IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

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C.P. (IB) No. 1422/KB/2018

IN THE MATTER OF:

An application under Section 8 and 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy Code 2016 (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process.

And

In the matter of:

M/s S.S. Engineers, having its registered office at J-179, MIDC, Bhosari, Pune - 411026

Operational Creditor /Applicant

-Versus-

M/s HPCL Biofuels Ltd., having its registered office at House No. 271, Road No. 3E, Holding No. 437 and 438, Ward No. 22, New Patliputra Colony, Patna - 800013

Corporate Debtor / Respondent

Date of hearing 04 Feruary, 2020

Order Delivered on 12 February, 2020

Coram :

Madan B. Gosavi, Member (Judicial)

Virendra Kumar Gupta, Member (Technical)

For the Appellant / Petitioner : Mr. Ratnanko Banerjee, Senior Advocate

: Mr. Tultul Das Singh, Advocate

: Ms. Debaleena Ganguly, Advocate

: Mr. Amar Singh, Advocate

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For Respondent : Ms. Manju Bhuetna, Advocate

: Mr. Prasun Mukherjee, Advocate

: Mr. Amar Singh, Advocate

Per Virendra Kumar Gupta, Member (T)

1. This application has been filed under section 8 and 9 of IBC 2016 for initiation of CIRP against the Corporate Debtor M/s HPCL Biofuels Ltd. by the Operational Creditor S.S. Engineers. The amount of default has been claimed at Rs. 13,69,78,237/-. In addition to this, interest is also claimed.

2. The facts, in brief, are that the Corporate Debtor floated a tender for upgradation of its plant. The Operational Creditor was given eight work orders. The scope of work was divided into supply portion, works contract portion and services portion. The Operational Creditor raised bills from 01.10.2012 till 30.12.2013. As per terms and conditions, Corporate Debtor had to provide Form "C". The last Form "C" was provided in March 2018. However, there occurred some differences during the execution which resulted in the non payment of the sum due to the Operational Creditor though part payments were made during the course of execution of contracts.

3. The Ld. Sr. Counsel appearing on behalf of the Operational Creditor narrated the facts and emphasised on the fact that as per purchase order, the activities were segregated into three portions as mentioned herein before. It was further contented that Form "C", were issued in respect of all the invoices raised by the Operational Creditor in respect of supplies portion. Our attention was drawn to Annexure - B of written notes which contained details of Form "C" and the reference to invoice and date relating to such Form "C". The Ld. Sr. Counsel emphasised on the fact that merely on the basis of outstanding amount on account of supplies, claim of the Operational Creditor was more than Rs. 1,00,000/- and there were no disputes, hence, application was liable to be admitted. He also placed reliance on the decision of Hon'ble Andhra Pradesh High Court at Hyderabad (Division Bench) in the case of Electrosteel Flame Ltd. And Mittal Iron Foundry Pvt. Ltd. for the proposition that the

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issue of Form "C" constituted acknowledgement of debt, hence, not barred by limitation. It was also contended that Consultants for the same project was also aggrieved on account of non payment of his dues and for the same said creditor approached this Tribunal in CP No. 548/KB/2017 which was reserved for orders. In the meantime the Corporate Debtor settled the issue by making the payment hence the application was withdrawn. According to him, this fact was sufficient to indicate about the conduct of the Corporate Debtor. It was specifically pointed out that if the work done by the Operational Creditor was not up to the mark or in accordance with the scope of work, then, the Operational Creditor should not have been awarded two new contracts by the Corporate Debtor subsequently. It was also submitted that no claim or damages were claimed by the Corporate Debtor from the Operational Creditor for so called lapses.

4. The Ld. Counsel appearing on behalf of the Corporate Debtor firstly raised the issue of maintainability of this petition as the petition had been filed in the name of Proprietorship firm and demand notice had been issued by Advocate on behalf of the Proprietorship firm. It was pleaded that sole proprietorship concern was not a legal entity as per section 3(23) of Code IBC 2016, hence, it could not initiate CIRP. In support of such claim, our attention was drawn to the following judicial decisions and observations made thereunder :

1. *Judgement / Order dated 14th January 2020 passed by this Tribunal in CP(IB)/506/KB/2018 (S.K. Traders Vs. Polar Industries) and Judgement / Order dated 14th January 2020 (Popular Plastics and Packaging Industries Vs. SD Heavy Sea Food Pvt. Ltd.)*

