IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P. (IB) No. 902/KB/2018

In the matter of:

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

And

In the matter of:

THE WESMAN ENGINEERING CO. PVT. LTD., CIN: U29292WB1951PTC019898, having correspondence address at Wesman Centre, 8, Mayfair Road, Kolkata-700 019

.... Operational Creditor

- VERSUS -

REFORM FERRO CAST PVT. LTD., CIN: U27101WB2006PLC112036, having registered office at Naupala, Bagnan-II, Howrah, West Bengal, Pin-711 303

.... Corporate Debtor

Date of hearing : 7th January, 2020

Order Delivered on : /01/2020

Coram:
Shri Madan B. Gosavi, Hon'ble Member (Judicial)
Shri Virendra Kumar Gupta, Hon'ble Member (Technical)

Counsel Present :

1. Mr. Samik Kanti Chakraborty, Advocate }
2. Mr. Piyush Agrawal, Advocate } For Operational Creditor
3. Mr. Agnish Basu, Advocate }

1. Mr. Anirban Bose, Advocate } For Corporate Debtor

ORDER

Per Virendra Kumar Gupta, Member (T)

1. This petition has been filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short, "IBC, 2016") by The Wesman Engineering Co. Pvt. Ltd. - the Operational Creditor for initiation of Corporate Insolvency Resolution Process ("CIRP") against Reform Ferro Cast Pvt. Ltd. - the Corporate Debtor as the Corporate Debtor has committed default in payment of outstanding debt. The amount claimed in default is Rs.2,68,18,309/- which comprises of principal of Rs.45,94,309/- and interest of Rs.2,22,24,000/-.

2. The relevant facts are that the Corporate Debtor issued a Purchase-cum-Work Order No. 047 dated 16.10.2007 for supply of Sand Plant Equipment which involved erection, installation and commissioning as well. The total value of the Work Order was Rs.71,98,668/- out of which two invoices aggregating to Rs.45,94,309/-, i.e., invoice No. WEFE-09111/09-10 dated 31.10.2009 for Rs.33,09,179/- and invoice No. WEFE-09194/09-10 dated 27.02.2010 for Rs.12,85,130/-, have remained pending for payment.

3. The Ld. Counsel for the Operational Creditor narrated the basic facts and contended that as per the terms and conditions of the Purchase-cum-Work Order, the Operational Creditor made the supplies, provided the requisite services and raised invoices from time to time. The Corporate Debtor made payments. However, the impugned invoices were not paid in spite of several reminders and discussions from time to time. As regards the aspect of debt being barred by limitation, the Ld. Counsel drew our attention to page no.39 of the Paper Book to submit that this was a letter of acknowledgement, hence, the debt was not barred by limitation as the petition has been filed within the limitation period of three years therefrom. It was further contended that even in reply to notice under Section 8 of IBC, 2016, the Corporate Debtor had admitted its liability. On a query regarding the dispute, it was submitted that as per Corporate Debtor's own admission, the undisputed amount,

excluding the amount which was disputed, the same would be around Rs. 4 lakhs to Rs. 5 lakhs which was more than the threshold limit of one Rs. 1 lakh, hence, the petition was liable to be admitted. The Ld. Counsel also referred to minutes of meeting between the Corporate Debtor and Operational Creditor to show that the debt was payable which was not paid, hence, the Operational Creditor could not complete its commitment.

4. On the other hand, the Ld. Counsel for the Corporate Debtor vehemently argued that the so called letter of acknowledgement was not a letter of acknowledgement, rather it was a piece of evidence which showed that there were serious disputes as regards the delay in performance and consequential losses suffered by the Corporate Debtor. It was also contended that a civil suit had also been filed in June, 2018 which also showed that the said disputes were taken forward. It was also pleaded that letter of June, 2015 was much prior to this petition being filed or notice under section 8 being issued, hence, genuineness of dispute could not be doubted. Therefore, for this reason, this petition was liable to be dismissed. As regards the claim of the Corporate Debtor that 10% amount was payable and which was more than Rupees One Lakh, it was contended that it was a case where the sum was mentioned in the context of the matter and not an admitted fact. It was vehemently argued that debt was also barred by limitation because if it was assumed that the letter dated 26th June, 2015 was an acknowledgement, then also it was beyond the original period of limitation of three years as prescribed under section 18 of the Limitation Act, 1963. It was also contended that the acknowledgement should be unequivocal and this was not so, hence for this reason also, such letter could not be considered as an acknowledgement of debt. It is also noted that the letter of 26th June, 2015 is beyond period of three years from the date of supply or last payment received. No other material on record has been brought on by the Operational Creditor to show that there was an extension of limitation within a period of three years when the date became due and payable as per provisions of Limitation Act, 1963, hence for this reason as well, the petition is liable to be dismissed. It was also pleaded that these contentions were also substantiated by minutes of meeting. For

