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

**CP (IB) No.1111/KB/2018**

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

**And**

**In the Matter of:**

**STATE BANK OF INDIA**, State Bank Bhavan, Corporate Centre, Madam Cama Road, Mumbai – 400021 also at Samriddhi Bhavan, 1, Strand Road, Kolkata 700001 through Stress Assets Management Branch (SAMB-II) at Jeevandeep Building, Ist Floor, 1, Middleton Street, Kolkata 700071

**.....Financial Creditor**

**And**

**In the Matter of:**

**M/S. HANUMANTA ENGINEERING PRIVATE LIMITED** (formerly known as SRC Steels Private Limited) a Company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at 37, Shakespeare Sarani, Suit No. 3, Ist Floor, Kolkata 700017 and also at 23, Netaji Subhas Road, Ist Flooor, 4th Commercial Building, Kolkata 700001 and having its place of business and/or Works



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at Sankrail Industrial Park, Post Office & Village Dhulagarh, Police Station – Sankrail, Howrah 711302.

**..... Corporate Debtor**

**Order Delivered on: 19th August 2019**

**Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &**
**Shri Harish Chander Suri, Hon'ble Member (Technical)**

**Counsels on record:**

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| **1. Jay Saha, Senior Counsel** | ] |
| **2. Debasish Chakrabarti, Advocate** | ] **For Financial Creditor** |
| **3. Trisha Saha, Advocate** | ] |

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| **1. Jishnu Chowdhury** | ] |
| **2. Noella Banerjee** | ] **For Corporate Debtor** |
| **3. Dipak Dey** | ] |
| **4. Dipanjan Dey** | ] |

***O R D E R***

**Per Shri Jinan K.R., Member (Judicial)**

1. This is an application filed by State Bank of India/Financial Creditor(FC) for initiating corporate insolvency resolution process against Hanumanta Engineering Pvt. Ltd./corporate Debtor (CD) under Sec.7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on the allegation that the

corporate debtor failed to comply with the terms and conditions of the loan agreement and credit limits and thereby committed default in repayment of Rs.173,85,76,484.56 (Rupees One hundred seventy three crore eighty five Lacs Seventy Six thousand four hundred eighty four and paise fifty six only) which included interest calculated up to 31/7/2018 along with further interest @ 13.85% per annum from 1/8/2018 till realisation.

2. The averments material for the consideration of this application in brief are the following:-

a) On the strength of an application **(Annexure-1C),** the FC had sanctioned Cash Credit Facility of Rs. 250.00 Lakhs and Export Packing Facility of Rs. 400.00 Lakhs on 15.10.2007, against hypothecation over stocks of raw material/stores, stocks in process, finished goods, book debts and other current assets as primary security and mortgage of immovable properties as collateral security upon terms and conditions of the said sanction letter **(Annexure-1D)**. On 17.11.2007, to secure repayment of debit balance outstanding from time to time, the Corporate Debtor executed an Agreement of Loan-cum- Hypothecation along with consent clause **(Annexure-1E)** in favour of SBI. On 10.01.2009, at request of Corporate Debtor, the Financial Creditor sanctioned and/or allowed and/or renewed the aggregate Credit Limit of Rs. 650.00 Lakhs into both way interchangeability between CC & LC limit to the extent of Rs. 100.00 Lakhs within overall limit of Rs. 650 Lakhs against hypothecation over stocks of raw material/stores, stocks in process, finished goods, books debts and other current assets as primary security and mortgage of immovable properties as collateral security upon terms and conditions of the said sanction letter **(Annexure-1G)**. On 10.01.2009, for consideration of granting 650 Lakhs and to secure repayment of debit balance outstanding from time to time, the Corporate Debtor delivered an Agreement of Loan-cum-Hypothecation **(Annexure-1I)** in favour of SBI. On 10.01.2009, a further charge was created by Corporate Debtor in favour of SBI before the ROC, WB and submitted a Form 8 **(Annexure-1J)** with ROC, WB. On 05.03.2009, at the request of



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Corporate Debtor, the Financial Creditor sanctioned and/or allowed and/or renewed and/or **enhanced** the aggregate Credit Limit of Rs. 650.00 Lakhs to Rs. 740 Lakhs into both way interchangeability between CC & LC limit to an extent of Rs. 100.00 Lakhs within overall limit of Rs. 740 Lakhs against hypothecation over stocks of raw material/stores, stocks in process, finished goods, books debts and other current assets as primary security and mortgage of immovable properties as collateral security upon terms and conditions of the said sanction letter in terms of letter of arrangement **(Annexure-1K)**.

