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IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

Coram:

Madan B. Gosavi, Member (Judicial)

Virendra Kumar Gupta, Member (Technical)

C.P. (I.B.) No. 432/KB/2019

In the matter of:

An application to initiate corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

~ And ~

In the matter of:

Asset Reconstruction Company (India) Limited [CIN: U65999MH2002PLC134884], having its registered office at The Ruby, 10th Floor, 29, Senapati Bapat Marg, Dadar (West), P.O. & P.S. Dadar (West), City and District Mumbai - 400 028 and regional office at Room No. A-11, 8th Floor, Chatterjee International Centre, 33A, Jawaharlal Nehru Road, Kolkata - 700 071

... ... **Applicant/Financial Creditor**

~ And ~

In the matter of:

Raigarh Properties Private Limited [CIN: U74140WB2000PTC091711], having its registered office at 1 Kyd Street, 2nd Floor, Room No. 16A, Kolkata - 700 016.

... ... **Corporate Debtor**

Counsel on Record:

1. Mr. Vikram Wadehra, Advocate 2. Ms. Vidushi Chokhani, Advocate 3. Mr. Soumava Ghosh, Advocate	For Financial Creditor

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1. Mr. Jishnu Chowdhury, Advocate
2. Mr. Soumabho Ghose, Advocate
3. Mr. Aritra Basu, Advocate
4. Ms. R. Basu, Advocate
5. Mr. Suman Roy, Advocate
6. Mr. Prashant Kr. Tripathi, Advocate
7. Ms. Roshni D Acharya, Advocate

For Corporate Debtor

Date of Hearing: 21st February, 2020

Date of Pronouncement of Order: 27th February, 2020

ORDER

Per Virendra Kumar Gupta (T)

1. This application under Section 7 of IBC, 2016 has been filed by the Financial Creditor namely Asset Reconstruction Company (India) Limited to initiate Corporate Insolvency Resolution Process ("CIRP") against Corporate Debtor namely Raigarh Properties Private Limited as the Corporate Debtor has committed default in payment of outstanding debt.

2. The facts, in brief, are that a loan was granted by Union Bank of India to the corporate debtor against hypothecation and other securities in 2010. By a Deed of Assignment dated 31st December, 2012, the financial creditor stepped into the shoes of Assignor. The financial creditor did the last restructuring on 21st March, 2013. The loan was recalled on 3rd February, 2015 by virtue of revocation of settlement package. The corporate debtor, on 23rd July, 2015, wrote a letter to the financial creditor requesting for reschedulement of the outstanding amount in terms of the 'term sheet' dated 21st March, 2013 entered into with the financial creditor. This was followed by another correspondence vide letter dated 14th August, 2015, wherein reasons for delays in past and other facts were also disclosed. Proposal was also given as to how the restructuring / reschedulement could be done. Again, a letter was written on 2nd September, 2015. Thereafter, vide letter dated 9th November,

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2015, the financial creditor rejected the settlement proposal and in such letter, it was also made clear that right to take recourse of appropriate legal remedy was always with the financial creditor. The corporate debtor again, vide its letter dated 5th April, 2016, submitted a revised proposal for reschedulement of the outstanding dues. This proposal was again rejected by the financial creditor on 7th April, 2016. A notice of demand requiring settlement of dues was sent on 20th May, 2016. However, failing to get positive response from the corporate debtor, this application has been filed.

3. The Ld. Counsel for the financial creditor appeared and narrated the above mentioned facts. It was pleaded that there was a debt which was due and payable in law and in fact and a default had occurred in payment thereof, thus, application filed under Section 7 was admissible on the face of it. It was also claimed that applicant was eligible to file this application as financial creditor holding the debt as the legal assignee of the original lender. The Ld. Counsel placed strong reliance on the order of this Tribunal in the case of sister concern / associated concern in CP No. 393/KB/2019 of the corporate debtor whereby the proceedings U/S 7 had been admitted in the similar set of facts. It was also pointed out that in that case also, the financial creditor was same, hence, based upon these facts, it was pleaded that this application was liable to be admitted.