legal propositions as regards the limitation, the Ld. Counsel for the Corporate Debtor relied on the following decisions:-

i) Bharat Petroleum Corporation Ltd. & anr. V. Punjab State Electricity Board & ors., reported in 2018(3) ICC 535 (Pb. & Hry.)

ii) Dr. Prabir Kumar Pal vs. Dr. Dilip Choudhury, reported in 2017(4) CHN (CAL), page 553

iii) Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha, reported in (2010) 6 Supreme Court Cases, page 601.

5. In the rejoinder, Ld. Counsel submitted that in this case suit had been filed after filing of petition under section 9, hence, it was an instance of afterthought and hence, not of any relevance for the purpose of admissibility of this petition.

6. We have considered the submissions made by both the sides and material on record. It is not in dispute that supplies have been made before 2010. As per the purchase order, both supplies and erection are included in the scope of work. It is also not in dispute that more than 90% payment of the invoices raised by the Operational Creditor has been made by the Corporate Debtor. From all the correspondences which we have carefully perused, it is apparent that there exists a claim of Corporate Debtor as regards non-performance / timely / satisfactory performance by the Operational Creditor which has caused substantial loss to the Corporate Debtor. It is also noted that the assertion made by the Corporate Debtor as regards it's admission of debt to the tune of 10% of the outstanding amount has to be seen in the facts and circumstances of the case as a whole wherein a stale claim has been sought to be revived and where the performance of the Operational Creditor itself is not found to be completed which in itself raises a question mark whether any debt is in fact due and payable.

7. Further, on the various aspects associated with the provisions of Section 18 of the Limitation Act, 1963, we consider it pertinent to reproduce the findings in our

order dated 13/12/2019 in the case of *Uco Bank Vs. Kaizen Power Limited, passed in C.P.(IB) No. 254/KB/2019* as under:-

" 9. In this application several issues arise for our consideration.First issue is whether the person who has signed and filed the petition is competent? In this regard, it is noted that application has been signed by Mr. B. Mondal, Dy. General Manager. It has also been claimed that no signature appeared at the last page of the Form No.1 at the specified place. However, there is a signature of this person at the bottom of the page, hence, we do not find any substance in this contention of the corporate debtor. We also find that this person is authorised as a attorney of the bank to do all acts and deal in matters for and on behalf of the bank including the establishment of the branches or agencies. At page 38 of the paper book as per document signed by the General Manager and Zonal head on 05.02.2019, the said person has been stated as authorised representative of the bank for filing application in the NCLT under section 7 of IBC, 2016 in respect of said corporate debtor. Thus, when both these documents are read together, it is established that such person is a authorised representative of the Financial Creditor. Even otherwise mere nomenclature of a document would not make a document of the nature of authorization as of the nature of Power of Attorney. The corporate debtor has placed reliance on the decision of the Hon'ble NCLAT in the case of Palogix Infrastructure Private Limited Vs. ICICI Bank Limited Company Appeal (AT) (Insol.) Nos.30,37 and 54 of 2017 order dated 20.09.2017 for the proposition that Power of Attorney holder was not competent to file an application on behalf of the Financial Creditor. However, it is observed that in para 36 of the said order it has been held that mere use of word " Power of Attorney" while delegating such power will not take away the authority of such officer and for all purposes, it was to be treated as an authorization by the financial creditor. Thus, in fact, this order supports the case of the Financial Creditor. The Hon'ble NCLAT in para 38 has also observed that if an officer was authorised to grant loan then it could not be said that such person

did not have the power to recover the loan amount or to initiate Corporate Insolvency Resolution Process in spite of default in payment of a debt. In the present case there exists two documents which make the case of the Financial Creditor more strong.