2. *Judgement / Order dated 25th November 2019 passed by Hon'ble NCLT Kolkata Bench in CP(IB)/202/KB/2018 (Sanjay Stores Vs. Cookme (Spice) Pvt. Ltd.*

3. *Judgement dated 23rd September 2019 passed by the National Company Law Tribunal, New Delhi in R.G. Steels Vs. Berrys Auto Ancillaries Ltd. [CP(IB)/722/ND/2019]*

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5. Thereafter, it was argued that claim was barred by limitation and merely because Form "C" had been issued by Corporate Debtor between 2015 and 2018, it could not be claimed that Corporate Debtor acknowledged the liability of debt or its default as such Form "C" did not amount to acknowledgement of debt or liability. For this proposition, she placed reliance on the following judicial decisions :

1. *National Company Law Appellate Tribunal (NCLAT) in Company Appeal (AT) (Insolvency) No, 261 of 2017 decided on 1st February, 2018 in the matter of Shrivarad Polyfab (P) Limited Vs. OLAM Agro India Private Limited*

2. *Judgement dated 22nd January, 2014 passed by the Hon'ble High Court at Calcutta in C.P. No. 326 of 2013 [Zion Steel Limited Vs. Subtleweigh Electric (India) Private Ltd.*

6. Next line of argument was that there were disputes prior to the issue of demand notice under section 8 of IBC 2016. In this regard, it was contended that the supplies made by Operational Creditor were defective and the petitioner did not complete the work due to which the Corporate Debtor suffered loss and damages and had to get the work with the help of other vendors / contractors. To substantiate her claim, she drew our attention to the letters exchanged between the parties. It was also claimed that the Operational Creditor had also invoked Arbitration Clause. In this regard, she drew our attention to letter to letter 9.7.2016, copy of which is placed at page no. 1895/1906 of the paper book. It was also claimed that the Operational Creditor abandoned the project in between and work was not completed.

7. Thereafter, she emphasised the fact that the contract was a turnkey project, hence, there was no substance in the contention raised by the Operational Creditor that the project was segregated in parts. In support of her such claim she drew our attention to the copies of Purchase Orders filed along with the application.

8. The Ld. Counsel also pleaded that even a suit had been filed by Operational Creditor against the contractor appointed by the Operational Creditor who did not perform. It was specifically narrated that the Corporate Debtor was also made

respondent / defendant therein. Thereafter, she drew our attention to the relevant paragraphs of the petition wherein allegations were made by the Operational Creditor against the party which were sufficient to indicate that there were lot of disputes between the parties which were admitted by the Operational Creditor itself.

9. In the rejoinder, the Ld. Sr. Counsel contended that petition had been filed by the proprietor of the firm, hence, valid. For this proposition, he also placed reliance on the decision of the Tribunal in C.P. No. 22/KB/2018 and drew our attention the observations of the Tribunal under para no. 12 of the said order. It was further pointed out that an advocate had been authorised on behalf of the sole proprietorship firm which was in accordance with the scheme of IBC, 2016 and it was also approved by Hon'ble Supreme Court, hence, no infirmity in the application. The Ld. Sr. Counsel also drew our attention to the purchase orders and invoices raised by the Operational Creditor to show that there was a clear cut bifurcation the purchase orders as regards to supply, work and service part and specific values were assigned to such activities, hence, it was not correct to say that it was a case of consolidated / composite EPC contract. It was further contended that invoice for supplies were raised independently as evident from the Annexure - B wherein all details of invoices had been given.

10. We have considered the submissions made by both sides and perused material on record. First question is regarding maintainability of the application filed by the Operational Creditor on the ground that it has been in the name of Sole Proprietor Firm and not Sole Proprietor. In this regard, it is noted that in column 1 of Part 1 the name of the Proprietorship firm is mentioned. Under Part 2 of Form 5 name of the proprietor is mentioned. Further, the application has been signed by the Advocate who has been authorised by the Proprietor of the firm. In the background of these facts, we are of the view that this technical point does not deserve undue attention. The first reason for this is that the definition of person under section 3(23) is inclusive. Further, as per section 2(f) partnership firms and proprietorship firms are included in the category of entities to which provisions of IBC, 2016 will apply. Although this section is applied in relation to their insolvency and not to initiation of

