loan transactions under different lending arrangements cannot be clubbed together. There were part payments made not in pursuance of one consolidated facility, but specifically into only two specific accounts.

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- (a) the records available with an information utility, if any; or
(b) other relevant documents, including –
(i) a financial contract supported by financial statements as evidence of the debt;
(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
(iii) financial statements showing that the debt has not been repaid; or
(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

67. On NPA, Mr Prateek Seksaria referred to the argument of the Learned Senior Counsel for the Financial Creditor that the NPA date is only for accounting purposes and submitted that such is not the case in the petition at all. He submitted that there cannot be two dates of default – one for accounting purposes as per RBI guidelines; and the second for the purposes of IBC.
68. Mr Janak Dwarkadas, Learned Senior Counsel for the Corporate Debtor, further submitted that under no circumstances can there be a financial debt arising out of a mortgage deed. He took us through the provisions of section 58 of the Transfer of Property Act, 1882, and submitted that the obligation to pay, and the terms of repayment, arise out of the financial documents dated 09.09.2008 (Term Loan Facility Agreement) and 22.06.2013 (Working Capital Consortium Agreement). Ignoring these documents, there is no mortgageable interest in the mortgage.
69. Mr Janak Dwarkadas submitted that unless there is mortgage debt, there cannot be a mortgageable interest. The existence of mortgageable interest either *in praesenti* or in the future, is a *sine qua non*. To say that there is a financial debt arising out of the mortgageable interest completely negates sections 11 and 58 of the Transfer of Property Act, 1882.
70. The memo of entry only creates a mortgage. The Mortgage Deed by itself cannot make anyone a Financial Creditor. If the mortgagee wants to enforce the mortgage or the mortgagor wants to redeem the mortgage, he will necessarily have to show the underlying

documents that created the debt. In a given case, one document may contain everything. But such is not the case here. There is a huge time-gap between advancement of money (in 2010) and the creation of a security. Therefore, this document (the Mortgage Deed) by itself cannot be termed to be the principal document from which the financial debt arose. In the absence of those documents, there cannot be a mortgageable interest in the mortgage.

71. Therefore, the argument is that the principal financial documents are the Term Loan Facility Agreement dated 09.09.2008 and Working Capital Consortium Agreement dated 22.06.2013. These are still not adequately stamped within the meaning of section 3(b) of the Maharashtra Stamp Act, 1958, and hence inadmissible in evidence.

Closing Arguments on the side of the Financial Creditor

72. Mr Chetan Kapadia, Learned Counsel for the Financial Creditor, had a short point to make with reference to the decision of the Hon'ble Supreme Court in *Anuj Jain (supra)*. He submitted that this case concerned a seat in the CoC and voting rights thereon. The Hon'ble Supreme Court had held that in such a situation, there has to be distinction drawn between a financial creditor and a creditor who holds a security interest. The application of that judgment to the facts of the present case cannot lie, because the mortgage was created by the Corporate Debtor in the present case.

73. Mr Chetan Kapadia further submitted that the documents submitted by the Financial Creditor in the present case can be broadly classified into five categories as follows: -
- (1) Balance sheets;
 - (2) Individual letters of acknowledgement;
 - (3) Requests for restructuring;
 - (4) Bank statements with proof of payments, proof of part payments and proof of disbursements; and
 - (5) Principal financial statements which have been disputed on account of inadequate stamp duty.
74. On the aspect of part payments, Mr Chetan Kapadia drew our attention to **Exhibit 'ZZ'** at p.907 of Vol.V, which enlists the seventeen accounts. Two numbers are written where the accounts are merged. There are 2,000 payments made from the date of NPA (01.01.2014) all the way till 2017 which are contained in **Vol.V** to **Vol.IX**, he stated.
75. We have heard the arguments of both sides on 21.02.2020, 03.03.2020 and 04.03.2020 perused the records.
76. In the Rejoinder at para 27 at page 17, the Learned Senior Counsel for the Financial Creditor has expressly submitted it is a settled position of law that non-payment or inadequate payment of stamp duty does not render the document void or make it in any manner invalid. Therefore, even if the documents are inadequately stamped, it neither makes the facilities void nor does it release the Corporate Debtor from its liabilities. Further, it is a settled

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principle of law that any document that is inadequately stamped may not be admissible in evidence but can definitely be relied upon by this Tribunal for collateral purposes.