10. In this regard, we also take this opportunity to express our view that in case of a economic legislation having wide ramifications for the National Economy, such technical pleas cannot be given more than what they deserve. If too much legalistic approach is adopted then as per part 1 of Form 1 only a corporate or LLP or partnership firm be Financial Creditor and could file petition under section 7 of IBC, 2016 as in Clause 2 thereof date of incorporation of Financial Creditor is to be given whereas an individual can also be a Financial Creditor and no separate Form 1 is prescribed. Thus, to give effect to the provisions of IBC, 2016 a harmonious and liberal approach is needed. Further, Regulations made thereunder must confirm to be substantive provisions of IBC,2016 as prescribed in section 240 of IBC,2016 or to the overall object of IBC,2016.Thus, on all counts this contention of the corporate debtor fails.

11. The next question is whether there exists debt which is due and payable?

12. In this regard two aspects are involved i.e.(i) whether as per contract there exists liability to pay ? (ii) whether debt is barred by limitation?

13. As far as first aspect is concerned, we find that this is a case of consortium loan and the nature of loan is term loan. The repayment of such loan, as per sanction letter/Agreement was to start after start of commercial operations. However, in the meanwhile, the project got stuck and abandoned due to various factors. Even the loan amount sanctioned was not disbursed fully. This leads us to look into the terms and conditions of sanction letter as well as agreement in detail. As per sanction letter there was a moratorium of a period of 9 months from the COD i.e."Commercial Operation Date" meaning thereby first repayment was to commence thereafter. However, in Clause 3 of part D of sanction letter containing other conditions , it has been mentioned that company was required to comply with all the conditions stipulated in project related agreements and carry out suitable amendments thereto as may be required for the implementation of the project including the time lines specified with respect to COD. In part F of

sanction letter under the head of event of default it has been mentioned that the lenders reserved the right to recall the facility, impose any other terms and conditions and appoint one additional director upon the happening of any of the following event of default, if necessary. This clause also covers a situation where the borrower commits any breach or default in the performance of observance of the material covenants of the facility agreement. Part H relating to documentation also provides that the borrower was to comply with customary covenants such as financial covenants, representation and warranties of the borrower, conditions precedent to the loan and conditions precedent to each disbursement, events of default and consequences of the events of default. It has also been provided that terms and conditions stipulated by other bankers to the extent considered necessary by the Financial Creditor may also be applied. This takes us to study of common loan agreement.In Clause 7.1 of Article VII containing specific events of defaults and remedies for various situations have been provided for. Clause (m) provides that on happening/occurrence of extra ordinary circumstances, the implementation of the project becomes improbable. It also provides that such situation may result into non-fulfilment of obligations by the corporate debtor. Clause(q) provides that event of default would have occurred if one or more events, conditions or circumstances happen which have a material adverse affect on the project. Clause (r) (i) provides that approvals would stand revoked as a consequence of happening of event of default having material adverse affect on the project. Clause 7.2 provides for consequences of default. As per sub clause (ii) of this Clause the principal amount and interest in respect of such loan and all other amounts payable by the corporate debtor become due and payable. In this contractual background, it is noted that the project had to be cancelled/abandoned due to coal scam and other associated issues. Such event made the project non implementable and had material adverse affect. Thus, there is a event of default as an enumerated in the contract/agreements read with the sanction letter. The consequences thereof follow accordingly.Thus, the amount

disbursed till then along with interest becomes due and payable. Thus, this contention of the corporate debtor is rejected.

14. The next aspect is whether debt is barred by limitation. A lot of judicial decisions have been cited by the Corporate Debtor. The date of default has been stated as 05.08.2014. The financial statements for the year ended 31st March, 2017, which also contain figures for the financial year ended 31st March, 2016, show the amount of long term borrowings both secured and unsecured. In Clause 3.4 thereof, it has been stated that the company has made certain defaults in payment of term loan and interest. It is also mentioned that the ***continuing default*** *as on 31st March, 2017 was in respect of interest on term loan and the period of delay was more than 180 days. In the Auditor's report also the fact of default in payment of interest and repayment of principal amount has been mentioned. Thus, there is an admission of continuing default in the financial statements. It is now a settled judicial position that presentation in the financial statements constitutes acknowledgement of debt within the meaning of provisions of section 18 of the Limitation Act, 1963. This aspect and other related issues as regard to the nature and scope of provisions of section 18 of the Limitation Act, 1963 have come up for consideration in a few cases before us. The relevant findings of this Bench in the case of Kotak Mahindra Bank Limited Vs. M/s Sri Balaji Metals and Minerals Pvt. Ltd. passed in (CP(IB) No. 1476/KB/2018 in CA(IB) No. 1005/ KB/ 2019) dated 03.12.2019 are reproduced as under:-*