4. On the other hand, the Ld. Counsel for the corporate debtor appeared and submitted that the debt was barred by limitation. He further contended that first of all, such letters did not amount to acknowledgement of debt/liability in terms of provisions of Section 18 of the Limitation Act, 1963. For this proposition, he placed reliance on the decision of the Hon'ble NCLAT in the case of *C. Shivakumar Reddy, former Managing Director of Kavveri Telecom Infrastructure Limited vs. Dena Bank & Anr. in Company Appeal (AT) (Insolvency) No. 407 of 2019, order dated 18th December, 2019* and drew our attention to paragraph 7 of the said order. It was further contended that there was aspect of matter of limitation also in the present case for the reason that application U/S 7 had been filed on 15.03.2019 whereas last restructuring was done on 21.03.2013, hence, being beyond 3 years, this application

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was barred by limitation. For this proposition, he placed reliance on the decision of the Hon'ble NCLAT in the *Company Appeal (AT) (Insolvency) No. 1092 of 2019 in the case of Akram Khan vs. Bank of India Limited and ors.* Apart from this, a plea was also made that the date of default was not mentioned in the petition and there were other infirmities as well and thus, the application did not confirm to the requirements of IBC, 2016 and regulations made thereunder, hence, liable to be dismissed. It was also contended on behalf of the corporate debtor that mortgage of the land was no more a valid ground as the same had already been divested from the corporate debtor.

5. In the rejoinder, the Ld. Counsel for the financial creditor again placed reliance on the decision of this Authority in the case of associated concern and contended that all these aspects had duly been considered therein.

6. We have considered the submissions made by both parties and have also perused the material on record. The dispute surrounds around the aspect whether the letters written by the corporate debtor constitute acknowledgement of debt or not in accordance with the provisions of Section 18 of the Limitation Act, 1963. First letter written to the financial creditor dated 23rd July 2015 is reproduced hereunder, which would sufficiently help us in arriving at a conclusion as subsequent letters are more or less on the same lines.

"This is in regard to the term sheet dated March 21, 2013 executed between Asset Reconstruction Company (India) Limited ("ARCIL"), Mohan Jute Mills Ltd. ("MJML") & Raigarh Properties Pvt. Ltd. ("RPPL"), and our discussions in this regard. We would like to submit and request you for the following.

1) <u>Present outstanding dues and related payments made till date</u>.

In line with the aforesaid term sheet we were supposed to pay the following till date:

<u>All figures in Rs. Lacs</u>

Due Date	*Interest Due*	*Interest Due*	*Interest Due*	*Principal Due*	*Principal Due*	*Principal Due*
	MJML	*RPPL*	*Total*	*MJML*	*RPPL*	*Total*
30 Jun 13	*144.68*	*39.65*	*184.33*	*-*	*-*	*-*
31 Jul 13	*24.78*	*6.79*	*31.57*	*-*	*-*	*-*
31 Aug 13	*24.78*	*6.79*	*31.57*	*-*	*-*	*-*
30 Sep 13	*23.98*	*6.57*	*30.55*	*-*	*-*	*-*

31 Oct 13	24.78	6.79	31.57	-	-	-
30 Nov 13	23.98	6.57	30.55	-	-	-
31 Dec 13	24.78	6.79	31.57	-	-	-
31 Jan 14	24.78	6.79	31.57	-	-	-
28 Feb 14	22.38	6.13	28.51	-	-	-
31 Mar 14	24.78	6.79	31.57	-	-	-
30 Apr 14	23.98	6.57	30.55	-	-	-
31 May 14	24.78	6.79	31.57	-	-	-
30 Jun 14	23.98	6.57	30.55	-	-	-
31 Jul 14	24.78	6.79	31.57	-	-	-
31 Aug 14	24.78	6.79	31.57	-	-	-
30 Sep 14	23.98	6.57	30.55	-	-	-
31 Oct 14	24.78	6.79	31.57	-	-	-
30 Nov 14	23.98	6.57	30.55	-	-	-
31 Dec 14	24.78	6.79	31.57	-	-	-
31 Jan 15	24.78	6.79	31.57	-	-	-
28 Feb 15	22.38	6.13	28.51	-	-	-
31 Mar 15	24.78	6.79	31.57	331.54	90.87	422.41
30 Apr 15	17.98	4.93	22.91	-	-	-
31 May 15	18.58	5.09	23.67	-	-	-
30 Jun 15	17.98	4.93	22.91	331.54	90.87	422.41
Total	710	194.55	904.55	663.08	181.74	844.82