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insolvency by them, however, in our considered view, once an entity is a legal entity for one purpose under the same Code, it will also be so for other purposes particularly when definition of the person is inclusive as stated earlier and there is no specific exclusion of proprietorship firm to file petition under section 7 or 9 of IBC, 2016. In this regard, the point which requires serious consideration is that if this application is dismissed on this basis and if the Operational Creditor becomes insolvent, then it can be sued in the name of proprietorship firm by its creditor. In our view, this cannot be the intention of the legislature. We are further of the view that this economic legislation has been promulgated with a view to promote entrepreneurship and in our country majority of the Operational Creditors are Sole Proprietorship firms. Hence, if such category of persons is debarred from filing applications under section 7 and 9 for realisation of their dues, then it would be against the object of the Code IBC 2016. It is also a settled proposition of law that interpretation of all sections or provisions of law should be made in the context of such provisions. It is also worth noting that Letter Of Intent (LOIs) as well as purchase orders have been issued by the Corporate Debtor in the name of the Sole Proprietorship firm. Invoices have also been raised by the Operational Creditor in the same format. Part payments have also been made by the Corporate Debtor to the Sole Proprietorship firm. Thus, considering the legal position as discussed above and facts of the case, we are of the view that in spite of divergent views on this aspect, a practical and pragmatic approach is required. Accordingly, we hold that there is no merit in this technical ground by the Corporate Debtor, hence, rejected.

11. Though in the facts and circumstances of the case, this issue has been decided, but considering the general importance of the matter, we considered it proper to discuss in this issue further. Sole Proprietorship firm is an economic or business entity and one man business organisation engaged in the business for profit. In legal sense, it may be a trade name and the legal position is that this form of business or business organisation and its owner are considered the same. However, such firm or organisation has also got different connotations for accounting, economic and taxation purposes and in that regard there is a prevalent concept known as business entity concept or separate entity concept or economic entity concept and it should

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be treated as a separate person as different from its owner. For accounting purpose, transactions related to a business must be recorded separately from those of its owner and of other business of its owner meaning thereby while recording transactions in business, we take into account only those transactions that affect that particular business and ignore which are not relevant. This concept is very important because if the transactions of business are mixed up with that of its owner or other business, accounting information may lose its credibility and usability. This business entity concept is applicable to all types of business organisations, i.e., sole proprietorship, partnership, Corporation and even if law does not recognise the business and its owner, as separate entity. Proceedings under IBC are concerned with the insolvency resolution and economic growth, hence, in our considered view more importance has to be attached to economic and accounting concept of business entity than its legal meaning or understanding. Further, for taxation purpose also this is required as in the case of sole proprietorship firm, money withdrawn by its proprietor for his personal purposes is treated as drawings and is not allowed as expenses of the business entity. Similarly, any personal income that may be of different nature cannot be considered as business income of the sole proprietorship firm. Thus, the dichotomy between the two has got its own relevance.

12. Having found the relevance of separate entity for sole proprietorship firm, now we have to look the into the Scheme of IBC 2016. It is not in dispute that IBC 2016 is a complete Code in itself, hence any general legal concept which is in contradiction to the provisions of IBC has not to be given weight due to scheme and specific provisions of IBC. In case of any contradiction it may give way to the provisions and scheme of IBC 2016 due to applicability of provisions of section 238 of IBC 2016. This leads us to look into the scheme / provisions of the IBC 2016. As per section 2, the provisions of IBC 2016 apply to different entities, which include both proprietary firms and individuals. Definition given to various terms in section 3 of IBC 2016 apply to the whole Code subject to condition that different meaning can be given to a term if the context otherwise requires i.e., the definition of a particular term meant to be applied to the particular situation can be different from meaning of a particular term given in the defining section if the context/situation so requires. Thus, definition of

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"person" given in section 3 (23) is not conclusive and binding for all situations. Thus, application filed by sole proprietorship firm would not lose its maintainability as the definition given under section 3 (23) is inclusive and not exhaustive and several form of business entities can be added to the entities mentioned in that section.