> *"10. We have considered the submission made by both the sides and material on record. The bone of contention is whether debt is barred by limitation or not. In this regard, it is noted that in the financial statements for the year ended 31st March, 2016, the amount of secured loan has been shown. The fact of default has also been mentioned.The said balance-sheet also contain figures of such loan in financial year ended on 31st March, 2015. It has been also noted that in financial year 2011-12 and 2012-13 cheuqes given by the Corporate Debtor as EMI have been presented by the Bank which have got dishonoured. Such cheques were neither recalled nor any instructions had been issued as regard to cancellation/ non encashment. The Financial creditor has also produced the demand promissory note and other documents to*

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establish the fact of continuation of limitation till December, 2012. Thus, a prima facie case of a alive claim has been established. Various arguments have been made regarding what would constitute acknowledgement and how it is to be determine/ ascertained. In this regard, we state that these issues have come up before us in number of petitions. As recently as, in the case of Stressed Assets Stabilization Fund Vs Ispat Profiles India Limited in C.P. (IB) No. 1400/KB/2018 order dated November 28, 2019, this bench has dealt with these aspects in detail and referred to other decisions also, therefore, the findings given therein are reproduced hereinafter which, in our considered opinion, would take care of all the arguments made by the Corporate Debtor. Consequently, such arguments of corporate debtor are rejected.

"17. It has been pleaded by the corporate debtor that amounts were advanced much before that date and those were payable by 31/3/1994, hence, debt had become time barred before filing reference under SICA and consequently Sec.22(5) of the SICA was not applicable. However, the fact remains that there have been continuous acknowledgement of liability by the corporate debtor either by way of proposal for revival package, presentation in balance sheet or through various letters to the lenders wherein fact of loan/outstanding debt has been either directly or as a part of correspondence. There have been promises as well to repay the loan. Thus, taking into consideration these aspects, we are of the considered opinion that this constitute an acknowledgement of debt, hence, for this reason the debt is not barred by limitation.

18. We also submit that various aspects relating to the acknowledgement of debt under Sec.18 of Limitation Act, 1963 have been considered by this Tribunal in a few cases recently. In the case of Hari Omm Transport vs. MSP Metallics Ltd. CP (IB) No.116/KB/2019 Order dated 15/10/2019 wherein the Tribunal has held as under:-

> *"8. It is not in dispute that the Operational Creditor has supplied material during the Financial Year 2014-15. It is also not in dispute that there were agreed deduction out of the bills raised by the Operational Creditor to the tune of Rs. 12,43,281/- resulting into impugned sum remaining unpaid. It is also noteworthy that thereafter there have been no supplies or payment by the respective parties. As far as Corporate Debtor is concerned the main plea is that the debt is barred by limitation. For this purpose, the e-mail dated 19th April, 2016 has been claimed as not a proper acknowledgement of debt under Section 18 of Limitation Act,1963. It has been claimed so far the reason that the said e-mail was addressed to Baba Gora Transport and not to the Financial Creditor. On perusal of the records, it is noted that the said e-mail is, in fact, has been addressed to mail ID i.e. babagoratransport@gmail.com which is not of the Financial Creditor but statement of account of Financial Creditor has been attached. To express our view about the validity of*

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such e-mail is an acknowledgement of that we consider it necessary to reproduce Section 18 of the Limitation Act, 1963 as under:

Section 18(1):

Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from time when the acknowledgement was so signed.

Section 18(2):

Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed;but subject to the provisions of the Indian Evidence Act, 1872 (a of 1872), oral evidence of its contents shall not be received.

Explanation: for the purpose of this section,-

(a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) The word 'signed' means signed either personally or by an agent duly authorised in this behalf;and

(c) An application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

9. *From the perusal of Section 18(1), it is apparent that acknowledgement of liability must be made before expiry of limitation period for filing the suit. If limitation has already expired, it would not revive under section 18. In the present case, last payment has been made in July, 2015 and e-mail has been sent in April, 2016, which is well before the expiry period of three years. Hence, first hurdle is crossed. Now, we have to look whether such e-mail can be construed as acknowledgement of debt as it has been claimed that such mail has not been addressed to the Operational Creditor. From the perusal of the explanation (a) above, it is clear that the claim of the Corporate Debtor is not valid because such explanation clearly states that a communication may be addressed to a person other than a person related to the property or right. The Corporate Debtor has also not been able to produce any record to show that such person was not authorised to send such e-mail.Though such claim has been made, the e-mail ID contains particulars of the Corporate Debtor, hence, it cannot be said that e-mail has not been sent for and on behalf of the Corporate Debtor. Another aspect which needs to be considered is that though said*

e-mail to statement of account has only sent and no other facts have been mentioned, hence, can it be said to be an acknowledgement of debt. This question again leads us to explanation (a) above wherein it has been stated that an acknowledgement may be sufficient though it omits to specify exact nature of property or right."