We have till date paid you R.264.78 lacs as follows:

a) *Rs.205.89 lacs to ARCIL on account of Interest Dues (Net of TDS)*
b) *Rs.58.89 lacs TDS on Interest dues has been deposited till date.*

The balance unpaid dues as per the above table is outstanding for payment as on date. The same is summarised as follows:

a) *Unpaid Outstanding Interest Dues - Rs. 639.77 lacs*
(After deducting the aforesaid payment
Made directly to you and also the TDS deposits)
b) *Unpaid Outstanding Principal Dues - Rs. 844.82 lacs*

2) *Future Dues as per the aforesaid term sheet*

The future dues as per the aforesaid term sheet are as follows:

All figures in R. Lacs

Due Date	Interest Due	Interest Due	Interest Due	Principal Due	Principal Due	Principal Due
	MJML	RPPL	Total	MJML	RPPL	Total
31 Jul 15	12.39	3.40	15.79	-	-	-
31 Aug 15	12.39	3.40	15.79	-	-	-
30 Sep 15	11.99	3.29	15.28	331.54	90.87	422.41
31 Oct 15	6.19	1.70	7.89	-	-	-
30 Nov 15	5.99	1.64	7.63	-	-	-
31 Dec 15	6.21	1.73	7.94	331.54	90.86	422.40
Total	55.16	15.16	70.32	663.08	181.73	844.81

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3) <u>Reasons for past delays</u>

We would like to submit that there were instances of irregularities in our loan repayments in the past due to the reasons given below.

A) <u>Labour Issues</u>

- *Please note that there were approx 875 workers in the erstwhile jute mill.*
- *We had settled their dues in line with their outstanding dues through appropriate channels including involvement of the Labour Unions and State Administration. This was the position at the time ARCIL had invested in the company.*
- *At that time we were confident of initiating and implementing the project development process soon.*
- *However, trouble started happening.*
- *Around 585 workers out of the total workers started claiming more amount over and above the settled amounts. They filed suits against the company for fresh settlement of their gratuity dues.*
- *We had to stall the project development process and had to divert our time and resources to settle this impending problem.*
- *We had to submit & fight our cases with the department for each labour case.*
- *The problems got much publicized involving labour union and also becoming a bit of a political matter.*
- *There were numerous hearings for each case and it took a lot of effort, time and resources from our side to settle these cases.*
- *However, we were successful and we started settling labour cases one by one from the beginning of 2014.*
- *These individual labour cases were settled after huge legal battle through appropriate government authorities and we started paying off the additional dues of the workers in line with the appropriate government authority orders.*
- *You will be happy to note that till date, 492 orders out of 585 cases' orders have been passed and we have settled the same and paid substantial additional amounts.*
- *The dues of the balance workers also we are hopeful that we will resolve the cases and pay them soon.*
- *Around 290 workers have not yet responded and not made any fresh claims. In case they claim, their dues, in case arising, we will settle and pay in line with the other settled cases.*
- *This process involved substantial amount of our time, effort, resources and funds which had to be diverted away from the process of project development.*

B) <u>Substantial Expenses incurred to settle matters</u>

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- *In the past 3-4 of years, we had to spend substantial funds to settle various related matters. These include:*

o *Labour Dues*	-	*Rs. 400 lacs*
o *Statutory Dues*	-	*Rs. 90 lacs*
o *Professional / Legal / Liaisoning Expenses*	-	*Rs. 30 lacs*
o *Site Office Admin / Other Expenses*	-	*Rs.100 lacs*