b) On 07.03.2009, for consideration of granting 740 Lakhs to secure repayment of debit balance outstanding from time to time, the Corporate Debtor delivered an Agreement of Loan-cum- Hypothecation **(Annexure-1M)** in favour of SBI. On 07.03.2009, a further charge was created by Corporate Debtor in favour of SBI before the ROC, WB and submitted a Form 8 **(Annexure-1J)** with ROC, WB. On 22.06.2010, at request of Corporate Debtor, the Financial Creditor sanctioned and/or allowed and/or renewed and/or enhanced the aggregate Credit Limit of Rs. 650.00 Lakhs to the tune of Rs. 12.50 Crores into both way interchangeability between CC & LC limit to an extent of Rs. 3 Crores against hypothecation over stocks of raw material/stores, stocks in process, finished goods, books debts and other current assets as primary security and mortgage of immovable properties as collateral security upon terms and conditions of the said sanction letter in terms of arrangement dated 22.06.2010 **(Annexure-1O)**. On 22.06.2010, in consideration of granting Rs. 12.50 Crores credit limit and to secure repayment of debit balance outstanding from time to time, the Corporate Debtor executed and delivered (i) Agreement of Loan for overall limit along with Consent Clause **(Annexure-1P)**, (ii) Agreement of Hypothecation of Goods and assets**(Annexure-1Q)**, (iii) letter regarding grant of individual limits within overall limits **(Annexure-1R)** and (iv) omnibus Counter Guarantee **(Annexure-1S)** in favour of SBI.

c) On 30.08.2011, at request of Corporate Debtor, the Financial Creditor sanctioned and/or allowed and/or **restructured** the aggregate Credit Limit with renewal with enhancement of Credit Limits to the tune of Rs. 68.43 Crores against hypothecation against entire current assets of the Company present and future, entire plant and machinery of the company as primary security and mortgage of immovable properties as collateral security upon



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terms and conditions of the said sanction letter in terms of arrangement dated 30.08.2011 **(Annexure-1T)**. On 30.08.2011, in consideration of granting aforesaid aggregate credit limit of Rs. 68.43 Crores and to secure repayment of debit balance outstanding from time to time, the Corporate Debtor executed and delivered (i) Supplemental Agreement of Loan for increase of overall limit, **(Annexure-1V)**, (ii) Supplemental Agreement of Hypothecation of Goods and assets for increase in overall limit **(Annexure-1W)**, (iii) letter regarding grant of individual limits within overall limits **(Annexure-1X).**

d) Aforesaid credit limits availed were repayable to the SBI on demand with 7.5% interest above base rate, from date of disbursement to date of payment with monthly rests or at a discretionary rate interest fixed by SBI. The Corporate Debtor enjoyed and utilised the said Credit facilities but in spite of repeated requests, the Corporate Debtor did not adhere to the terms and conditions of the said credit facilities. The account was therefore classified as NPA on or about 06.08.2012. On 10.01.2013, bank issued demand notice **(Annexure-1Y).** Disbursement details and Statement of accounts containing computation of amount of default and Statement of accounts with certificates of financial creditor under the Banker's Book Evidence Act, 1891- **Annexure-1Z.**

e) Total outstanding of Rs. **173,85,76,484.56**, inclusive of interest calculated upto 31.07.2018 and further interest @13.85%. from 01.08.2018 till realisation. On 27.01.2013, despite receiving demand notice dated 10.01.2013, the Corporate Debtor failed to pay an aggregate sum of **Rs. 75,74,16,762.00.** Copies of Form 8 being certificate of registration of charge issue by ROC- **Annexure-2A.** SBI has filed an application being O.A.No. 392 of 2014 u/s 19 of RDB Act, 1993 before DRT-II, Kolkata which was transferred to DRT-III, Kolkata as T.A.No. 307 of 2014 which is still pending. Pendency does not hinder admission of instant application. Record of default- status classification by CRIF High Mark Credit Information Services Pvt. Ltd. Dated 30.07.2018 – **Annexure-2B.** Copies of audited Balance Sheets for FY 2014-2015, 2015-2016 and 2016-2017 of Hanumanta Engineering Private Limited- **Annexure-2C.** A resolution professional Mr. Balasubramanium is proposed as IRP. Form 2 and written consent is also enclosed. Upon the above said contention the FC prays for admission of the application under section 7 of the Code.



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3. The CD entered appearance and filed reply affidavit contending in brief is the following:-

a) The Corporate Debtor states that the Financial Creditor has suppressed the following facts, that the Corporate Debtor had requested the Financial Creditor on several occasions to reduce the rate of interest as per RBI guidelines and in spite of the RBI guidelines for concessional rate of interest, the Financial Creditor continued to charge the Corporate Debtor higher rate of interest @ 17.75%. However, no interest concession or Fund Interest Term Loan [FITL] was granted by the Financial Creditor. The Corporate Debtor received a notice dated 14.08.2012 declaring that the account of the Corporate Debtor was classified as NPA from 10.08.2012. The Corporate Debtor submits that the NPA notice dated 14.08.2012 is contrary to the Prudential Norms on Income Recognition Assets Classification and Provisioning.