77. To counter this, Mr Janak Dwarkadas, Learned Sr Counsel for the Corporate Debtor, relied on the judgment of the Hon'ble Supreme Court in *Avinash Kumar Chauhan v Vijay Krishna Mishra*,¹² wherein it has been held that an inadequately stamped document would not be admissible even for collateral purposes (para 25 at p.539 of the judgment). In para 17 at p.537 of the said judgment, it has been held that Parliament has in section 35 of the Act¹³ advisedly used the words "*for any purpose whatsoever.*" Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the aforesaid provisions (relating to impounding of the document). In para 22 of the judgment at p.538, it has also been recorded that section 33 of the Act¹⁴ casts a statutory obligation on all the authorities to impound a document. The Hon'ble Supreme Court, in para 29 of the judgment at page 541, also noted the decision in *T Bhaskar Rao v T. Gabriel* (AIR 1981 AP 175) that the bar against the admissibility of an instrument which is chargeable with stamp duty

¹² (2009) 2 SCC 532, decided on 17.12.2008

¹³ Indian Stamp Act, 1899, which is in *pari materia* with section 34 of the Maharashtra Stamp Act, which states that instruments not duly stamped are inadmissible in evidence, etc.

¹⁴ Indian Stamp Act, 1899, which is in *pari materia* with section 33 of the Maharashtra Stamp Act, which relates to impounding of instrument.

and is not stamped is of course absolute, whatever be the nature of the purpose, be it for main or collateral purpose.

78. Mr Janak Dwarkadas also placed reliance on the judgment of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & others***,¹⁵ wherein it has been held in para 99 as follows: -

“99. So far as Civil Appeal No.7266/2019 and Civil Appeal No.7260/2019 are concerned, the Resolution Professional has rejected the claim of the Appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the Resolution Professional ... The submission of the Appellants that they have now paid the requisite stamp duty after the impugned NCLAT judgment would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed.”

79. We have carefully considered the submissions made by the learned Senior Counsel on both sides, and perused the records.
80. In a proceeding under section 7 of the IBC, we are not required to go into the aspect of what constitutes a primary document. We are only required to go into the 3D's – debt, default and dispute. Additionally, we are required to consider the overarching question whether the petition is hit by limitation or not.

¹⁵ 2019 SCC OnLine SC 1478 (15.11.2019)

81. In *Vashdeo R. Bhojwani Vs. Abhyudaya Co-Operative Bank Ltd. & another* decided by the Hon'ble Supreme Court on 02.09.2019,¹⁶ it was held as follows: -

"3. Having heard learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services Private Limited v Parag Gupta and Associates, 2018 (14) Scale 482, para 27 of which reads as follows:-

"27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

82. Therefore, the date of default becomes the key determinant in deciding the question of limitation.
83. In the Petition, the Financial Creditor has not mentioned the date of default. This has been highlighted in the Reply dated 16.12.2019 to the Petition, filed before this Adjudicating Authority on 17.12.2019.
84. Mr Janak Dwarkadas, Learned Senior Counsel for the Corporate Debtor has argued that since there is a total of seventeen accounts,

¹⁶ (2019) 0 SCC 158 : 2019 SCC OnLine SC 1159

the dates of default cannot be uniformly applied to all and will have to be individually established. This argument has not been properly rebutted by the Financial Creditor. Further, he pointed out that the Financial Creditor's own case is that the date of default is 31.12.2013. In so far as the Limitation aspect is concerned, Mr Janak Dwarkadas contended that we should not look into the Rejoinder to see if there is an answer, since this is after a reply has been filed.

