

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CP (IB) No.616/KB/2018
CA (IB) No.818/KB/2018
CA (IB) No.148/KB/2019
CA (IB) No.846/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;
And

In the Matter of:

The Press Trust of India Ltd. (PTI), PTI Building, 4, Parliament Street, New Delhi
- 110 001
.....Operational Creditor

And

In the Matter of:

Axiom Estates Advisory Services Pvt. Ltd., PTI Building, 7th Floor, DP-9, Kolkata
- 700 091
..... Corporate Debtor

Date of hearing 20th September 2019

Order Delivered on 1st October 2019

Coram:

Madan B Gosavi, Member (J)
Virendra Kumar Gupta, Member (T)

For the Operational Creditor

: 1. Mr. Anirban Roy, Advocate
2. Ms. Prapa Ganguly, Advocate

ORDER

Virendra Kumar Gupta, Member (Technical)

This petition under Sec.9 of the Insolvency & Bankruptcy Code, 2016 has been filed by the operational creditor, viz., The Press Trust of India Ltd. (PTI) for initiation corporate insolvency resolution process against the corporate debtor, viz., Axiom Estates Advisory Services Pvt. Ltd. for the reasons that the corporate

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debtor has failed to pay outstanding sum of Rs.7285164/- which comprises of Rs.6194096/- (principal amount) and Rs.10,91,068/- (interest) thereon.

2. The facts, in brief, are that the operational creditor had entered into a lease agreement with the corporate debtor for letting out part of its property for a period of 5 years with effect from 1st November 2010 to 31st October 2015. Extension of such agreement was done through an agreement dated 1st November 2015 for a period up to 31st October 2020. The corporate debtor is running its business from this place and using the said premises also as its registered office. On failure of corporate debtor to pay the rent for several months and also electricity and water charges, a meeting was held in January 2017 whereby corporate debtor assured to clear off its dues, however, outstanding amount as mentioned hereinbefore still remained pending.

3. Ld. Counsel for the operational creditor narrated these basic facts and drew our attention to the bills raised by the operational creditor, various cheques given by the corporate debtor and other correspondences exchanged between them to substantiate its claim. Our attention was also drawn at pages 17 and 18 of the petition containing unpaid bills along with interest thereon.

4. Ld. Counsel, thereafter, took us to the lease agreement dated 20th January 2012, defining the role and responsibility of each of the parties, which is placed at pages 19 to 54 of the Paper Book. Thereafter, Ld. Counsel submitted that notice under Sec.8 Insolvency & Bankruptcy Code, 2016 was delivered on 13th February 2018 to which response by the corporate debtor was submitted wherein it was stated that earlier notice under Sec.8 Insolvency & Bankruptcy Code, 2016 was issued and delivered on 17th October 2017, hence, the said notice was bad in law and unenforceable. In the said letter the corporate debtor has also alleged that electricity supply and other essential services in the leased

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premises had been illegally disconnected. It has also been alleged that there were deficiency in services being provided by the operational creditor hence, there was no liability on the part of the corporate debtor to pay such claim.

5. In the reply affidavit filed on behalf of the corporate debtor, it has been claimed that the corporate debtor invested in internal furnished air conditioning to make the office premises habitable and workable and for such exercise a sum of Rs.8091241/- was incurred which was to be reimbursed by the operational creditor. It has been further claimed that in fact, including refund of security deposit and loss on account of disruption of business were considered then the amount of claim due from operational creditor would be Rs.98,03,708/-. In regard to claim of the corporate debtor that alleged amount did not fall within the definition of claim as defined in Sec.3(6) of Insolvency & Bankruptcy Code, 2016 nor it was of the nature of operational debt, hence, this petition was not maintainable in law at all.

6. On behalf of operational creditor, in the rejoinder, submitted that notice dated 17th October 2017 was not in the correct form and/or was not in accordance with law hence, the same had been withdrawn. Second petition was filed based on the fresh notice dated 9th February 2018, hence, the legal requirements of Sec.8 of Insolvency & Bankruptcy Code, 2016 were met and consequently, the petition was maintainable. It has also been claimed that the operational creditor has raised invoices for the period during which the premises was under the possession of corporate debtor for its business purpose and, therefore, the claim that agreement being unstamped and unregistered could not be a valid ground for not to make payment of rent. It has been contended that operational creditor provided necessary facilities under its scope as per lease agreement hence, the corporate debtor did not suffer due to any

such alleged lapses and such claims were an after thought just to avoid the claims made by the operational creditor through this petition.

