IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH, KOLKATA

CP(IB) No.1476/KB/2018

CA(IB)No.1005/KB/2019

IN THE MATTER OF

An application Under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Application to Adjudicating Authority) Rules, 2016, for initiation of Corporate Insolvency Resolution Process.

And

IN THE MATTER OF

Kotak Mahindra Bank Limited, having its registered office at 27, G Clock, Bandra Kurla Complex, Bandra (E), Mumbai-400051 and one of its branch office at Apeejay House, Block- "C", 7th Floor, 15, Park Street, under P.S. Park Street, Kolkata-700016.

.....Financial Creditor

Versus

M/s Sri Balaji Metals and Minerals Pvt. Ltd., having is registered office at 23A, Netaji Subhas Road, Room No.6, 3rd Floor, Kolkata-700001, West Bengal.

.....Corporate Debtor

Date of Hearing : 27.11.2019
Order Delivered on : 03.12. 2019

Coram:

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

For the Financial Creditor :1.Mr.Joy Saha, Sr. Advocate
:2.Mr.Vikram Wadehra, Advocate
:3.Mr.Vidushi Chokhani, Advocate

For the Corporate Debtor :1.Mr. Abhrajit Mitra , Advocate
:2.Mr.Satadeep Bhattacharya, Advocate.
:3.Mr.Anirudhya Dutta, Advocate

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ORDER

Per Virendra Kumar Gupta, Member (T)

This application under Section 7 of Insolvency and Bankruptcy Code, 2016 has been filed by the Financial Creditor namely Kotak Mahindra Bank Limited to initiate Corporate Insolvency Resolution Process against Corporate Debtor namely M/s Sri Balaji Metals and Minerals Private Limited. The amount of default has been claimed at Rs. 5,17,34,441.12 /-(Rs. Five Crore Seventeen Lakh Thirty Thousand Four Hundred and Forty One and paise Twelve only) and the date of default has been stated as 29.12.2012.

2. The facts, in brief, are that the Financial Creditor granted term loan to the Corporate Debtor for purchase of Dumpers. The Corporate Debtor, however, failed to make repayment,hence, legal notice was issued from time to time and finally loan recall notice was issued on 7th April, 2015. Notice under section 434 of the Companies Act, 2013 was also served on 25th May, 2016. Finally, this petition has been filed.

3. The learned Senior counsel appearing for the Financial Creditor narrated these facts and specifically pointed out that the hurdle which was to be crossed at the first instance was whether debt/claim was barred by limitation or not. In this regard, he drew our attention to page 480 of the paper book, which contains financial statements of the Corporate Debtor for the year ended as on 31st March, 2016. It was pointed out that the name of the Financial Creditor was appearing therein under the head of secured loans and the admission of the

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Corporate Debtor regarding default being made in repaying the same had also been mentioned. Apart from this, he contended that on 20th June, 2014 payment of Rs. 10,000/- had been made. Based upon these facts, learned Sr.Counsel submitted that there was a continuous cause of action and therefore, claim of the Financial Creditor was not barred by limitation. On query from the bench regarding presentation of outstanding amount in earlier years, the Ld. Senior Counsel fairly submitted that if required balance-sheets for earlier years could be produced.

4. The learned Sr. Counsel appearing on behalf of the Corporate Debtor submitted that debts were due and payable in 2012 on the face it but in sum and substance it fell due on 12.01.2010. In this regard, he drew our attention to page 372 to 375 Annexure 'O' show that loan had been forclosed. He, thereafter, drew our attention to page 382 to 392 and Annexure-Q of the paper book to show that on 29.11.2010 the Bank in letter through its advocate had itself stated that amount loan had been forclosed and the agreement had been terminated. It was strenuously argued that there was no admission or acknowledgement or any repayment by the Corporate Debtor thereafter and no record to this effect were also produced by the Financial Creditor, hence, it was an open and shut case on account of limitation as aforesaid loan became time barred on 10.09.2013 and 29.11.2013. Thereafter, he drew our attention to page 85 and 103 of the Paper Book to show that as per CIBIL report, the Financial Creditor had already written off amount and also showed that no amount was outstanding and for this

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reason also there was no debt due and payable. Therefore, this fact also supported the contention of the Corporate Debtor that no debt was payable. He thereafter referred to page 66 to 77 of C.A filed by the Corporate Debtor to show that dumpers were defective and because of in action/non corporation on the part of Financial Creditor. The Corporate Debtor suffered huge losses and these dumpers were returned to the Bank in the year 2009 itself. To support this contention, he referred to page 91 to 93 and Annexure-9 of the paper book of I.A. He also drew our attention to MOU placed at page 56 to 57 to show that dumpers purchased were returned back to the manufacture of dumpers for repair and bank was also a party to such MOU. As regard to payment of Rs. 10,000/-, the learned counsel submitted that this payment had not been made towards the outstanding amount of loan but towards the costs as per the direction of the Hon'ble High Court in section 434 of the Companies Act, 2013 proceedings. To substantiate this claim, the learned counsel submitted copy of the order of the Hon'ble High Court. In this regard, he further pleaded that this amount had wrongly been adjusted by the Financial Creditor towards loan. It was also pleaded that there was a pending dispute with regard to amount of debt and hypothecated securities and therefore, this petition was not maintainable for this reason.

