

IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, DELHI

BENCH III

C.P. (IB) 571(ND)/2020

U/S. 7 of the IBC 2016 and Rule 4 of the
Insolvency and Bankruptcy (Application
to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF:

M/s SREI Infrastructure Finance Limited

....Applicant/Financial Creditor

VERSUS

M/s Gujarat Hydrocarbons and Power SEZ Limited

....Non-Applicant/Corporate Debtor

Order Delivered on 18th November, 2020

CORAM:

CH. MOHD SHARIEF TARIQ, HON'BLE MEMBER (JUDICIAL)

SHRI, NARENDER KUMAR BHOLA, HON'BLE MEMBER

(TECHNICAL)

Parties/Counsels present

For Financial Creditor: Mr. Abhimanyu Bhandari, Adcocate

For Corporate Debtor: Mr. Ajay Kathpallia, Advocate

ORDER

contd.

PER, NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1. The instant application has been filed by M/s SREI Infrastructure Finance Limited (“**Financial Creditor/Applicant**”) under the provisions Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process (CIRP) of M/s Gujarat Hydrocarbons and Power SEZ Limited (“**Corporate Debtor**” or “**CD**”).
2. The facts necessitating the filing of the present application are as follows:
 - i. The Corporate Debtor for the purpose of development of Hydrocarbons and Power SEZ at the Vilayat Industrial Estate, Vagra Talik, Bharuch District in the State of Gujarat (hereinafter referred to as “**Project Land**”) approached the Financial Creditor for financial assistance for an amount of Rs.100 crores (Rupees One Hundred Crores Only) (hereinafter referred to as “**Loan Amount**”).
 - ii. The Financial Creditor duly considered the said request and vide its letter dated No. SIFL/PF/GHPSL/2011/01/001 dated 03.01.2011 agreed to sanction the said Loan Amount to the Corporate Debtor. Pursuant to the enabling resolutions

passed by the Board of Directors of the Corporate Debtor on 03.01.2011 and acting through its Authorized signatory, the Corporate Debtor entered into a Rupee Loan Agreement dated 05.01.2011 (hereinafter referred to as “**Loan Agreement**”) with the Financial Creditor. The Loan Agreement duly stipulated the terms and conditions for the sanction of the Loan. Pursuant to the execution of the Loan Agreement and furnishing of the stipulated securities, the Corporate Debtor requested the Financial Creditor for a drawdown of Rs.100 Crores i.e. the entire amount of the Loan Amount.

3. The following are the terms of the Loan Agreement dated 05.01.2011:

A. Interest

The Corporate Debtor was required to pay interest on the outstanding amount of the Loan Amount at a rate linked to SREI Benchmark Rate (hereinafter referred to as “SBR”) as mentioned in Schedule 2 thereto viz SBR minus 1%. The rate of SBR at the time of execution of the Loan Agreement was 16%p.a. Subsequently, the financial Creditor vide its letter SREI/PF/SBR Hike/2011-12 dated 19.05.2011 advised the Corporate

Debtor that for the reasons and in the circumstances mentioned therein, the SBR has been revised from 16% p.a. to 16.75 p.a. effective from 01.06.2011. Thereafter, again on 21.09.2011 vide its letter dated SREI/PF/SBR Hike/2011-2012, the Financial Creditor informed the Corporate debtor for the reasons and circumstances mentioned therein the SBR has been revised from 16.75% p.a. to 17.50% p.a. effective from 01.10.2011. Thereafter, the SBR has been revised from time to time and the current SBR is 20.75% p.a. effective from 1.12.2019. As per the Loan Agreement the applicable interest on the Loan Amount is SBR minus 1% i.e. 19.75 p.a. effective from 1.12.2019.

B. Repayment

In terms of the payment schedule contained in schedule 8 of said Loan Agreement, the principal amount of the said Loan agreement was required to be repaid in four equal quarterly installments, in arrears, starting from 15th day of the 15th month from the first date of disbursement i.e. 10.01.2011.