13. Section 6 of IBC 2016 provides the categories of business who may initiate CIRP in the manner as provided under this Chapter. Section 8(1) of this Chapter i.e., Chapter II provides that Operational Creditor may deliver the demand notice or copy of invoice demanding payment of amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed. Section 9 (3) provides that Operational Creditor in the event of non payment shall file application and along with this application furnish as per clause (a) thereof a copy of the notice of demand along with other documents. Both these provisions are based on its source document i.e., invoice. As stated earlier, in the present case, invoices have been raised in the name and style of the proprietorship firm which have been accepted by the Corporate Debtor and such invoices are in pursuance of LOI / PO placed by the Corporate Debtor on the sole proprietorship firm. Once copy of invoice which is in the name of the sole proprietorship firm and also considered a necessary document for notice of demand by way of invoice, then, how the application filed in the name of sole proprietorship firm which is signed either by the proprietor or any person on his behalf can become unenforceable. Now, we take a brief look at Rule 5 and 6 of IBBI (Application to Adjudicating Authority) Rules 2016. As per rule 5 (1) (clause a) and (clause b) the payment notice can be in the form 3 or a copy of invoice can be attached with a notice in form 4. Thus, invoice has been again recognised in the Rules also. As per rule 6, application in form 5 may be filed along with documents / records required to be attached there with. Even Form 3 mentions as under - " Form of Demand Notice / invoice demanding payment under Insolvency and Bankruptcy Code - 2016" and in such form reference to invoice has been given at various places. Form 4 reads as - "Form of notice with which invoice demanding payment is to be attached". Thus, both the forms are based on the outstanding invoice. In the present case un-disputedly invoices have been raised in the name of the partnership firm, hence, on the strength of this fact alone, maintainability of the application can be

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held. Further, based on the Doctrine of Substance over form, no value can be attached to such contention. Further, apart from the provisions of section 238, we are also required to take into consideration the definition of the term "claim" given under section 3 (6) of IBC 2016 which includes claim on equitable grounds as well. It also provides that such claim may be legal or not. For the ready reference, the same is reproduced as under :

> *(6) "claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured.*
>
> *(b) ... not relevant*

14. Now, coming to the second contention that it was a composite contract for supply, erection and services including design and engineering. We have carefully gone through the letter of intent and purchase order issued by Corporate Debtor itself. In the letter of intent, breakup of amount for supply portion, contract portion and service portion (including design and engineering) has been given separately. Further, the invoices have also been raised by the Operational Creditor separately for each of the activities undertaken by the Operational Creditor. Thus, in our considered view, the claims made by the Corporate Debtor in this regard are devoid of merits, hence, rejected.

15. As regard to the contention that it is time barred, both sides have cited decisions wherein opposite views have been expressed in respect of suit for recovery. Hence, in our considered view, this aspect has to be looked into in the context of IBC 2016. Further, the decision of the Hon'ble NCLAT cited by the Corporate Debtor is not applicable as in that case, the issue was not whether Form C issued by Corporate Debtor amount to acknowledgement of liability or not but the issue was whether issuance of Form "C" amounted to settlement of dispute / claim. Hence, this decision does not come to the rescue of the Corporate Debtor. We are further of the view that in Form C name of the Operational Creditor is mentioned and supply of goods by Operational Creditor and receipt of goods by Corporate Debtor is acknowledged. If the stand of the Corporate Debtor is accepted, this will amount to

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unjust enrichment i.e., on one side the Corporate Debtor takes benefit of reduced rate of taxes and on the other side do not want to make payment of money which is due to the supplier of goods. Further, in the absence of the books of accounts/ financial statements it cannot be said that liability to pay has not been disclosed either in financial statements or as contingent liability which should be there because Form "C"s have been issued. It has been further brought to our notice that the Operational Creditor has been awarded work subsequently as well. Hence, considering this fact that in real life situation, small entrepreneurs wait for an amicable settlement of issues so that they can continue to work with the entity of the size of Corporate Debtor as it gives them continuity of business with the said entity and on this basis they also get empanelled for work with other business entities that are as large as the Corporate Debtor and to the extent possible do not take any legal action unless compelled to do so. Considering these facts and contents of Form "C" we are of the view that the issue of Form "C" amounts to acknowledgement of debt / liability in respect of goods supplied by Operational Creditor and received by the Corporate Debtor. As regards to the nature of acknowledgement of debt in terms of explanation (a) of section 18 of Limitation Act, 1963, we reproduce the findings of the Tribunal in the case of Hari Om Transport vs MSP Metallics Ltd. CP(IB) No. 116/KB/2019 Order dated 15.10.2019 wherein the Tribunal 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*

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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;

(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*

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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."

Further, in case of Trinetra Electronics Ltd. Vs McNally Bharat Engineering Co. Ltd. In CP (IB) No. 1506/KB/2018 Order dated 16.10.2019, Tribunal 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

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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.

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

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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."

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 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

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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".***

16. Thus, considering the legal framework as a whole, i.e., provisions of section 3(23) along with other provisions of the IBC, 2016, in our considered view, in the present context, the term "person" in our considered view would include sole proprietorship firm as well being eligible to file petition under section 7 or 9 under IBC 2016. We further observe that these aspects and legal provisions were not argued in cases relied on by the Corporate Debtor while deciding the issue as regards to maintainability of the application by the sole proprietorship firm, hence, we most humbly submit that such decisions are not applicable.