19. *In the case of Trinetra Electronics Limited vs. McNally Bharat Engineering Co. Limited in CP (IB) No.1506/KB/2018 Order dated 16/10/2019, this Tribunal has held as under:-*

"5. We have considered submissions made by both sides and have also perused the materials on record. The question for our consideration arises is that (i) whether debt is barred by limitation or not; (ii) whether the letters dated 29/1/2018 and 30/7/2018 constitute acknowledgement as per provision of Sec.18 of the Limitation Act, 1963. It is not in dispute that these letters have been written by the corporate debtor regarding confirmation of outstanding balance of ICD as on 31/12/2017 and 30/6/2018 as per the books of account of Financial Creditor. The confirmation of outstanding balance is to be given to the statutory auditors of the corporate debtor. This exercise cannot be considered in a light manner because reliance on the accuracy of the books of account and financial statement is based upon such standard auditing practice. In the letter dated 29/1/2018 it has been clearly mentioned that such confirmation was in respect of amounts payable in respect ICD as on 31/12/2017 which by itself establishes the fact of acknowledgement of debt beyond any doubt. To deal with the contention of the corporate debtor that such emails do not constitute acknowledgement of debt within the meaning of provision of Sec.18 of the Limitation Act, 1963, we consider it necessary to reproduce the Sec.18 of the said Act as under:-

"Effect of acknowledgement in writing.

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed, but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation: For the purposes of this section,-

(a) An acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than

a person entitled to the property or right;

(b) The word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) An application for the execution of a decree or order, shall not be deemed to be an application in respect of any property or right."

From perusal of the explanation (a) to the said section it can safely be concluded that such letters constitute acknowledgement of debt by the corporate debtor, as it is not necessary that the letter should be written to the financial creditor only. It is further noteworthy that explanation (a) takes into its ambit the generally accepted commercial practices of communication between the parties whereby acknowledgement of debt can be inferred as no specific format has been prescribed.

6. Having stated so, a question may arise that such communications are in respect of the debt outstanding in the books of account of corporate debtor as on 31/12/2017 and 30/6/2018 and have been sent on 29/1/2018 and 30/7/2018 respectively which are beyond three years period from 30/9/2014, hence, whether requirement of Sec.18(1) of Limitation Act, 1963 is complied with. To look into this aspect, we have to see whether presentation in the balance sheet by itself constitutes an acknowledgment of debt or not. Now, there have been catena of decisions of NCLT and NCLAT that presentation of debt in the balance sheet constitutes acknowledgment of debt. Since the corporate debtor, in the present case has asked for conformation of balance from the financial creditor as on 31st December 2017 and 30th June 2016 in respect of loan taken in 2014 which itself implies that such loan is continuously outstanding in the balance sheet of corporate debtor from earlier financial years ending on 31st March 2015, 31st March 2016 and 31st March 2017. Thus, this fact by itself goes against the corporate debtor and irrespective of these emails, there exists acknowledgment of debt due and payable which is not barred by limitation. This being so, hence, such emails also fall in the period specified for filing of suit as per provisions of Limitation Act, 1963 and, therefore, these comply with the requirements of Sec.18 of Limitation Act, 1963.

7. In the case of Jignesh Shah & another, Hon'ble Supreme Court in the order dated 25th September 2019 at para 19 of the order has held as under:-

"19. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct

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from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding."

The above findings also support our view.