b) The Corporate Debtor on 03.08.2012 requested the Financial Creditor to consider restructuring of the account of the Corporate Debtor and on 25.08.2012, the Corporate Debtor requested the Financial Creditor to allow "holding on" operation in the account of the Corporate Debtor and also submitted a restructuring proposal. The Corporate Debtor submits that talks for restructuring the account of the Corporate Debtor were in process from September, 2012. The Corporate Debtor further submits that after several rounds of discussions and meetings, the Financial Creditor requested the Corporate Debtor to submit a proposal again, the same was sent on 31.12.2012. The Financial Creditor did not reply to the Proposal sent but



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instead sent a demand notice dated 10.01.2013 and the Corporate Debtor replied to the said notice on 28.01.2013 requesting the Financial Creditor to withdraw the notice as the restructuring proposal was under consideration. Thereafter, discussions for restructuring of the accounts were once again carried out between the Financial Creditor and Corporate Debtor, but the Financial Creditor did not consider the restructuring proposal of the Corporate Debtor.

c) It is further stated by the Corporate Debtor that the Financial Creditor had blocked Rs.2,00,000/- in the Corporate Debtor's current account for the purpose of TEV study, though the agency had failed to conduct a detailed TEV study which was later admitted by the Financial Creditor. The Corporate Debtor further states that the viability study was conducted after more than a year from the date the account of the Corporate debtor became NPA. The Corporate Debtor further submits that the account of the Corporate Debtor ceased to be NPA when the Financial Creditor transferred 5% of all monies coming to the Corporate Debtor's account for being adjusted against outstanding dues. The Corporate Debtor further states that the Financial Creditor by allowing regular operation of the Corporate Debtor's account from 03.04.2013 had revived the account of the Corporate Debtor. The Corporate Debtor states that the notice dated 19.08.2013 sent under Section 13 [2] of the SARFAESI Act, 2002 by the Financial Creditor is bad and illegal in law as the "hold on" operation by the Financial Creditor was being implemented. It is further stated that in reply dated 15.10.2013 to the said notice the Corporate Debtor once again requested the Financial Creditor to restructure the account of the Corporate Debtor.

4. That the Corporate Debtor had filed a Suit being **C.S. No. 191 of 2014** before the Hon'ble High Court at Kolkata which is pending till date. An interim order passed against the financial creditor is also in force. An appeal filed by the Financial Creditor has been disposed of. The Financial Creditor attempted to issue a notice under Section 13 [4] of the SARFAESI Act, 2002 which was challenged before the DRT. Thereafter, the Corporate Debtor filed an application under the Contempt of Courts Act, 1971 being C.C. No. 14 of 2018 before the Hon'ble High Court at Kolkata, in view of the alleged flagrant violation of the interim order passed by the Hon'ble High Court. The Financial Debtor has also filed O.A. No. 307 of 2014 against the Corporate Debtor. The Corporate Debtor further states that by stopping the account of the Corporate Debtor the Financial Creditor has caused the Corporate Debtor to shut down its business and the corporate Debtor has suffered substantial loss and damage. The Corporate Debtor further submits that the Corporate debtor is a Micro and Small Scale Enterprise and therefore does not fall within the definition of the Corporate Debtor and is outside the purview of the IBC, 2016. The Corporate Debtor further submits that there is no debt or default of the Corporate Debtor towards the Financial Creditor and therefore this petition is liable to be dismissed.

i) The FC has filed rejoinder contending in brief the following:-

a) The FC denied the averments in the reply affidavit other than the averments admitted in the rejoinder. Corporate Debtor has categorically admitted and acknowledged in paras 7-11 of Affidavit in reply that it has, from time to time, availed diverse credit facilities from the Bank. Allegation that Corporate Debtor is entitled to concessional rate of interest is without any basis or support. The contention that request was made by Corporate Debtor to restructure their account which makes it apparent that the corporate Debtor has admittedly defaulted in repayment. The TEV deals with feasibility of reviving the Corporate