The repayment of the principal amounts disbursed by the financial creditor to the Corporate Debtor were due

and payable by the Corporate Debtor on the following dates:

S.No.	Amount	Date of Repayment
1.	Rs.25 Cr	15.04.2012
2.	Rs.25 Cr	15.07.2012
3.	Rs.25 Cr	16.10.2012
4.	Rs.25 Cr	07.01.2013

C. Securities

The repayment obligations under the Loan Agreement were secured by the execution of *inter alia* the following:

S. No.	Types of Security	Particulars of the Security
1.	First and exclusive mortgage and charge on the project Land and building, both present and future	Indenture of Mortgage in English Form on 06.01.2011 in respect of the Project Land and building situated at Vilayat Industrial Estate, village Vorsamni, Bhersam and Vilayat, all in Taluka Vagra, District Bharuch in the state of Gujarat as more particularly described in the schedule.
2.	First and exclusive charge by way of mortgage on all immovable assets of Corporate Debtor (including equipments);	Deed of hypothecation dated 05.01.2011 thereby charging in the favour of the Financial Creditor all its movable assets, both present and future and all its bank accounts, including but not limited to the Trust and
3.	First and exclusive charge on all the Corporate Debtor's bank account, including but not limited to the Trust	

	<p>and Retention Account (hereinafter referred to as "TRA") opened with the mutually acceptable bank, where all cash flows shall be deposited and all proceeds shall be utilized in manner and priority to be decided by the Financial Creditor;</p> <p>First and exclusive charge by way of hypothecation of all movable assets of the Corporate Debtor.</p>	<p>Retention Account Agreement that was opened pursuant to the Financing Documents.</p> <p>Designated Account Agreement dated 28.12.2011 executed between the Corporate Debtor, Financial Creditor and Bank of Baroda.</p>
4.	Pledge of 51% of the total shareholding by holding company [Assam Company (India) Limited];	Agreement of Pledge dated 05.01.2011 executed by Assam Company (India) Limited.
5.	Pledge of one crore shares of Assam Company (India) Limited held by Link Holdings Private Limited.	<p>Agreement of Pledge 05.01.2011 executed by Link Holdings Private Limited.</p> <p>The Financial Creditor vide its letter dated 10.09.2012 had invoked the pledge of shares by Link Holdings Private Limited and subsequently an amount of Rs. 5.76 Cr was recovered by the Financial Creditor and adjusted towards the dues of the Corporate Debtor.</p>
6.	Irrevocable Corporate Guarantee of Assam Company (India) Limited;	M/s Assam Company (India) Limited, executed and furnished to the Financial Creditor a deed of Guarantee dated 05.01.2011 guaranteeing the due repayment of the Corporate Debtor of all moneys due in terms of the Loan Agreement.
7.	Irrevocable Personal Guarantee of Mr. Aditya Kumar Jajodia, the Director of the Corporate	Mr. Aditya K. Jajolia, the managing Director of the Corporate Debtor executed and furnished to the Financial Creditor the Deeds of Guarantee

	Debtor.	dated 05.01.2011 guaranteeing the due repayment by the Corporate Debtor of all moneys due in terms of the Loan Agreement.
8.	Demand Promissory Note covering the principal and interest payments	The Corporate Debtor and also furnished to the Financial Creditor a demand promissory note on 05.01.2011.
9.	Post-dated cheques covering the principal and interest payment of the Loan Amount.	

4. On 03.04.2012 the Corporate Debtor vide its letter dated 03.04.2012, requested the Financial Creditor to provide a period of 60 days' time for repayment of the installments due on 15.04.2012. The Financial Creditor in response to the said request vide its email dated 12.04.2012 advised the Corporate Debtor to make the repayment at the earliest as per the agreed terms of the Loan Agreement.

5. The Financial Creditor subsequently on numerous occasions issued several demands for the repayment of the Loan Amount together with interest and all other amounts which was due and payable by the Corporate Debtor to the Financial Creditor under the Loan Agreement, however, the Corporate Debtor completely neglected and failed to make of the Loan Amount together with interest and all other amounts due and payable under the Loan Agreement till date.

6. In response to the said invocation letter dated 10.09.2012 invoking the pledge of shares by Link Holdings Private Limited, the Corporate Debtor along with Link Holdings Private Limited which had pledged the shares of Assam Company (India) Limited to the Financial Creditor, both issued letters dated 24.09.2012 requesting the Financial Creditor to not dispose of the 100,00,000 shares and that the Corporate Debtor was transferring an amount of Rs.1.31 Crores to the Financial Creditors towards the interest amount due for the period of 15.02.2012 to 14.03.2012. In view of the facts that the said amount was paid by the corporate debtor to the Financial Creditor, the Financial Creditor refrained from disposing of the said shares and also issued a letter dated 20.11.2012 withdrawing the invocation of the said pledge by Link Holdings Private Limited on the condition that the Corporate Debtor would regularize all the outstanding dues to be repaid by the Corporate Debtor.

7. The Corporate Debtor again failed to regularize the outstanding dues under the Loan Agreement and therefore, the Financial Creditor was constrained to revoke the concession granted by the Financial Creditor to the Corporate Debtor (Ref. Letter dated 20.11.2012) vide its letter dated 14.12.2012. Accordingly, the shares of Assam Company (India) Limited held by Link Holdings Private Limited were invoked by the Financial Creditor and the sale

proceeds received through sale of the aforesaid shares were adjusted against the dues of the Corporate Debtor.