7. It has further been claimed that the corporate debtor had taken the premises as is where is basis and all the interiors were to be done by the corporate debtor itself hence, such investment was made by corporate debtor on its own purpose which was never an obligation of operational creditor, as such, claim of the corporate debtor was also liable to be rejected.

8. On behalf of operational creditor it has also submitted that there is no counter claim which is required to be set off against the dues of the operational creditor nor the possession of the said premises had been given, therefore, security deposit was also not liable to be refunded. Operational creditor has also stated that present outstanding fall within the definition of operational debt within the meaning of relevant provision of Insolvency & Bankruptcy Code, 2016, hence, the petitioner was a operational creditor. It has also been pleaded that lease agreement had been executed with mutual consent and there could not be any dispute with regard to amount of rent payable by the corporate debtor.

CA (IB) No.148/KB/2019

9. CA(IB) No.148/KB/2019 had been filed by the corporate debtor for impounding of document as Annexure F to CP(IB) No.616/KB/2018 and send the same to the appropriate authority for stamping and to stay the proceedings.

CA(IB) No.846/KB/2019

10. CA(IB) No.846/KB/2019 had been filed under Sec.60(5) Insolvency & Bankruptcy Code, 2016 seeking relief for recovery of possession and hand over of the premises occupied by the corporate debtor to the operational creditor. It has also been prayed that receiver be appointed if considered necessary.

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11. We have considered the submissions made by both sides, materials on record. In this application following issues emerged for our consideration:-

- i. Whether such outstanding debt is a claim within the meaning of provision of Sec.3(6) of Insolvency & Bankruptcy Code, 2016?
- ii. Whether the unpaid lease rent is an operational debt or not within the meaning of provisions of Insolvency & Bankruptcy Code, 2016?
- iii. Whether insufficient of stamp duty makes the lease agreement unenforceable and not an admissible document for the purpose of Sec.9 Insolvency & Bankruptcy Code, 2016 petition filed by the operational creditor?
- iv. Whether claim of operational creditor regarding recovery of amount spent on interior/furnishing and loss of business can be considered at the stage of admission of petition filed under Sec.9 Insolvency & Bankruptcy Code, 2016?
- v. Whether there were deficiency in services provided by the operational creditor and, if so, whether such deficiencies were of the nature of preexisting dispute between the parties?

12. The present application involves above interesting questions, however, question no.(i) and (ii) go to the root of the matter and fate of the application would depend upon answers to these two questions. First and foremost the basic question arises whether arrears of rent can be considered as a debt or not, as per general law. In general law, there is not an iota of doubt that arrears of lease rent constitute the debt which can be assigned/transferred and recovery proceedings can be initiated against the defaulting party. However, as it is a settled proposition now that the Insolvency & Bankruptcy Code, 2016 is not a mechanism or tool for recovery of outstanding dues but it is a process for revival

of an entity and continuation of such entity as a going concern. In this background, before proceeding further we reproduce definition of few relevant terms as under:-

Sec.3(6) "Claim" means -

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

Sec.3(10) "Creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

Sec.3(11) "Debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

Sec.3(12) "Default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be.

Sec.5(20) "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Sec.5(21) "Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

13. The initiation of discussion is done with the definition of the term "debt".

From bare perusal of such definition following points emerge:-

- a. Debt means a liability or obligation in respect of claim.
- b. It includes financial debt and operational debt.
- c. Legislature in its wisdom has given this term an inclusive meaning and that too with reference to nature of debts i.e. financial debt and

operational debt. It means that the debt can also be of a different nature other than the financial debt and operational debt.