8. Having stated so, we also take into consideration the provision of Sec.238A of the Insolvency & Bankruptcy Code, 2016 which is re-produced as under:-

"The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

9. Before looking into the ambit and scope of this section, it is stated that this provision was incorporated in Insolvency & Bankruptcy Code, 2016 with the object that stale claims cannot be made alive through the mechanism of Insolvency & Bankruptcy Code, 2016. This is also so because Insolvency & Bankruptcy Code, 2016 is not a recovery mechanism rather a comprehensive code for insolvency resolution old and stale claims cannot be considered as a source or detecting of signs impending insolvency at an early stage. Hence, for this reason also the necessity was felt to make provision of Limitation Act, 1963 applicable to Insolvency & Bankruptcy Code, 2016. ***It has been settled judicially that Sec.238A is applicable since the implication of Insolvency & Bankruptcy Code, 2016. It is evident that Sec.238A the word "as far as may be" have been used which means that the provisions of Limitation Act, 1963 would apply to the extent possible and any provision of Limitation Act, 1963 being inconsistent to the provisions of Insolvency & Bankruptcy Code, 2016 will not be applicable. Further, the technicalities of Limitation Act, 1963 would not be applicable as Insolvency & Bankruptcy Code, 2016 is an economic legislation and functions on the principles of summary procedure. As discussed earlier that explanation (a) of Sec.18 of Limitation Act, 1963 provides much flexibility and takes into consideration various factors/situations for explaining as to what would constitute acknowledgement and in view of Sec.238 and 238A of the Insolvency & Bankruptcy Code, 2016, such provision has to be read further in conjunction with the wider meaning given to the term "claim" in Sec.3(6) of the Insolvency & Bankruptcy Code, 2016 which includes right to payment even on equitable ground.*** ***(Emphasis supplied).***

10. In view of above discussion, we hold that there is no merit in the claim of the corporate debtor that the said emails cannot be said to be an acknowledgement within the meaning of provision of Sec.18 of Limitation Act, 1963. Accordingly, we reject the same."

20. In the case of Asset Reconstruction Company (India) Ltd. vs. Dagcon (India) Private Limited, Order dated 20/11/2019 in CP(IB) No.1198/KB/2018, the Tribunal has held as under:-

> *"11. Coming to the aspect of limitation, we are of the view if averment made before a court of law or any statutory authority cannot be constituted as an acknowledgment of debt then that would render such averment meaningless. Legally such averment bind party making them. Doctrine of estoppel applies without any restriction in commercially and legally. Accordingly, we hold that such statement constitute acknowledgment. In this regard, we further take the assistance of the provision of explanation (a) of Sec.18(1) of Limitation Act, 1963 wherein scope of acknowledgment has been given in a widest possible manner. It is also to be noted that writ petition was filed within a period of 3 years from the date of issue of recall notice and, hence, for this reason also provisions of Sec.18 of the Limitation Act, 1963 are applicable. Even otherwise, in our considered view, such averments made before the Hon'ble High Court amount to promise within the meaning of provisions of Sec.25(3) of the Indian Contract Act, 1872 and, therefore, if such promise is made after expiry of original limitation period also, the limitation period gets extended as condition of acknowledgement before expiration exists only under Sec.18 of the Limitation Act, 1963."*

21. From the perusal of the above judicial decisions, it may be noted that the explanation (a) of Sec.18 of Limitation Act, 1963 is wide in scope and has to be interpreted in the background of the current commercial environment and in accordance with the nature of proceedings of Insolvency & Bankruptcy Code, 2016".

11. Thus, considering the various aspects as discussed above, we hold that,in the present case, there is a continuous cause of action and an acknowledgement of debt resulting into continuation/ extension of limitation period before the expiry of the original limitation period. In this regard, we are further of the view, that presentation of outstanding loan in the financial statements for the year ended on 31st March, 2016 which also depict the figures of the same as on 31st March,2015 is continuation of such outstanding loan from the earlier financial years as in such a case no other conclusion can be arrived i.e. the outstanding loan continues from earlier years except the figure of the same which may vary due to interest, if any, charged subsequently or due to repayment of loan, if any.

12. We further find no merit in the claim of the Corporate Debtor that no outstanding debt had been shown in CIBIL report or balance had been written off by the Financial Creditor in its books of account, hence, no debt was due and payable for the reason that such action is required as per the guidelines of the RBI as well as the Bank itself