- *During these problems, we also paid you approx Rs. 265 lacs (including TDS) till date.*

- *Promoters had to keep pumping more funds and apply more time & resources to settle these problems.*

C) <u>Recessionary market conditions</u>

- *In addition to the above, there was a general economic downturn prevailing in the country*

- *More specifically the real estate market in India was going through a severe downturn. Even in the leading metro cities of the country, huge inventory of empty space remained unoccupied for lack of customers. The situation became far worse in Tier 2 and Tier 3 cities. The market condition in Raigarh is even worse than the other parts of the country.*

All the aforesaid factors, more specifically, the fresh labour problems, resulted in the delay of the project development process. The promoters had to divert substantial time, energy, resources and funds to manage these problems which would otherwise have gone into project development as also in making payment to ARCIL.

We are hopeful that most of our problems have now been resolved and the balance matters will also be settled soon in the near future.

Further, we are sure that the market conditions are going to improve by the middle of next year. We should be able to start seeing an improvement in the real estate market scenario and are quite confident that conditions are going to improve soon.

We should be then able to expedite the process of project development and also clear your outstanding dues at the earliest.

<u>The Proposal</u>

We would, however, need your support in the current difficult situation.

Hence we request you for the reschedulement of the outstanding dues as follows:

a) The outstanding Interest dues upto July 31, 2015 is Rs. 655.56 lacs (Interest instalment for July 2015 of Rs. 15.79 lacs plus Unpaid Outstanding Interest Dues upto June, 2015 for Rs. 639.77 lacs).

We request you to kindly capitalize the same as of July 31, 2015

b) The outstanding principal payment (including present and future) is as follows:

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Rs. Lacs

Due Date	MJML	RPPL	Total
31 Mar 15	331.54	90.87	422.41
30 Jun 15	331.54	90.87	422.41
30 Sep 15	331.54	90.87	422.41
31 Dec 15	331.54	90.86	422.40
Total	1326.16	363.47	1689.63

c) *We request you for a moratorium of 18 months on the aforesaid capitalized interest and principal amount from August 1, 2015.*

d) *Repayment thereafter in 6 equal quarterly installment as follows:*

e) *Interest servicing regularly as per the norms prevailing currently.*

We would be happy to furnish any additional information as required.

We would request you to kindly look into our request and sanction the reschedulement proposal.

We would be really grateful for your assistance. "

7. From the perusal of the above, it is apparent that the letter has been written by the corporate debtor to the financial creditor. It has been addressed accordingly and duly signed by the director of the corporate debtor. In the aforesaid letter, as apparent, the first detail is regarding present outstanding dues and related payments made. Second point is regarding future dues as per the agreed term sheet. In third point, reason for delays in past have been explained. In fourth point, a proposal has been made to sanction the reschedulement and terms & conditions so as to enable the corporate debtor to meet its obligations.

8. In our view, the above observations sufficiently establish the fact of acknowledgement of debt / liability by the corporate debtor, hence, the period of limitation needs to be computed from the date of such proposal. Having said so, we further find that such acknowledgement is well within original period of limitation from the date of last restructuring which was done on 21st March 2015, hence, this condition of Section 18 of the Limitation Act, 1963 is also met.

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9. As regards the nature of acknowledgment, this Bench had dealt with the same in a few decisions on earlier occasions, hence, we consider it pertinent to reproduce the findings given therein as under :

"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 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

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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;

(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*

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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."

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

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corporate debtor that such emails do not constitute acknowledgement of debt within the meaning of provision of Sec.18 of the Limitation Act, 1963, we consider it necessary to reproduce the Sec.18 of the said Act as under:-

"Effect of acknowledgement in writing.

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

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

Explanation: For the purposes of this section,-

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

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

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

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

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

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Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

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

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

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 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".*

Thus, from the perusal of the above decisions, it is apparently clear that such letters constitute acknowledgement in terms of provisions of Explanation A to Section 18 of the Limitation Act, 1963.