14. To further draw support for our view that there could be debts other than financial debt or operational debt. We take a look at Regulation 9A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which provides for submission of claim by other creditors. In this regulation, it has been expressly mentioned that any person claiming to be a creditor, other than those covered under Regulation 7, 8 or 9 shall submit its claim with proof to the Insolvency Resolution Professional or Resolution Professional in Form F of the schedule. Regulation 7, 8 and 9 deal with claims by operational creditors and financial creditors, workman and employees. The Government claims are covered within the definition of operational debt. Hence, the claim of the Government will have to be made in Form B of the schedule. Thus, regulations which have been devised/prescribed to achieve the objects of Insolvency & Bankruptcy Code, 2016 also take into its ambit of debt which could be a debt other than financial debt or operational debt. This Tribunal had an occasion to deal with the scope of the term "claim" and its implications for enforcing the provision of Insolvency & Bankruptcy Code, 2016, in the case of Religare Finvest Ltd. Vs. Bharat Road Network Ltd. CP (IB) No.540/KB/2018 in CA (IB) No.1060/KB/2019 dated 28th August 2019. Relevant findings of the aforesaid order are reproduced as under:-

(i) *It is noted that Financial Creditor is a registered NBFC with RBI having requisite authorisation to carry on business as NBFC. In the course of its business, it has granted short term loan to the Corporate Debtor. Such short term loan was given on interest and payable after one year as per the terms and conditions agreed by and between the parties, through MoU dated 14.12.2016. The amount of loan and rate of interest is not in dispute. It is also not in dispute that the Corporate Debtor has failed to repay the loan along with interest accrued thereon.*

Hence, the Financial Creditor has filed an application for initiation of Insolvency Resolution Process under Section 7 of the IBC 2016.

(ii) First preliminary objection raised by Corporate Debtor is that petition is not maintainable due to insufficient stamp duty being paid in relation to such MoU. To deal with this plea, firstly we would examine the scheme of IBC 2016 relating to initiation of CIRP by Financial Creditor. Section 4 of IBC 2016 provides the minimum threshold limit of Rupees One Lakh of default for initiating insolvency and liquidation of Corporate Debtors. As per section 6, when a Corporate Debtor commits a default, a Financial Creditor or Operational Creditor or the Corporate Debtor may initiate Corporate Insolvency Resolution Process (CIRP) in respect of such Corporate Debtor. Thus, on occurrence of a default, the outcome is initiation of CIRP and the rationale behind for fixing such mandatory threshold limit is to detect, at early stage, the signs of insolvency and take corrective measures to secure the interest of various stakeholders. As per provisions of Section 7(1), Insolvency Resolution Process can be initiated against a Corporate Debtor when a default has occurred and the Financial Creditor files evidence of default along with the application. As per section 3(12) of I&B Code, 'default' means non-payment of a debt which has become due and payable and is not paid by the Corporate Debtor. 'Debt' as per clause 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. This takes us to look at the meaning of 'claim' which is defined in section 3(6) of the I&B Code, 2016 and reads as under:-

"3(6) "claim" means -

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured."

(iii) The IBC, 2016 defines "debt" as an obligation or liability in respect of a claim which reveals the legislative intent that meanings of "debt" and "claim" be co-extensive. Thus, the meaning of "claim" is crucial to our analysis. A "claim" is a "right to payment, whether or not such right is" and from this it is apparent that expansive language has been applied in defining both the terms. The existence of right to payment is a pre-condition to bring a default within the definition of the term "claim". To establish existence of right to payment, one of the

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tests which has been evolved by Courts is "the conduct test". Under the conduct test, a right to payment arises when the conduct giving rise to the alleged liability occurred. Another test is "the

tests which has been evolved by Courts is "the conduct test". Under the conduct test, a right to payment arises when the conduct giving rise to the alleged liability occurred. Another test is "the pre-petition relationship test" which requires some pre-petition relationship such as contract, exposure, impact or privity, between debtor's pre-petition conduct and the claimant in order for the claimant to hold a section 3(6) claim.

(iv) It is further apparent that the term 'claim' has been defined in widest possible manner so that lender's right to receive payment can be enforced in variety of situations or conversely, it contemplates that all obligations to the extent possible of the corporate debtor would be dealt within the insolvency and bankruptcy proceedings. For example, on occurrence of default, even if a claim is disputed, financial creditor can seek refuge under I&B Code to initiate CIRP process. Similarly, whether loan is secured or unsecured, in both these situations CIRP process can be initiated when a default occurs in repayment of loan.