and such unilateral action can not result into waiver of loan or in any way lead to a conclusion that debt is extinguished by financial creditor and no claim is to be made by the financial creditor in accordance with law. This view is further fortified by the fact that financial creditor in spite of writing it off have perused various legal options to realise the same and even petition under section 434 of Companies Act, 2013 had been filed. Further, the default of this debt has been shown in the Balance-sheet of Corporate Debtor which by itself negates this plea of Corporate Debtor. Similar is our view on the aspect of for-closure raised by the Corporate Debtor. In this regard, we are further of the view that the definition of the term "claim" as given in section 3(6) of IBC 2016 covers the liability to pay debt on equitable ground. Further, this definition also negates the claim of the Corporate Debtor that the agreement had expired. For such view, we further find support from the observations of the Hon'ble Supreme court in the case of Pioneer Urban Land and Infrastructure Limited & Anr. vs Union of India Ors passed in Writ Petition (Civil) No. 43 of 2019 dated August 9, 2019 wherein para 59-60, the Hon'ble Supreme Court has observed that the term "claim" under IBC has been defined in a manner to do away with the legal limitations associated in general law in regard to enforceability of claims regarding defaults and recovery of outstanding debt. We consider it pertinent to reiterate that IBC,2016 has been enacted with the object to resolve the bankruptcy and promote entrepreneurship along with its focus on promotion of credit and growth, hence, a pragmatic approach has to be taken which should to be in accordance with such objects for this reason also, we hold that once a person obtains the loans and fails to repay, adverse impact is a natural consequences nor only for a specific borrower but on the overall economic growth of the country, hence, legal technicalities should not be allowed to over-ride such objectives for this view, we draw support from the following observations of the Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd.and Ors. Vs Union of India (UOI) and Ors. is under:-

84. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy in as as much as banks and financial institutions are able, with the money that has been paid back, to further lend money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial

debts and operational debts, which are unsecured,which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 19 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail.

Epilogue

85. The Insolvency Code is a legislation which deals with economic matters and, in the large sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors' ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called creditors and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners".

13. In the case relied on by the Corporate Debtor, there is no issue is involved as to whether presentation in the balance sheet constitutes acknowledgement of debt or not. Hence, the same is not applicable. On the contrary, the judicial decisions cited by the financial creditor, confirm the plea that presentation in the balance-sheet amounts to acknowledgement of debt.

14. We also find no merits in the contention of the Corporate debtor that there exists some dispute and it was a case of non performance for the reason that even a disputed claim can be considered for the purpose of section 7 so long, there is debt which is due and payable and a default has occurred in payment thereof. In this regard, following observations of Hon'ble Supreme Court in the case of Innovative Industries are relevant:-

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment

of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under section 5(21) means a claim in respect of provision of goods or services".

15. Apart from the above decision, we consider it pertinent to reproduce findings of the Tribunal in the case of Punjab National Bank Vs. M/s Jas Infrastructure and Power Ltd. in CP (IB) No. 1290/KB/2018 order dated 01.10.2019 as under:-

"7. The first objection raised by the Corporate Debtor in regard to competency of person, who has signed and filed application under section 7 of IBC, 2016.

We have perused the contents of the relevant documents, which are wide enough in scope and also authorise the signatory of the petition to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.In this regard particular reference of para d(iv) read with para d(ii) can be taken. We are further of the view that the decision of the Hon'ble NCLAT in the case of Ramesh Chander Gupta(Supra) also supports the claim of the Financial Creditor. We are further of the view that in sum and substance, the authority appears to have been vested in the person who has acted in bonafide manner then such technical reasons should not be given an overriding effect on the merits of case. It is noted that the Board Resolutions authorizing the applicant is also attached.Thus, in view of above discussion, we do not find any merit in this contention of the Corporate Debtor and therefore,we reject the same.

8. The second plea is that the debt is barred by limitation, hence, petition cannot be filed. In this regard reliance has been placed on the decision of the Hon'ble Supreme Court in the case of ***Jignesh Shah & another and B.K. Educational Services Pvt. Ltd.*** *(Supra).*

9. It is not in dispute that provisions of Limitation Act, 1963 are applicable to the proceedings under IBC,2016. In the above cases, the Hon'ble Supreme Court has held that in case of delay,

the limitation could be extended Under Section 18 of Limitation Act, 1963 by the act of parties as prescribed thereunder and the application can be filed after getting condonation of delay under Section 5 of Limitation Act, 1963. The findings of the Hon'ble Supreme Court in the case of B.K. Educational Services in para 48 of the order are reproduced as under:-

> *"48. 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.*

The finding of the Hon'ble Supreme Court in the case of Jignesh Shah & another in para 19 of the order are as under:-

> *"19. The aforesaid judgements correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding."*