17. As regards the pre-existing dispute, we have gone through all the facts stated by the Corporate Debtor but having regard to the quantum of claim in respect of supplies order, in our considered view, the amount of disputed claim due and payable will be more than Rs. One lakh in any case. Hence, such claims do not help the case of Corporate Debtor in substantial manner. Having said so, we would further refer to the provisional statement attached with the letter of the Corporate Debtor dated June 25, 2014 copy of which has been placed at Page 1779 of Vol. 10 of the paper book to find as to what is the factual position as per the stand of Corporate Debtor on various issues. As per this provisional statement, the total

purchase order value has been shown as Rs. 3818.72 lakhs. There have been several deductions including for services provided by Corporate Debtor to the Operational Creditor in the execution of the contract, entry tax, TDS, WCD, payment to parties/ payment to Operational Creditor by the Corporate Debtor / sub-vendors and sub contractors/vendors of the Operational Creditor. These are normal deductions as per business practice and terms of contract. However, it is noteworthy that Liquidated Damage @ 5% amounting to Rs. 190.94 lakhs, Performance Bank Guarantee to the tune of 673.6 lakhs, work claim of Rs. 352.00 lakhs for boiler house extension P.O. finalisation and additional work 71 lakh have also been considered. The net effect has been worked out by Corporate Debtor as Rs. 500 lakhs receivable from the Operational Creditor. If the boiler house extension and additional work are ignored, the amount recoverable from the Operational Creditor gets reduced to 63.13 lakhs. Further, if the amount retained for Performance Bank Guarantee is taken into consideration, then the amount payable to Operational Creditor works out at Rs. 610.23 lakhs (i.e., 673-63.13). As noted earlier, L.D. is applicable @ 5% amounting to Rs. 190.94 lakhs has already been deducted. Further, amount of Rs. 400.55 lakhs in respect of Purchase Orders issued at the risk and cost of the vendor have also been deducted. Thus, all recoveries for non performance / default has been considered and therefore, amount of Performance Bank Guarantee minus recovery i.e., 610.23 lakhs at least becomes payable by Corporate Debtor to the Operational Creditor. As an adjudicating authority in the proceedings, we are not suppose to do this kind of working, but to find out the genuineness of the claim of pre-existing dispute, and amount of outstanding debt, it was necessary in the facts and circumstances of the case, hence, it has been so analysed on the basis of the provisional statement prepared and filed by the Corporate Debtor itself. At the cost of repetition, we again state that this statement takes into consideration all these disputes raised by the Corporate Debtor, hence, the amount payable by the Corporate Debtor remains in positive which is more than one lakh ultimately that too when we have considered the project as a whole against the claim of Operational Creditor of undisputed dues of supply portion only. We have also gone through the emails which have been taken into consideration while preparing this provisional statement. Hence, on the basis of material on record, it cannot be said that any other dispute remains to be

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considered. Apart from this, the fact which is crucial to note is that the Corporate Debtor has awarded new work orders to the Operational Creditor subsequently which means that all the disputes relating to this contract had been considered / resolved and this fact has remained undisputed. Further, Form "C"s have been issued as late as up to March 2018. We further make it clear that we have analysed the provisional statement with limited objective of admissibility of this application and this analysis cannot be considered as expression of opinion on the amount of claim in any manner which may be actually due and payable.

18. Name of IRP has not been proposed which is not mandatory. Hence, we will appoint the IRP from the approved list maintained by IBBI. In case such person does not accept the assignment, then another person would be appointed.

19. Thus, considering the overall facts and above discussions, we are of the view that this application is liable to be admitted.

20. The application is otherwise complete in all respects and stands admitted. We order as under :

ORDER

i. The application filed by the Financial Creditor under section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, namely HPCL Biofuels 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.

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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 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);

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.

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

x. **Mr. Nitesh Kumar More,** IBBI Regn. No. IBBI / IPA-001/ IP-P-01087/ 2017-18/11785 email - nmore2091@gmail.com appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

xi) The Operational Creditor to pay a sum of Rs. 2,00,000/- (Rs. Two lakhs) 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.

21. List the matter on 26th March, 2020 for the filing of the **progress report**.

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

Sd/- 12/2/2020

(Virendra Kumar Gupta)

Member (T)

Sd/- 12/2/2020

(Madan B. Gosavi)

Member (J)

Signed on 12 February, 2020