(v) 'Claim' has been defined also to include a right to payment whether or not such right is legal or equitable. We need to elaborate on these two aspects in detail. In the definition, 'claim' has been mentioned as right to payment which may or may not be legal. On the face of it appears as if both legal and illegal claims can be considered but, in our view, this definition cannot be extended to include debt/claim arising out of contract/obligations relating to illegal activities or activities which are of criminal nature under any law for the time being in force as debt/claim arising out of such activities are against public policy and void ab initio and only covers other infirmities which result into non-enforceability of contracts in civil laws such as legal incapacity of the person executing a contract or insufficiency of stamp duty paid on the instrument or lack of valid licence, registration, authorisation or Board resolution or other technical breach/defects etc. which would not absolve the corporate debtor under IBC,2016 from facing CIR Process. It is further noteworthy that enforceability subject to limitations of Public Policy and agreement being void ab initio has not been made a pre-condition in IBC, 2016 as Financial Creditor as per section 5(7) means only person to whom a financial debt is owed. Financial debt as per section 5(8) means a debt along with interest, if any, which is disbursed against time value of money and includes different kinds of transactions and whenever such transactions take place that by-itself is suffice to create an event or conduct which may give birth to claim subsequently. Further, we are of the considered view that obligation to pay loan is not created by the instrument, but it arises from promise to repay such loan which law always implies when money is borrowed. Having said so, the legal infirmities

regarding initiation of CIR Process under IBC could be: (i) the amount of debt is less than Rs. One Lakh, (ii) default has not occurred, (iii) claim is barred by limitation. In case of financial debt, even if it is disputed, such dispute will not create any limitation / embargo on initiation of CIR Process on the happening of the event of default.

(vi) Further, Regulation 8(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 provides as to how the existence of debt due to financial creditor would be proved. The said clause 8(2) is reproduced hereunder:-

"8(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.

Form C has been prescribed in this regard which is reproduced as under :-

FORM C

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional / Resolution Professional,
[Name of the Insolvency Resolution Professional / Resolution Professional]
[Address as set out in public announcement]

Subject: Submission of claim and proof of claim.

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

Relevant Particulars	
1.	Name of the financial creditor
2.	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)
3.	Address and email address of the financial creditor for correspondence
4.	Total amount of claim (including any interest as at the insolvency commencement date)
5.	Details of documents by reference to which the debt can be substantiated
6.	Details of how and when debt incurred
7.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim
8.	Details of any security held, the value of the security, and the date it was given
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan
10.	List of documents attached to this claim in order to prove the existence and non-payment of claim due to the financial creditor
(Signature of financial creditor or person authorised to act on his behalf) [Please enclose the authority if this is being submitted on behalf of the financial creditor]	
Name in BLOCK LETTERS	
Position with or in relation to creditor	
Address of person signing	

*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

DECLARATION

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me for a sum of Rs. [insert amount of claim].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:
[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].
5. I am / I am not a related party of the corporate debtor, as defined under section 5 (24) of the Code.
6. I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.

Date:

Place:

(Signature of the claimant)

VERIFICATION

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this day of, 20...

(Signature of claimant)

[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]

(vii) Thus, it can be seen, CIR Process can be initiated on the basis of records available with an information utility or other relevant documents as mentioned hereinbefore which include financial statements showing that debt had not been paid. Similarly, in Form C, the claim can be substantiated in the same manner. On the basis of this analysis, it can safely be concluded that purpose of documents is extremely limited and restricted only to prove the existence of debt and default thereof.

(viii) Another aspect relating to the term "claim" is that right to payment may be an equitable claim. The term 'equitable' has not been defined under IBC, 2016, hence we have to look the meaning of the term in the common parlance or, as has been noticed judicially or, as defined in the dictionary. In general parlance, the term "equitable" means, something that is fair and reasonable to all parties in a particular situation. In judicial sense, it can be explained as a remedy or solution that is ethically or legally just and reasonable under the circumstances, though, it may or may not be wholly satisfactory to any or all parties involved. The dictionary meaning of the term 'equitable' is just that confirmable to the principles of natural justice and right. Just, fair and right, in consideration of the facts and circumstances of the individual case. Existing in equity; available or sustainable only in equity; or upon the rules and principles of equity.