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Debtor, it does not justify the default. The Notice issued u/s 13(2) of SARFAESI Act, 2002 cannot be challenged in these proceedings. Declaring the account as NPA cannot be challenged after 6 years that too in these proceedings. The contention that Corporate Debtor is entitled to refund of excessive interest amounting to Rs. 10 Crores is absurd and unsubstantiated. In terms of his **Lordship HMJ I.P. Mukherjee's Order dated 21.07.2014,** the financial creditor and/or its higher authority has considered and rejected the representation on 10.07.2014. the Corporate Debtor has wrongly and illegally contended that its representation had not been disposed of. To avoid unnecessary controversy and without prejudice to its rights and contentions the Bank by a letter dated 03.10.2018 again offered to grant fresh hearing to the Corporate Debtor however, the Corporate Debtor spurned the offer by letter dated 15.10.2018. By letter dated 05.12.2018, the Bank again offered to grant fresh hearing to the Corporate Debtor on 12.12.2018 however, the Corporate Debtor again denied/refused to participate vide letter dated 10.12.2018. It is denied that the Petition suffers from suppression of material facts or that the Bank has not come to this court with clean hand. It is incorrect to say that the Corporate Debtor made considerable repayment to the Bank between 2007 and 2011. It is also incorrect to say that the Corporate debtor had agreed to charge interest at the rate of 14% per annum as alleged or at all. it is denied that master circular dated 12.09.2011 has any application to Corporate Debtor. It is denied that any assurance was given by the financial creditor to corporate debtor to restructure the account of the corporate debtor as alleged or at all. Contents of letter of corporate debtor dated 28.01.2013 are denied and disputed. It is denied that the senior officials of the Bank visited the office of Corporate Debtor or assured the Corporate Debtor that account will be restructured. It is denied that the viability of restructuring was justification of non-payment of dues. The TEV study was done at the behest and instance of the Corporate Debtor. It is incorrect to say that the proceedings initiated under SARFAESI were contrary to RBI guidelines. The contents of C.S. No. 191 of 2014 are false untrue and incorrect. The said C.S. has been initiated with mala fide intent and ulterior motive. It is liable to be dismissed. Contents of G.A. No. 1693 of 2014 in above said C.S. is false, untrue and incorrect. It is denied that any order has been passed by the Calcutta H.C. in any manner whatsoever that prevents or bars the financial creditor from instituting the present petition. It is denied that the Financial Creditor or any of its officers have violated any order passed by the Calcutta H.C. Contempt proceedings have been filed to intimidate, browbeat,



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harass and threaten the Financial Creditor into instituting the present petition. It is denied that the Corporate Debtor is outside the purview of the IBC or that it is a MSME. It is denied that the proceedings have been initiated against the direction of Calcutta High court.

ii) The CD then filed a supplementary affidavit contending that the application filed is not within the period of limitation and hence not maintainable. To the said supplementary affidavit the FC has filed a rejoinder denying the allegations in the supplementary affidavit.

5. Heard Ld. Sr. Counsel Shri Joy Saha for and on behalf of State Bank of India/Financial Creditor and Ld. Counsel Shri. Jishnu Chowdhury for and on behalf of the corporate debtor. Perused the records, argument notes and citations referred to on both sides.

6. Upon hearing the arguments and on considering the contentions raised on both sides the points that arises for consideration are:-

i) Whether the application was filed within the period of limitation?.

ii) Whether the interim order in C.S.191 of 2014, passed by the Hon'ble Calcutta High court, in any manner whatsoever prevents or bars the financial creditor from instituting the present petition?.

**Point No (i).**

The financial creditor at the request of the corporate debtor had granted various loan facilities to the CD. Though the rate of interest to by the CD is under challenge as per the claim of the FC the CD is liable to pay Cash Credit of Rs.87,87,79,091/-, working capital term loan of Rs.79,64,12,310.45 and term loan of **Rs.63385082.58** as the outstanding amount inclusive of interest as on 31/7/2018 totaling a sum of



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Rs.173,85,76,484.56. Availing the above said three nature of loan facilities by the corporate debtor and declaration of the above said account as Non Performing Asset (NPA) on 6/8/2012 is not in dispute. As per the averments in the reply affidavit, the CD made a request to restructure their accounts which make it apparent that the CD has admittedly defaulted in repayment. The above said are the admitted facts.

The CD though filed an exhaustive reply affidavit disputing its liability, there is no challenge in regard to the execution of loan agreement, letter of arrangement, agreement of hypothecation of goods and assets, guarantee agreement as referred to in the application as **Annexure-D** to **Annexure-X**. The disputes raised in the reply can be summarized as shown below:-

i) Contractual rate of interest claimed by the Financial Creditor is not correct;

ii) Entitled to concessional rate of interest;

Iii) Notice issued u/s.13(2) of SARFAESI Act is illegal and improper;

iv) Declaring the account of Corporate Debtor as NPA is being challenged in this application and hence this application is not maintainable

v) Initiation of proceeding u/s.7 of the Code is in violation of the order of Hon'ble Calcutta High court in CS 191 of 2014.

vi) Contempt proceedings initiated against the Financial Creditor as against the violation of orders in CS 191 of 2014 is pending before the Hon'ble Calcutta High Court bar the Financial Creditor from instituting the present proceedings.



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vii) There is no debt or default of the Corporate Debtor towards the Financial Creditor

7. By filing supplementary affidavit, another contention was taken by the Corporate Debtor that the application was filed not within the period of limitation and hence not maintainable.

8. When this case was taken up for hearing, the Ld Counsel for the CD stressed his argument mainly on the question of limitation. According to him, this application was filed not within the period of limitation and that since an interim order in a civil suit is in force as against the FC, filing of this application is in violation of the order of High Court and therefore, on the said two grounds this application is liable to be held not maintainable. In the above said background let us consider point No.(i).