5. As regard to reliance placed by the Financial Creditor on the balance-sheet for year ended on 31st March, 2016 to make a plea of acknowledgement of debt, it was pleaded that in the said balance-sheet, it was specifically mentioned that EMI payable to all creditors including

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the Financial Creditor had expired but for one other Financial Creditor, hence, based upon these facts, it could be said that in fact there was no acknowledgement of its debt.

6. As regard to the applicability of provisions of section 18 of the Limitation Act, 1963 in there true sense, the learned counsel placed strong reliance on the decision of the Hon'ble Supreme Court in the case of *Prabhakaran & Ors Vs M. Azhagir Pillai (Dead) by Lrs. & Ors as reported in A.I.R. 2006 SC 1567* and drew our attention to para 12 to 17 of the said order. Based upon the observations of the Hon'ble Supreme Court, the learned counsel submitted that there was no admission or acknowledgement of debt which could be inferred from any document on record and in particular, the balance-sheet could not be considered as acknowledgement of debt.

7. In the Rejoinder, the Ld. Senior counsel, drew our attention to page 2 at serial no.15 to show that demand promissory note had been issued on 30.3.2009. He also drew our attention to pages 292 to 296 containing details of cheques of EMI presented by the Bank, which got dishonoured and on this basis, it was pleaded that cheques were received but dishonoured, however, this factual position indicated the intention of the corporate debtor to make the payments otherwise the Corporate Debtor could cancelled or recalled the cheques or issued instructions to the Banker not to encash the same,which had not been done. He contended that last cheque was received and bounced in December 2012. Thereafter, he drew our attention to page 480 of the

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paper book once again to show that outstanding amount payable was also appearing in the column of previous year figures i.e. 31st March, 2015. On the basis of this sequence of events, he contended that the fact of continuity of acknowledgement of debt before the expiry of limitation period got established. He also referred to notice given under section 434 of the paper book which have been placed on page 394 of the paper book to show that the Financial Creditor had no other transactions, hence, the amount of 10,000/- was only in connection with the outstanding amount and, therefore, pleadings made by the Corporate Debtor in this regard were liable to be rejected.

8. As regard to the reliance placed by the Corporate Debtor on the decision of the Hon'ble Supreme Court in the case of *Prabhakaran & Ors Vs M. Azhagir Pillai (Dead) by Lrs. & Ors* (supra), it was pleaded that not a single word had been mentioned in the said decision as to whether presentation in the balance sheet constituted acknowledgement of debt or not. Hence, this decision was on the face of it not applicable to the facts of the case. He further submitted that findings in the said judgement rather helped the cause of the Financial Creditor in a sense that by admitting the fact of default in the balance-sheet a jural relationship had been established. On the aspect of presentation in the balance sheet being a instance of acknowledgement of debt, the learned Sr. Counsel further placed reliance on the following judicial decisions, which are as under:-

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1. *Bhajan Singh Sharma v M/s Wimpy International Ltd.(2011 SCC Online Del 4888, passed by the Delhi High Court in CO.PET 246/2006 & CA 1206/2006 dt. November 21,2011.*

2. *Bengal Silk Mills Co. Vs Ismail Golam Hossain Arif (AIR 1962 Cal 115) passed by Calcutta High Court, in Appeal No. 120 of 1958 and Suit No. 2261 of 1939 dated April 17,1961.*

3. *Edelweiss Asset Reconstruction Ltd. V M/s Birla Cotsyn(India) Limited (CP 579/I & BP)/NCLT/MAH/2018) dt. 20th November, 2018.*

9. As regard to the fact of note in the balance-sheet regarding EMI being expired, the learned Sr.Counsel submitted that this was a factual position and after the expiry of repayment period obviously EMI could not be received but that would not go to show that there was no outstanding debt in the balance-sheet. Particularly,when the fact of default had also been mentioned therein.

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 establish the fact of continuation of limitation till December, 2012. Thus, a prima facie case of a alive claim has been established. Various

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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.
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> 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:-

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"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 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;

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(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

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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

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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 from the remedy of winding up would, in no manner, impact the

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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***

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<u>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.</u> (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*

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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:-

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"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".*

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15. In the present case, it is not in dispute that undisputed claim remains more than Rs. One Lakh, hence, CIRP can be initiated. Thus, this claim of the corporate debtor is also rejected.

16. The petition is otherwise complete in all respects and defect free. The name of the IRP has also been proposed who has given his consent and it has been claimed that no disciplinary proceedings are pending against him.Accordingly, we approve his name.

17. We admit this petition and order as under:-

ORDER

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, namely M/s Sri Balaji Metals and Minerals Pvt. Ltd is hereby admitted.

ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.

iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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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);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.

vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

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

viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

x. Mr. Jitendra Lohia, having registration No. IBBI/ IPA-001/ IP-P00170/ 2017-18/10339 email id jitulohia@knjainco.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

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xi. The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees Three lacs) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.

xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xiii. Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

9. List the matter on **15.01.2020** for the filing of the progress report.

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

Sd 3/12/19 Sd 3/12/2019

(Virendra Kumar Gupta)
(Member (T))

(Madan B Gosavi)
(Member (J))

Signed on 3rd December, 2019

PJ