(ix) Another judicial principle based upon equity is principle of equitable estoppel. In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defence that is contrary or inconsistent with his or her prior action of conduct. Our this view can further be supported on the basis of application of doctrine of approbate and reprobate, which means that a person cannot approbate and reprobate at the same time, that is, no party can accept or reject the same instrument and cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of

securing some other advantage. In the instant case, it is the Corporate Debtor who has purchased the stamp paper for the execution of said MoU, meaning thereby that stamp duty for execution of MoU has been borne by the Corporate Debtor. It is settled judicial proposition that insufficiency of a stamp duty is a curable defect which can be cured by making up for the deficiency, hence, if the Corporate Debtor wishes to pay the stamp duty not paid, then nobody can stop but, at this stage, the Corporate Debtor being a wrongdoer at one end cannot be allowed to take advantage of its own wrong. For this reason also the claim of the Corporate Debtor regarding enforceability of MoU is liable to be rejected.

(x) To strengthen our this view, we draw support from certain observations of NCLT Mumbai Bench in the case of Bank of India vs. Gupta Infrastructure (India) Pvt. Ltd., Order dated 01.02.2018 which is reproduced hereunder:-

“3. On looking at the terms and conditions galore in the deed of guarantee, there could not be any speck of doubt about the binding nature of the guarantee deed upon these corporate debtors. For that matter, any agreement consciously and voluntarily executed between parties is sacrosanct, upon which whole society running from thousands of years, unless such trust and belief is not present, we can't survive even for a single day, some are explicit, some are implicit, but fact of the matter is, every second of us is run on trust upon each other, wherever it is broken, there is a dispute, there is a pain to the doctrine of trust and belief, therefore before going any further, I must say that the discretion given to the courts is to see as to whether the agreement entered in between the parties is prohibited under law or as to for any other reason the agreement is invalid for the reason of incompetency of parties, unlawful object or fraud, but these reasons have to be proved to the hilt by the person assailing it, not by the person asking relief basing on the agreement. The only ground that has to be proved by the party asserting it is execution of the agreement, if execution is admitted, then what all assailing party to do is to prove to the satisfaction of the court that though execution of instrument is admitted, it is hit by one or other ground mentioned above. The basic reason perhaps for not providing trial in IBC proceedings is, credit availed by the debtor and guarantees given by guarantors reflect in various records of the respective company, banks and RoC, therefore the defence that is being witnessed day in and day out is non-filing of certificate, some fraction of deference in computation of claim amount etc. If we see any case de-hors all these frivolous technical flaws, it will be evident that debt is availed and

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defaulted. So if anybody going beyond this fact, it is nothing but breach of trust, which is the basic element present in an agreement entered between the parties. We don't say that parties should not raise the defences available to them; we only say how we have to deal with administration of justice when substratum is admitted by the assailing party.

4. Courts normally will not go into the advantages and disadvantages of the parties, we can't get into subjective perceptions of anybody or even of us, law is set out how to deal with it, parties apply their wisdom when they enter into binding covenants they enter into contracts, Parliament applies its wisdom when a legislation is brought in, therefore discretion in between left to this Bench is judicial discretion, not to wedge into any other perception into it. Why conventional method of trial has been taken out from IBC proceedings is one – obviously to expedite the process and two – perhaps on the reason that parties cannot deny at least the entries showing in the records of companies.

(xi) From the above discussion, it can be fairly said that where Corporate Debtor has obtained a loan having time value of money or on interest, enjoyed it on the basis of subject MoU, it is both a legal and equitable obligation of a Corporate Debtor and, simultaneously, legal and equitable right of the Financial Creditor to initiate CIR process under IBC 2016 in case of default by the Corporate Debtor in repayment thereof.

(xii) We are further of the view that admitted facts need not be proved and when it is so that is, when proof of document is not required, then, there is no need to revisit the validity of document bypassing the admission already made by the opposite party. The Corporate Debtor has admitted the fact of loan, rate of interest payable by the Corporate Debtor thereon and also default committed by the Corporate Debtor in repayment of impugned loan in its audited financial statements, hence, there is no need to look into the aspect of nature of MoU or its enforcement due to insufficiency of stamp duty.

(xiii) We also reject the contention of the Corporate Debtor regarding applicability of provisions of Indian Stamp Act, 1899 while deciding the fate of proceedings under section IBC, 2016 for the reason that the same, in our considered view, are contrary or repugnant to the provisions of IBC, 2016.

(xiv) Thus, on the basis of above discussion, we reject this preliminary objection raised by the Corporate Debtor.