10. In the present case, it is not in dispute that in the balance-sheet for the financial year ended on 31.03.2016, the Corporate Debtor has categorically admitted the amount outstanding, amount of instalment payable and default in payment of interest. Copy of the relevant pages have been placed on pages 930 and 931 of Paper Book. It is also not in dispute that Corporate Debtor submitted a proposal for revival on 16.02.2015 in which the amount of loan has been admitted. The limitation, if counted from that date, ends on February 15, 2018. As per provisions of Section 18 of the Limitation Act,1963 if the acknowledgement of debt happens before the expiry of said period, the limitation gets extended. As held in catena of decisions that presentation of debt in the balance-sheet amounts to acknowledgement of debt. Thus, taking into consideration of provisions of Section 18 of Limitation Act, 1963 and this legal proposition together, the presentation of outstanding loan and fact of default in the balance-sheet as on 31st March, 2016 of the

Corporate Debtor amounts to valid acknowledgement of the loan, hence, limitation has to be counted from this date. This view is guided by the ratio of the decision of the Hon'ble Supreme Court in the case of Jignesh Shah & another as mentioned in para 19 reproduced hereinbefore. We further hold that in this view of the matter there is no need to seek condonation of delay under Section 5 of Limitation Act, 1963 in filing of application as canvassed by the Corporate Debtor.

11. Having said so, we further find that as per Regulation 8(2) of IBBI (Insolvency Resolution Process for Corporate person) Regulation, 2016, the existence of debt due to the Financial Creditor may be proved on the basis of record available in information utility or other relevant documents or financial statements showing that the debt has not been paid. Thus, on this basis also existence of debt due and payable in alive mode stands proved.

12. As far as the reliance on the decision by Corporate Debtor on the decision of the NCLT Kolkata Bench in the case of ***M/s Prowess International (P) Limited Vs M/s Shyam Steel Industries Limited*** *(Supra) is concerned, the said decision is no longer holds the field for the reason of subsequent judicial decisions, wherein presentation of debt in financial statements has been held as acknowledgement. We further consider it pertinent to point out that in the case of M/s Prowess International (P) Limited Vs M/s Shyam Steel Industries Limited, finding was based on the basis of fact that name of Financial Creditor was not appearing in the balance-sheet which is not the case here and for this reason also the ratio of that case is not applicable".*

16. In our considered view, the aforesaid decisions take care of all the contentions raised by the corporate debtor. Thus, all such contentions are rejected. As regard to impact of non mentioning of the name of the Financial Creditor in the balance sheet specifically, in addition to our findings in the aforesaid decisions, we find that as per explanation to section 7(1) of IBC,2016, the proceedings under section 7 of IBC,2016 get triggered even in case of a default by the debtor in respect of any financial creditor other than the applicant. In the present case, it is not in dispute that there is a default in respect of payment of financial debts. Thus, for this reason also, there is no merit in this contention of the corporate debtor.

17. It is further considered necessary to mention that presentation of a debt as liability in the balance sheet is a statement made by the corporate debtor to the world at large that this amount is payable by the corporate debtor. Even for commercial purposes such as credit ratings/ renewals, obtaining of financial assistance or fixation of drawing limits

or additional loan facilities etc. such liability is taken into consideration for computing net-worth, current ratio, capital gearing debt equity ratio etc.,hence, such presentation is of paramount importance from all perspectives.Thus, the same cannot be ignored for the purposes of proceedings under section 7 or 9 of IBC,2016. We are further of the view that after taking into consideration above aspects, such presentation also amount to promise under section 25 (3) of Indian Contract Act, 1872. "

8. In the written notes, the Corporate Debtor has taken a plea that notice was not served on the registered office but on the corporate office, hence, it could not be considered a proper service. However, the fact remains that the plea was not taken during the course of hearing at the first instance; even otherwise notice has been served on the corporate office of the Corporate Debtor which is an admitted fact and also Rule provides for service of notice through e-mail as well, hence, we do not find any merit in this technical objection taken now. Further, along with the written notes, the Corporate Debtor has also relied on certain judicial decisions which were not cited during the course of hearing, hence, we did not take cognizance of the matter as the other party has not been given an opportunity to counter the same.

9. Thus, considering the above facts and the applicable legal position, we find no merit in this petition filed by the Corporate Debtor. Accordingly, the same is dismissed, however, no order as to cost.

10. The Petition being **CP(IB) No.902/KB/2018** is **dismissed**.

Sd

Sd

11. Registry is hereby directed to communicate the order to the Operational Creditor and the Corporate Debtor by Speed Post as well as through E-mail.

12. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd 14/1/2020

(Virendra Kumar Gupta)
Member (Technical)

Sd 14/1/2020

(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 13th day of January, 2020.

cbn