9. The Limitation Act, 1963 is made applicable to the Code by way of amendment of Sec.238-A of the Code.

The Ld. Sr. Counsel for the Financial Creditor submits that the application was filed within the period of limitation. The four folded submission on the side of the Financial Creditor are the following:-

Firstly he submits that the period of limitations runs from the last date of execution of Letter of Arrangement by the Corporate Debtor, is on 30.08.2011. Since the Financial Creditor had filed **OA No 392 of 2014** u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act,1993 (RDDBFI Act) on 25th march, 2014 within the period of 3 years from the last

date of execution of loan agreement by the Corporate Debtor and the proceeding is still pending before the DRT, Kolkata, filing of this application is within the period of limitation. According to him time period stops running from the date of filing of the said OA and there is continuing cause of action. To strengthen the said argument, he relied upon **Babulal Vardhaji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt.ltd and Ors, CA (AT) (Inso) No. 549 of 2018, NCALT, [Manu/NL/0213/2019]**

Secondly he contends that right to apply u/s 7 of the Code accrued to the Financial Creditor since 1st December,2016 when the I&B Code came into force, filing of this application on 10.08.2018 is within 3 years and therefore, this application is within time limit. He relied upon **B.K.Educational Service Pvt.Ltd V. Parag Gupta and Associates** and **Shankar Varadharajan vs. Dewachand Ramsaran Corporation Pvt. Ltd and Ors.** [CA (AT) (Inso) No 735 of 2018 [Manu/NI/0311/2018] for strengthening the said submissions.

Thirdly he submits that in the balance sheet for the year ending 31.3.2017, the CD admitted the debt and therefore, filing of this application is not barred by law. He relied upon section 18 of the Limitation Act.

Fourthly, he also would submit that the Financial Creditor being a mortgagee, the period of limitation to file an application to foreclosure is 30 years as per Article 63 (3) of the Limitation Act,1963 and therefore, filing of this application on 10.08.2018 is not barred by law.

10. In regards the submission of the Ld. Sr. Counsel that filing of OA within the period of limitation, and that the time period stops run upon filing the OA before the DRT and therefore, filing of this application is with in the period of limitation. The Ld. Counsel for the Corporate Debtor submits that filing of

the OA No.392/2014 before the DRT under Sec.19 of the **Recovery of Debts due to Banks and Financial Institutions Act, 1993** on 25th march 2014, does not save the period of limitation. According to him the Financial Creditor cannot take the benefit of the pendency of the proceedings before the DRT to claim that filing of this application u/s 7 of the Code is otherwise barred by laws of limitation. He would further submit that both the proceedings were initiated on the strength of very same cause of action and that being so in new proceedings, there is no saving of period of limitation. According to him, the cause of action in both the proceedings is on the strength of default i.e is on 06.08.2012, on the date of declaration of the account of Corporate Debtor as NPA and therefore, filing of this application on the strength of the very same cause of action in which the OA filed before the DRT is clearly barred under section 14 of the Limitation act,1963. He cited **AIR 2017 Culcutta 289 ( Dr.Dipankar Chakraborty v. Allahabad bank & Others** for stressing on the said argument. He brought our attention specifically to para 12 & 18 of the said judgment. It is good to read para 12 & 18, which read as follows:-

*12. "In the facts of the present case, the petitioner has not contended that, the claim made by the secured creditor before the Debts Recovery Tribunal under Section 19 of the Act of 1993 is barred by the laws of limitation. In any event, the issue of limitation of the proceedings under Act of 1993 is an issue which is to be decided by the Debts Recovery Tribunal before which such proceedings are pending. A Writ Court in a collateral proceeding is not required to answer such an issue. Such an issue also does not fall for consideration in the present case. Rather the issue as to whether the lodging of the proceedings under Section 19 of the Act of 1993 continues the period of limitation, or in other words, stops the running of the period of*



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*limitation on and from the date of lodging of such proceedings has arisen for consideration in the present case."*

*18. "Section 14 of the Limitation act,1963 saves the period of limitation in the event of a new proceeding being filed when the Court in which the former proceeding was being prosecuted suffers from defect of jurisdiction or defect of like nature. It does not contemplate two proceedings on the same cause of action at the same time. In the present case, the bank has not withdrawn the proceeding under Section 14 under the RDB Act, 1993, for defect in jurisdiction of the Tribunal to decide the same or otherwise. Rather the bank is proceeding under Section 19 of the RDB Act, 1993. It can proceed parallely by under the Act of 2002 provided that, the proceedings under the Act of 2002 are within the period of limitation. Pendency of the proceedings before the DRT, under the RDB Act, 1993, will not save the period of limitation for a proceeding under the Act of 2002, if the proceeding under the Act of 2002, is by itself barred by the laws of limitation. In other words, a bank cannot take the benefit of the pendency of the proceedings before the DRT to claim that, a proceeding under the Act of 2002, which is otherwise barred by limitation to be validly instituted within the period of limitation. In other words, a bank cannot take the benefit of the pendency of the proceedings before the DRT to claim that, a proceeding under the Act of 2002, which is otherwise barred by limitation to be validly instituted within the period of limitation. Section 4, Section 14 and Section 15 of the Limitation Act, 1963, does not assist a bank to initiate a proceeding under Act of 2002 which is otherwise barred by limitation on the date of its initiation premised upon of a pendency of a proceeding under Section 19 of the RDB Act, 1993 before the DRT."*