15. Thus, based upon the above discussion it is clear that an outstanding sum in respect of commercial transactions need to fall within the definition of

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term "claim" at the first instance and, thereafter, issue of classification of such debt as to whether it is a financial debt or operational debt or other debt would arise. Basically the term "claim" is a mirror image of the term "debt" in a sense that claim is a right to payment of one person in respect of a liability or obligation of another person. To put it differently "claim" and "debt" are obverse and reverse side of the same coin. As per our understanding, the term "claim" has been given widest possible scope so that creditors rights are not restricted/narrowed down due to legal technicalities and litigation and, consequently, objects of Insolvency & Bankruptcy Code, 2016 are not defeated.

16. Now, this legal position needs to be applied to the facts of this case. The corporate debtor has taken the premises on lease based upon the lease agreement executed between the corporate debtor and the operational creditor. The lease agreement provides for payment of lease rent for the use of premises and other services rendered by the operational creditor, hence, there cannot be a dispute that the corporate debtor is liable to pay the consideration for use of such facilities and, therefore, the lessor has got a claim to receive such payment as creditor irrespective of its classification as operational creditor or other creditor. Accordingly, we reject the contention that the outstanding sum is not a claim within the meaning of Sec.3(6) of Insolvency & Bankruptcy Code, 2016.

17. Further, based upon the meaning of term "debt" and "claim", the inevitable conclusion is that the Insolvency & Bankruptcy Code, 2016 recognises three types of debts giving birth to three different types of creditors i.e. financial creditors, operational creditors and other creditors who have been given different rights, powers and treatment under the Insolvency & Bankruptcy Code, 2016. Therefore, classification of debt as financial, operational or other debt is extremely important, for example, CIRP can be initiated only by financial

creditors or operational creditors or corporate debtor itself as per Sec.6 of the Code whereas other creditors have been given right to lodge their claims during CIRP only. This has been structured in this manner because most of the creditors may fall under the category of either financial creditor or operational creditor and claims of other creditors would generally be not of substantial magnitude and they may not be interested in the initiation of IRP.

18. If arrears of lease rent are categorised as of the nature of other debt which would create a situation where lessor being treated as other creditor would be left with the following two options:

a. In case a corporate debtor has already been admitted under CIRP then it would be able to lodge its claim with the IRP or RP as per CIRP Regulations read with substantive provisions of the Insolvency & Bankruptcy Code, 2016.

b. In case corporate debtor is not in CIRP then such lessor for realisation of such debt would have remedy under other laws only.

In our view, this could not be the intention of the legislature for the simple reason that preamble to the Insolvency & Bankruptcy Code, 2016 manifests that promotion of entrepreneurship and availability of credit are two prime objects of this Code. Such situation would be against such purpose and have severe economical consequence because provision of immovable property on lease serves economic activities in a significant manner, provide businesses opportunities to other industries and generates substantial employment. Hence, classification aspect of outstanding rent in respect of immovable property becomes crucial.

19. Before proceeding further, we consider it pertinent to mention that this matter was earlier heard and reserved for order but listed for clarification was noticed that there were divergent views. In spite of that none appeared on behalf

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of the corporate debtor but Ld. Counsel for the operational creditor appeared and put forth his submissions.

20. We are conscious of the fact that reconciliation of divergent views is a difficult task and normally this is done by a Larger Bench in case of difference in co-ordinate Benches. However, we most humbly submit that ratio of each decision depends upon the facts of each case and, therefore, such ratio cannot be applied in a routine manner to all other cases which may involve the same dispute but the facts are not same or similar. In that situation it is an established practice that ratio of a particular decision will not be binding in other cases. Further, in case of economic legislation where time lines are given supreme importance, in our most humble view, a call has to be taken by each and every Bench to decide the issue at the earliest but, applying judicial wisdom in a most pragmatic manner to give effect to objects of the Code. Having stated so, now we proceed further.