10. As far as reliance placed by the corporate debtor on the decision of the Hon'ble NCLAT in the case of Dena Bank vs. Kavveri Telecom Infrastructure Ltd. is concerned, we find that in that case there is a clear finding that there was nothing on record to suggest that the corporate debtor had acknowledged the debt within 3 years and agreed to pay the debt, whereas in the present case, restructuring of the debt has already been done on 21st March 2013 and now the corporate debtor has acknowledged the fact of such restructuring with a further request to give the corporate debtor additional time and reschedulement of loan. Hence, in our view, this fact is different from the facts of the case relied on by the corporate debtor. In the present case, the aspect whether presentation in balance sheet constitutes

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acknowledgement of debt/ liability or not is not before us, hence, such observations of the Hon'ble NCLAT in that case do not help the cause of the corporate debtor.

11. We further find that in a subsequent decision in the case of *Anubhav Anilkumar Agarwal vs. Bank of India, in CP(AT)(Insolvency) No.1504 of 2019, Order dated 07.02.2020, Hon'ble* NCLAT itself has held as under:

> *"If Corporate Debtor has written the letter for due debt, the period of limitation stands shifted to the date on which the Corporate Debtor agreed to pay.*
>
> *Bank of India moved an Application under Section 7 of the ICode, pursuant to which, by impugned order dated 26th November, 2019 the Adjudicating Authority (NCLT), Mumbai Bench initiated CIRP against RNA Corp. Pvt. Ltd. (Corporate Debtor), who was the Guarantor. The Appellant has challenged the impugned order on main ground that the Application under Section 7 of the Code was barred by limitation.*
>
> *In the present case, the Corporate Debtor by its letter dated 18.03.2016/20.03.2019 has specifically stated that it will make an effort in reducing their outstanding dues and raise other funding to save their Bank account from getting NPA. The last three paragraphs of the aforesaid letter show that to save the Bank Account from getting NPA and citing the good reputation and goodwill, the 'Corporate Debtor' agreed to pay the amount and acknowledged the dues.*
>
> *In view of the letter dated 18th March, 2016 written to the Bank, NCLAT has held that the period of limitation stands shifted to the date on which the Corporate Debtor agreed to pay and thus, held that the Application under Section 7 of the Code was not barred by limitation."*

Thus, the Hon'ble NCLAT itself has reconsidered the issue and decided that such kind of letters / applications constitute acknowledgement of debt within the meaning of the provisions of Section 18 (explanation (a) to Section 18) of Limitation Act, 1963. Thus, in view of the subsequent decision, the case relied on by the corporate debtor is not binding on us.

12. Although we have already held that such kinds of letters constitute an acknowledgement of debt. However, considering the general importance of the

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issue and its recurring nature, we consider it pertinent to reproduce the findings of the Hon'ble Supreme Court in the case of *C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd., (2008) 2 SCC 444: (2008) 1 SCC (Civ) 582 in page 456, as under* :

> *"20. Section 18 of the Limitation Act, 1963 deals with effect of acknowledgement in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgement was also signed. The explanation to the section provides that an acknowledgement may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right. Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, 1963) this Court in Shapoor Freedom Mazda v. Durga Prosad Chamaria [AIR 1961 SC 1236] held: (AIR p. 1238, paras 6-7).*
>
> > *6. … acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in qthe acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. … Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or fa-fetched process of reasoning. … in construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered.*

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7. ... The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document. ..."

13. We are further of the view that the contents of letter clearly indicates the existence of jural relationship between the parties such as that of a debtor and a creditor and there is also an admission of the liability of a debt, hence, based on the parameters as set out by the Hon'ble Supreme Court in the aforesaid decision, there remains no iota of doubt that such letter constitutes an acknowledgement. This decision has not been considered by the Hon'ble NCLAT in the aforesaid decision relied on by the corporate debtor, hence, for this reason also, we most humbly submit that the decision of Hon'ble NCLAT relied on by the corporate debtor would not render any assistance to its cause.