11. In the above cited decision, the Bank initiated parallel debt recovery proceedings both under **Recovery of Debts due to Banks and Financial Institutions Act, 1993** and under **SARFAESI Act of 2002.** The borrower/petitioner in the writ petition contends that when the bank invoked proceeding under SARFAESI Act of 2002, the same was barred by



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limitation. The Hon'ble High Court found that the bank invoked section 13 (2) of the Act of 2002 on April 13, 2011, i.e. more than 9 years after the Act came onto effect, not within the period of limitation and thereby quashed the proceedings under the SARFAESI Act of 2002 referring to section 36 of the Limitation Act.

12. In the case in hand truly the Financial Creditor/Bank initiated parallel proceedings. It filed OA before the DRT under **Recovery of Debts due to Banks and Financial Institutions Act, 1993 on 25th march 2014** and filed this application under section 7 of the I&B code on 10th August 2018. It is significant to note here that the invoking proceedings under **Recovery of Debts due to Banks and Financial Institutions Act, 1993** is on the strength of declaration of the borrower's account as NPA. That deceleration was on 06.08.2012. But filing of this application is not on the basis of the very same cause of action but on the occurrence of default. Occurrence of default was on 30.08,2011. So the cause of action for initiating proceedings under the two proceedings already initiated by the Financial Creditor is different and hence the above said proposition is not at all applicable in the case in hand. The I&B Code is a new Code enacted in the year 2016 and coming into effect on 28th May, 2016. By the said enactment, the Financial Creditor like the Financial Creditor in the case in hand got an additional remedy and not a parallel remedy as attempted to establish on the side of the Corporate Debtor. Thus, the said citation has no application to the facts of the case.

13. In view of the abovesaid, we are of the view that the filing of the proceedings before the DRT by the Financial Creditor under the provisions of Recovery of Debts due to Banks and Financial Institutions Act, 1993, continues the period of limitation, or in other words, stops the running of the period of limitation from 25th March 2014, when the OA was filed by the Financial Creditor before the DRT, Kolkata. Pendency of a petition under the provisions of the RDDBFI Act, 1993, being not a bar for initiating the proceedings under the I&B Code, filing of this application is within the period of limitation.

14. In answering the 2nd submission of the Ld. Sr. Counsel for the Financial Creditor, Ld. Counsel for the Corporate Debtor submits that the Financial Creditor was remedy-less before the filing of this application, because right to sue was barred long before the date of filing of this application. To strengthen his said argument, he also relied upon the very same citation i.e B.K. Educational Service Pvt .Ltd. According to Ld. Sr. Counsel for the Financial Creditor as per the judgment of the Hon'ble Supreme Court in B.K. Educational Services Private Limited vs. Parag Gupta and Associates, the financial creditor has taken remedy under the then existing law within 3 years from the date of commencement of the I&B Code, as such, is well within the period of limitation. He relied upon Article 137 of the Limitation Act,1963. According to him as per Article 137, the right to apply accrued when the I&B code came in force and since the I&B Code came in force on Ist December, 2016, filing of this application is within 3 years of accruing its right and therefore, the application filed is well within period of limitation.

15. Ld. Counsel for the CD on the other hand relying upon para 27 of the B.K.Educational Service Private Ltd, submits that right to sue accrued not on Ist December, 2016, as submitted but accrued on the date of default i.e on 30.08.2011 as alleged by the Financial Creditor and therefore filing of this application beyond three years would be barred under Article.137 of the Limitation Act. It is good to read Article 137. It read as:-

| **Description of application** | **Period of limitation** | **Time from which period begins to run** |
|---|---|---|
| 137. Any other application for which no period of limitation is provided elsewhere in this division | Three years | When the right to apply accrues |

16. A reading of the Judgment cited on both sides and reading the judgment of NCALT in Shankar Varadharajan, referred to above, it appear to us that as per Article 137, right to apply accrued to the Financial Creditor in the case in hand on Ist December, 2016 and not on 30.08.2011 as attempted to be established on the side of the Corporate Debtor. At this juncture it is good to read para 4 of the Judgment of Hon'ble NCLAT in Shankar Vardhrajan.

*4. "In the present case, the right to apply under Section 9 of the I&B Code accrued to the respondent since Ist December, 2016 when the I&B Code came into force. Therefore, we find that for triggering the application under Section 9, the application is within the time limit."*

17. On a reading of the above said judgments, we are of the view that right to apply under the provisions of the Code started from the date of commencement of the Code and not on the date of default as attempted to be established on the side of the Corporate Debtor. So the contention on the side of the Corporate Debtor that second submission of the Ld.Sr.Counsel for



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the Financial Creditor is fallacious and unacceptable, and is found devoid of any merit.