21. It is also an established principle of judicial propriety that a later decision which after considering the earlier decision takes a view on the same matter, that later view would have higher persuasive value. Thus, the decision of the NCLT Kolkata Bench in the case of Sarala Tantia vs. Nadia Health Care Pvt. Ltd. in CP(IB) No.108/KB/2018 order dated 5/10/2018 wherein, after considering a divergent view expressed by NCLT Bench Delhi in the case of Promod Yadav and Ors. vs. Divine Infracom Pvt. Ltd. IB/209/ND/2017, order dated 28/9/2017 it has been held that outstanding lease rent would fall within the definition of operational debt needs to be followed. It is further noteworthy that in the case of Sarala Tantia (supra), the Tribunal drew support from the decision of the Hon'ble Apex Court in the case of Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd order dated 21/9/2017 wherein it was held that outstanding

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lease rent would be an operational debt. It is further noteworthy that in the case of Promod Yadav & Ors. (supra) this decision of the Hon'ble Supreme Court was not considered. Accordingly, in our humble view, this aspect can be said to have been settled on this basis only. Having hold so, we consider it necessary to reproduce the relevant findings of the Tribunal in the case of Sarala Tantia (supra) as under:-

"6. As against this, the Ld. Counsel for the Operational Creditor relief on the order of this authority wherein it is held that, "from reading of above definition of section 5(21), it is evident that insolvency application is maintainable for recovery of debt on account of services. It is pertinent to mention that letting out premises for rental income is services and service tax is payable on the income from the same. In fact, the Hon'ble Apex Court in the case of Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. held that, "The report of the Bankruptcy Law Reform Committee Volume I, Rational and Design dated November 2015 at 5.2.1 under the heading "Who can trigger the IRP" also provides that, "the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three years lease."

7. In fact, the order of Hon'ble Supreme Court led controversy at the rest holding that the "recovery of arrears of rent is of operational debt within the meaning of definition of operational debt stated under section 5(21) of I&B Code." No further analysis is required at all. Moreover, the Ld. Counsel for the Operational Creditor brought to my notice the provisions of section 2 of Central Goods & Services Tax Act, 2017. Section 2(a) of the Act states that "any lease, tenancy, easement, licence to occupy land is a supply of services." Section 2(b) of the Act further makes clear that, "any lease of services." Section 2(b) of the Act further makes clear that, "any lease or letting out of the building including a commercial, industrial or residential complex for

business or commerce, either wholly or partly, is a supply of services.”

7. In view of this, it is to be held that, “letting out premises on rent is nothing but providing the services. Section 5(21) of the IB Code defines the operational debt as a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under the law for the time being in force and payable to the Central Government, any State Government by way of rent, lease from time to time, licence fees for letting out the premises would fall under the purview of providing services and the consideration that is recoverable becomes operational debt. In view of these facts on record, I hold that recovery of arrears of rent is operational debt within the meaning of section 5(21) of the I&B Code.”

22. We are further of the view that in fact, the decision of the NCLT Delhi Bench in the case of Promod Yadav & ors. (supra) support our view for the reason that in the present case operations of the corporate debtor are being carried from the leased premises only, hence, the out put is produced from the said premises. Having said so, with all humility we submit that the ratio that services should be of the nature of input to output directly needs reconsideration for the reason that no such requirement exists in Sec.5(21) of Insolvency & Bankruptcy Code, 2016 and services referred to in Sec.14(2) read with Regulation 31 and 32 are “essential” goods and services and not goods or services as mentioned in Sec.5(21) of Insolvency & Bankruptcy Code, 2016 which means that definition given in the context of specific purpose or the object cannot apply to a general object or purpose. In the present case, the issue is related to classification of creditor based upon nature of debt who can initiate CIRP under Sec.6 of Insolvency & Bankruptcy Code, 2016, hence, a wider and expansive meaning would meet the objects of Insolvency & Bankruptcy Code,

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2016 as compared to a restricted/limited meaning given to such terms. As evident that the words "goods" or "services" have not been defined in Sec.5(21) of Insolvency & Bankruptcy Code, 2016. It is settled principle of judicial interpretation that purposive construction should be made based upon the objects and reasons of an Act before looking meaning of undefined terms elsewhere or externally. For this purpose, we get great insights from Viswanathan Committee Report of which in para 5.2(1) has already been mentioned by the Hon'ble Apex Court in the case of Mobilox Innovations (supra). Apart from this, at few other places also we get reference of operational creditors. For example, in para 3.2.2 under the heading "conflicts in creditor and debtor negotiation" following comments are made:-

"Conflicts tend to be exacerbated when there are multiple levels and types of liabilities in an enterprise. In addition to the conflict between creditor and debtor, there can be conflict between different types of creditors as well. Enterprises have financial creditors by way of loan and debt contracts as well as operational creditors such as employees, rental obligations, utilities payments and trade credit. When the debtor contracts these liabilities, there is an understanding about a priority structure of payment to the claims. While this will not be disputed when the debtor is solvent, multiple claims will give rise to conflict during insolvency".