14. A plea was also taken that such letter was "without prejudice", hence, no significance could be attached thereto. In this regard, we find that this aspect was considered by the Hon'ble Supreme Court in the case of "*ITC Limited vs. Blue Coasts Hotel*" [*Civil Appeal Nos. 2928-2930 of 2018]-MANU/SC/0263/2018*. The relevant findings in paragraph 35 of the said decision are reproduced as under:

... "<u>Letter of Undertaking "Without Prejudice"</u>

"35. Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that feel for consideration in Spencer's case as pointed out by Mr. Harish Salve, "as a rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure."

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It was argued in a subsequent case that an acknowledgement made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:

"But when a statement is used as acknowledgement for the purpose of s. 29 (5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement."

Therefore, the without prejudice rule could have no application. It said: "Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment." We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up."

In view of the above findings, we do not find any force in this contention of the corporate debtor.

15. The issue on hand can also be looked from other angle, i.e., whether such letter also constitutes a promise to pay within the meaning of Section 25(3) of Indian Contract Act, 1872. It is further to be noted that acknowledgement may not always be a promise to pay as to constitute such acknowledgement as promise to pay, there must be an express/explicit statement to pay. Thus, a promise to pay has element of acknowledgement and in addition to that, there must be an express confession to pay. Thus, considering this legal position as applicable to these letters, in our considered view, it is not merely an acknowledgement of debt but it also constitutes a promise to pay. It is also not in dispute that for the purpose of applicability of provisions of section 25(3) of Indian Contract Act, 1872, no condition of it being made within limitation period exists. Hence, for this reason also, the application filed under section 7 cannot be said to be barred by limitation.

16. We are further of the view that explanation (a) to section 18 of Limitation Act is very wide in its scope as such, hence, an acknowledgement is to be construed in that spirit only. Further, no strait jacket formula or format can be prescribed. There have been instances where Sale Deeds, Mortgage Deeds or Gifts Deed have been construed as acknowledgement of debt/liability within the meaning of provisions of

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section 18 of Limitation Act, 1963. It is also noteworthy that provisions of section 238A further relax the rigours of explanation (a) as provisions of Limitation Act, 1963 are applicable to the extent possible to IBC, 2016. Thus, in our view, considering the scheme of IBC, 2016 and specific provisions of section 3(6), the term 'acknowledgement' is to be read and interpreted in a liberal manner.

17. The corporate debtor has also taken technical pleas such as non-mentioning of date of default in the form etc. which, in our opinion, are not fatal as regards the maintainability of this petition is concerned for the reason that such technicalities cannot be given an undue weightage and that too in respect of an economic legislation. Further, such deficiencies have not been prescribed as incurable defect in the IBC, 2016, hence, for this reason also we find no merits in this contention of the corporate debtor. We also consider it pertinent to mention that the doctrine of substance over form plays a key role in such situation and in case of overwhelming evidence against the corporate debtor on merits, such technical reasons cannot prevail over merits. We further find that other facts and records produced before us overwhelmingly justify the claim of the financial creditor, hence, such technical pleas made by corporate debtor give way to such facts/material on record.

18. The name of IRP has been proposed who has given his consent as well and as per records no disciplinary proceedings are pending against such IRP, hence, we approve his name to act as IRP.

19. The petition is complete and defect-free. Hence, we admit the same and order as under:

ORDER

i) The application filed by the operational creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the corporate debtor, Raigarh Properties Private Limited, is hereby admitted.

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

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

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

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

b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

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.

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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. Kamal Nayan Jain, IRP Registration No.IBBI/IPA-001/IP-P00029/2016-17/ 10065 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

xi) The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees Three Lacs only) to IRP as advance fees as per Regulation 33(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.

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

Xiii) List the matter on 9th April, 2020 for the filing of the progress report.

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xiv) 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 IRP by Speed Post as well as through e-mail.

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

Sd 27/2/2020

(Virendra Kumar Gupta)
Member (Technical)

Sd 27/2/2020

(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 27th day of February, 2020.

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