18. Coming to the 3rd submission that there is valid acknowledgment of debt by the Corporate Debtor in its financial statement for the year ending 31 .3.2017, the ld. Counsel for the Corporate Debtor submits that balance sheet does not contain any acknowledgment that the money as claimed by the Financial Creditor is due to the Financial Creditor. Referring to section 18 of Limitation Act, he attempted to convince us that there is no unconditional admission in writing in the balance sheet that the amount is due to the Financial Creditor and therefore, the balance sheets cannot be used as a proof of acknowledgment as claimed by the Ld.Sr.Counsel on the side of the Financial Creditor.

19. We are taken to **Annexure-2-C**, page no 835 and 842 of the balance sheet by the Ld.Sr.Counsel for the Financial Creditor. Page No. 842 relates to **Disclosures-Secretarial audit report**. The balance sheet under the head **Long-term borrowings** the amount of debt payable is shown as **Rs.33,49,92,064.** But the creditor to whom the said amount is due is not written under the said head. However this entry if read along with **Textual**

amount and therefore is not an acknowledgment. The Note was read over by him to us to convince us that the amount shown in the note being written as the disputed amount it won't fall under section 18 of the Limitation Act. The said note is extracted below:-

***Disclosure in auditors report relating to default in repayment of financial dues.*** *"In our opinion and according to the information and explanations given to us, the Company has not defaulted in repayment of dues to any financial institutions, banks and debenture holders* ***except the Secured Term Loan from State Bank of India of Rs.33,49,92,064/-*** *which has been declared by the bank as a Non Performing Assets. The same has been* ***disputed by the company*** *in the High Court".*

20. Referring to the civil suit pending before the High Court, he further would submit that the declaration of NPA is under challenge and therefore that is not an acknowledgment of dues. We are not at all convinced by the argument advanced by the Ld. Counsel for the Corporate Debtor. The challenge regarding declaration of account of the Corporate Debtor as NPA is nothing to do with the case in hand. As per the Civil Suit pending for consideration, the Corporate Debtor challenged the procedure followed by the Financial Creditor in declaring the account as NPA. This case not on the basis of declaration of account as NPA but on the basis of occurrence of default. It has come out in evidence that no amount was repaid. Admittedly, the loan was availed by the Corporate Debtor. That being so the recital in the note that declaration of account as NPA is under challenge before the High Court and hence there is no direct admission in writing in the balance sheet, is found devoid of any merit. In view of the above said we are inclined to hold that the balance sheet above refereed is an acknowledgment of debt found due to the Financial Creditor from the Corporate Debtor and therefore



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the said ground taken by the Corporate Debtor is found unsustainable under Section 18 of the Limitation Act,1963.

21. The next submission on the side of the Financial Creditor is that even if it is found that filing of this application is barred by Article 137, or under Section 21 of the Limitation Act, 1963, the period of limitation for filing this application being 30 years as per **Article 63(a)** filing of this application is within the period of limitation. According to the ld. Sr. Counsel for the Financial Creditor the application filed under section 7 of the Code can be equated to a suit filed by a mortgagee for foreclosure, and the period of limitation start from when the money secured by the mortgagee becomes due and therefore filing of this application within 30 years of the money secured by the FC is due, is well within the period of limitation. In Babulal Vardhaji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. and Ors reported in CA(AT)(Insolvency) No. 549 of 2018, the Hon'ble NCLAT has observed in respect of a suit filed for recovery of immovable property by a mortgagor the period of limitation is 12 years under Article 61(b) and held that *"filing of an application wherein property has been mortgaged, claim is not barred by limitation"*. Here in this case the FC is not a mortgagor, but is a mortgagee, and therefore Article 61(b) is not applicable, but Article 63(a) appears to be applicable. By applying the very same principle applied by the Hon'ble NCLAT in the said case, we can rightly hold that the applicant being a mortgagee its claim is not barred by limitation as the period of limitation is 30 years.



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22. The above said discussions lead to a legitimate conclusion that the filing of this application is within the period of limitation and the claim of the Financial Creditor is not barred by limitation. This point is answered in favour of the Financial Creditor.

23. **Point No (ii)**

It is contended on the side of the Corporate Debtor that initiating the proceedings by filing this application is in violation of the order of the Hon'ble High Court, at Calcutta in C.S. 191 0f 2014, dated 21st July,2014 and therefore, Financial Creditor is disentitled to take any steps against the Corporate Debtor, and therefore this application is not maintainable. To stress his said submission, he relied upon the below extracted para in the said order.

*" Only for the period from now till the appeal is disposed of by the higher authority, the bank will not take any further step and the existing interim order will continue. The appeal should be disposed of on merits. Any further step may be taken by the bank according to the decision of the higher authority".*

24. According to him, the above said order was affirmed by the Hon'ble Division Bench in an appeal preferred by the Bank and therefore the Financial Creditor is prevented from taking any steps till the disposal of the appeal preferred by the Corporate Debtor before the higher authority of the Bank/Financial Creditor. He would further submit that such appeal is still pending and Financial Creditor has not disposed of the same on merit in terms of the said order and therefore, these proceedings are to be held not maintainable.