Similarly in para 4.3.3 under the heading "information about liabilities of solvent entity", following comments are made:-

"A solvent entity has a certain structure of liabilities. The terms of all contracted liabilities are relevant for valuing liabilities. As an example, the presence of debt, and the terms on which the debt is contracted, is relevant for the pricing of equity. While the identities of counterparties should remain private, the existence of all financial contracts along with the terms and conditions, is

relevant for all financial analysis related to the health and status of the entity.

Liabilities fall into two broad sets: liabilities based on financial contracts, and liabilities based on operational contracts. Financial contracts involve an exchange of funds between the entity and a counterparty which is a financial firm or intermediary. This can cover a broad array of types of liabilities: loan contracts secured by physical assets that can be centrally registered; loan contracts secured by floating charge on operational cash flows; loan contracts that are unsecured; debt securities, that are secured by physical assets, cash flow or are unsecured. Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payable for purchase of raw materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees".

23. From perusal of these comments/observations it is apparent that rental obligation are to be considered as operational debt and consequently claim of operational creditor. Secondly, observation in para 4.3.3 make it absolutely clear that raw material and other inputs cannot be sole criterion to define the scope of term "services". We are, further, of the view that if a restricted meaning is given then the amount payable to consultancy, adviser etc. who play an important role in running of organisation will not be able to initiate CIRP and which cannot surely be an intention of legislature.

24. As far as the decision of the Tribunal in the case of Jindal Steel and Power Ltd vs. DCM International Ltd. in IB No.200/ND/2017 order dated 6/10/2017 is concerned, it is noticed that in that case operational creditor was claiming refund of security deposit from the corporate debtor who was not the owner of the leased premises but a tenant thereof who had sub-let the same to the corporate debtor. Thus, the facts of that case are entirely different from the

facts of the case in hand, hence, the ratio of the decision of Hon'ble NCLAT confirming the said decision is not applicable here.

25. In view of the above discussion, we hold that arrears of lease rent are operational debt. Accordingly, this contention of the corporate debtor is rejected.

26. As far as third question is concerned the same is also liable to be rejected in view of our decision in the case of Religare Finvest Ltd. (supra) and the relevant findings of the said decision have already been re-produced hereinbefore. Accordingly, this contention of the corporate debtor is also rejected.

27. As regard to the counter claim of the corporate debtor for cost incurred on furnishing/meeting the leased premises habitable is concerned, the same cannot be considered at the stage of admission of an application filed under Sec.9 of Insolvency & Bankruptcy Code, 2016, in view of the legal position that the same needs can be considered during CIRP. Having stated so, we further find that such claim of the corporate debtor is also not valid in view of the terms and conditions of lease agreement wherein no liability or responsibility was undertaken by the lessor for doing such works. Accordingly, this contention of the corporate debtor is also rejected.

28. As regard issue of deficiency in services is concerned, we have perused the materials on record and on that basis we find that no material evidence has been brought on record in support of such claim. Therefore, this contention of the corporate debtor is also rejected.

29. The name of IRP has not been proposed hence, Tribunal will appoint IRP, from the panel maintained by IBBI.

30. The application filed by the operational creditor is otherwise complete in all respects and is in accordance with the requirement of Insolvency &


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Bankruptcy Code, 2016 read with relevant Regulation thereto. Accordingly, we admit the same and order as under: -

ORDER

- i. The application filed by the Financial Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Axiom Estates Advisory Services Pvt. Ltd. is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

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- c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. Shri Shashi Agarwal, having registration No.IBBI/IPA-001/1P-P00470/2017-18/10813 e mail id shashiagg@redifmail.com is appointed as Interim Resolution Professional for ascertaining the

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particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

- xi. The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees three lakh) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.
 - xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
 - xiii. Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.
31. List the matter on 22/11/2019 for the filing of the progress report.
 32. In view of this all CAs pending in this proceedings stand disposed of.
 33. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Madan B Gosavi)
Member (J)


(Virendra Kumar Gupta)
Member (T)

Signed on 1st October 2019