85. There is no document on record which would attest to a straightforward acknowledgement of liability within the three-year period commencing from 01.01.2014. The documents mentioned at page 37 of the Petition are all dated beyond the three-year period commencing from the date of default, which would render it outside the scope of limitation. It is for the Financial Creditor to prove that documents acknowledging the liability were executed within the three-year period, which would have enabled the Financial Creditor to take advantage of section 18 of the Limitation Act, 1963.
86. In this view of the matter, there is no resetting of the Limitation Clock either under section 18 or under section 19 of the Limitation Act, 1963.
87. On both these counts, there is no effective acknowledgement of liability within the meaning of section 18 of the Limitation Act, 1963, which would have the effect of extending the period of limitation.

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88. Therefore, we hold that the Financial Creditor has not proved beyond doubt that the present petition is within the period of limitation prescribed for proceedings under the IBC.
89. During the course of arguments, a further issue was raised regarding the status of India Resurgence ARC Private Limited as a 'Financial Creditor,' following the judgment of the Hon'ble Supreme Court in **Anuj Jain (IRP of Jaypee Infratech Limited v Axis Bank Limited)**.¹⁷ In that case, the Hon'ble Supreme Court has stated as follows: -

*"47. A conjoint reading of the statutory provisions with the enunciation of this Court in **Swiss Ribbons** (supra) leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other*

¹⁷ Civil Appeal Nos.8512-8527/2019 decided by the Hon'ble Supreme Court on 26.02.2020

stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

“47.1 Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the Corporate Debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor’s growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former, i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the process contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

“47.2 Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of ‘financial creditors’ as per the definitions contained in sub-sections (7) and (8) of section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of ‘debt’ under section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a ‘financial debt’ within the meaning of section 5(8) of the Code.”

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90. Upon a careful reading of the judgment in its entirety and placing it in the factual matrix of that case, it is clear that it applies to a situation where a corporate debtor has given its property in mortgage to secure the debts of a third party. Such is not the case here. Therefore, the *ratio decidendi* of that judgment will not apply to the facts of the present case.
91. To sum up, -
- (a) There is no declaration of default in respect of the accounts maintained by the erstwhile State Bank of Bikaner & Jaipur, which got merged with State Bank of India;
 - (b) There is no document placed on record acknowledging the liability in the three-year period commencing from 31.12.2013 or 01.01.2014, whichever date is taken to be the date of default, which would have the effect of extending the period of limitation in terms of section 18 of the Limitation Act, 1963;
 - (c) The Balance Sheets placed on record in the rejoinder are for the period from 2017-18 onwards. This is past the three-year period of limitation. This cannot be taken to be acknowledgement within the meaning of section 18 of the Limitation Act, 1963. No reasons have been adduced as to why the Financial Creditor was not in a position to place the Balance Sheets of the Corporate Debtor for the previous years, either as part of the Petition or as part of the Rejoinder.

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The petition filed by the Financial Creditor is, therefore, defective to the extent indicated above.

92. For all the reasons, the present Company Petition CP (IB) No.3846/2019 fails and therefore, we are constrained not to admit the same as prayed for at this moment. As a corollary, IA No.396/2020 succeeds and is allowed.
93. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the Financial Creditor before any other judicial forum, including this Adjudicating Authority after defects are cured, shall not be prejudiced on grounds only of dismissal of the present petition by this Adjudicating Authority, if such proceedings are otherwise maintainable in law.
94. Needless to say, the petitioner is at liberty to pursue its legal remedies in the pending proceedings before DRT, Jabalpur.
95. Let a copy of this order be communicated to the parties in terms of the provisions of section 7(5)(ii) of the IBC.

Sd/-
Ravikumar Duraisamy
Member (Technical)

06.05.2020

Sd/-
Rajasekhar V.K.
Member (Judicial)