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25. The Ld.Sr.Counsel for the Financial Creditor objected to the said submission on two grounds. Firstly, he submits that the appeal submitted before the higher authority was disposed of and repeated offers in writing were given to it for re-hearing if any and therefore, there is no violation of the order by initiating proceedings under the Code. Secondly, he would submit that prohibition order is against taking any further steps relating only to the proceedings pursuant to the NPA date which are of no relevance in the instant case which was filed u/s.7 of the Code.

26. We do find some force in the arguments advanced on the side of the Financial Creditor. A copy of the letter dated 3.10.2018 addressed to the Corporate Debtor was brought to our notice by the Ld. Sr. Counsel. It was produced along with the rejoinder. This letter was not seen challenged on the side of the Corporate Debtor. An extract from the letter is self explanatory. It is extracted below:-

*"Despite your representation not having been made to the 'next Higher Authority', when the Branch received the communication, much after the time permitted by Hon'ble High Court vide its order dated 21.07.2014, the same was duly considered by the Deputy General manager (B&O) being the 'next Higher Authority' of the Assistant General manager, SME Finance Branch. Upon due consideration your appeal was declined by the Deputy General Manager (B&O) as the proposal was not viable or met with or conformed to RBI guidelines. We state and assert that the said decision of the Deputy General Manager (B&O) was duly communicated to you and that you were fully aware of the same".*



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27. The above said reply to the Corporate Debtor by the Bank revels that the Corporate Debtor itself did not act as per the directions of the order and delayed in submitting the appeal and the higher authority had declined the appeal and given fresh opportunities for fresh hearing by issuing several letters on 3rd October,2018, 5th December,2018 and on 10th December,2018 and copies of all the letters were produced for our reference along with the rejoinder. Those letters were seen received by the Corporate Debtor and Corporate Debtor did not appear before the authority for rehearing. This circumstance indicates that any steps after the disposal of the appeal in no way violate the direction issued in the said order.

28. The Ld. Sr. Counsel referred to the relief sought for in the civil suit submits that it was filed by the Corporate Debtor challenging the date of declaration of the account as NPA alleging non adherence in following the guidelines issued by the RBI and further steps in continuing the already initiated proceedings were stayed and therefore the proceedings in the instant case will not fall under the scope of the direction. On going through the relief sought for in the suit, and since these newly instituted proceedings in no way related to any steps to be initiated in a DRT proceedings, we are of the opinion that the order in no way would affect the right of the Financial Creditor from initiating the proceedings under the provisions of the Code. Accordingly, we do not find any merit in the submission on the side of the Corporate Debtor. This point is answered accordingly.

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29. By answering point No.(i) and (ii), we come to a conclusion that filing of the application on 10.08.2018 is within the period of limitation; that the claim of the Financial Creditor is not barred by any of the provisions of Limitation Act,1963 and that initiating the proceedings under section 7 by the Financial Creditor as against the Corporate Debtor is not contrary to the order dated 12th July,2014 passed by the Hon'ble High Court, at Calcutta. Therefore, this application filed under section 7 of the I&B Code is found perfectly maintainable.

30. The Corporate Debtor has miserably failed to substantiate that the dispute it raised in the reply is fit for not to initiate CIRP and also failed to substantiate any reason as to why the application filed under section 7 of the I&B Code, shall not be initiated against the Corporate Debtor. The application filed is otherwise complete. Though no record with the information utility seen produced in the instant case a copy of report from CIRF High Mark Credit Information Services Pvt. Ltd as **Annexure 2-B**, produced on the side of the Financial Creditor proves that the Corporate Debtor is a defaulter. As per the written communication submitted by the proposed resolution professional, no disciplinary proceeding is pending against him. Hence, he can be appointed as an IRP. Being satisfied that there is default, that the application is complete as per section 7 (5) (a) of the I&B Code, the application warrants admission as prayed for on the side of Financial Creditor. Accordingly we order admission of this application and pass the following directions:-



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## *ORDERS*

i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Hanumanta Engineering Private Limited is hereby **admitted.**

ii) 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.

iii) 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 judgement, 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;

(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);



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(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.

iv) 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.

v) 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.

vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

vii) 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 the 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.

viii) **Mr. Balasubramanium Govindarajan,** C/o. RBSA Restructuring Advisors LLP, 9th Floor, Kahm Tower, 13, Nellie Sengupta Sarani, Kolkata 700087, a Resolution Professional registered with Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) having **Registration No. IBBI/IPA-003/IP-N000136/2017-18/11500, E-mail ID** bgrajan@rediffmail.com, Mobile No. 8939911203 is hereby



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appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

x) Registry is hereby directed under section 7(4) 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.

xi) List the matter on **20th September, 2019** for filing of the progress report.

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

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**(Harish Chander Suri)**
**Member (T)**

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19/8/19.

**(Jinan K.R.)**
**Member (J)**

Signed on this, the 19th day of August 2019

pd/vc