8. Subsequently, the Financial Creditor was also constrained to recall the outstanding amounts of the Loan from the Corporate Debtor vide its letter dated 15.12.2012 and thereby also invoked the guarantees issued by Mr. Aditya K. Jajodia, the Managing Director of the Corporate Debtor and by M/s Assam Company (India) Limited, the Corporate Guarantor of the Corporate debtor.

9. Meanwhile, the financial Creditor filed a section 7 application under the Insolvency and Bankruptcy Code, 2016 for initiating the process of corporate insolvency resolution process against the Corporate Guarantor of the Corporate Debtor i.e. Assam India (Company) Limited, which was admitted by the National Company Law Tribunal Guwahati vide its order dated 26.10.2017. Thereafter, the Financial Creditor filed its Form C dated 13.11.2017 before the Interim Resolution Professional under the Regulation 8 Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulation 2016 claiming an amount of Rs. 648,80,93,833/- due and payable by Assam India (Company) Limited as per its statement of Accounts dated 26.10.2017 towards the corporate guarantee issued by it in favour of the Financial Creditor. Subsequently, a resolution plan proposed by one of the

Resolution Applicants of Assam India (Company) Limited was approved by the Committee of Creditors which was also later approved by the National Company Law Tribunal, Guwahati vide its order dated 20.09.2018. Thereafter, the Financial Creditor approached the Resolution Professional of Assam India (Company) Limited, which only accepted an amount of Rs. 38,85,60,743/- towards the repayment of dues by Assam India (Company) Limited towards the Corporate Debtor under the Resolution Plan.

10. Therefore, an amount of Rs. 38,85,60,743/- was subsequently recovered by the Financial Creditor in pursuance of the approved resolution plan of Assam India (Company) Limited. However, as per the Resolution Plan upon payment under the Resolution Plan, all assets of Assam India (Company) Limited that are encumbered to its lenders or third parties stood released/extinguished.

11. Meanwhile, in December 2012, the Financial Creditor had filed an Original Application No. O.A.477/2012 against the Corporate Debtor for the unpaid dues before the Debt Recovery Tribunal 1, Kolkata for the recovery of the unpaid dues amounting to Rs.121,41,39,813/- due as on 15.12.2012, which is still pending before the Ld. Tribunal. The proceedings before the Ld. DRT are still pending. Since over the period interests kept on accruing on

the principal amount disbursed by the Financial Creditor. Therefore, a sum of Rs.1,428,84,56,867/- (Rupees One thousand four hundred Twenty-Eight Crores Eighty-Four Lakhs Fifty-Six Thousand Eight Hundred Sixty-Seven Only) as on 31.01.2020 remains due and payable by the Corporate Debtor to the Financial Creditor towards the repayment of the Loan Amount and the payment of interest and other monies under the Loan Agreement as per the following particulars:

Particulars	Amount
Principal	Rs.100,00,00,000/-
Interest Overdue	Rs.650,27,32,508/-
Delay Payment Interest	Rs.678,57,24,359/-
Total Dues	Rs.1,428,84,56,867/-

12. In the premises, the Financial Creditor prayed the following:

- I. To admit the application under consideration and pass an order for initiating Corporate Insolvency Resolution Process under section 7 of the Code.
- II. To appoint an Interim Resolution Professional in terms of Section 16 of the Code.

III. To cause a public announcement of the initiation of the Corporate Insolvency Resolution Process and calling for submission of claims under section 15 of the Code.

IV. To declare a moratorium in terms of section 14 of the Code.

Reply on Behalf of Corporate Debtor:

13. The Corporate Debtor submitted that the application under consideration is misconceived and has been filed by the applicant with ulterior motive to create undue pressure on the Corporate Debtor and the application is barred by principles of estoppels, waiver and acquiescence. Moreover, the application is also barred by Law of Limitation.

14. It is averred by the Corporate Debtor that during the pendency of the O.A.477 of 2012 the applicant i.e. Financial Creditor and Corporate debtor settled their disputes and entered into a Debt Recovery Settlement Agreement dated 25th March, 2015 ("Said Settlement Agreement") wherein it was agreed upon that the Applicant shall be actively involved in the development of the said property and upon such development, sell parts and portions of the said property and adjust the loan amount against the sale proceeds received. Moreover, upon execution of the said

settlement agreement, all legitimate dues of the Applicant were duly settled in accordance with the said agreement and the Applicant also filed an application being I.A. No. 1163 of 2015 in OA No.477 of 2012 praying for sine die adjournment of the main application being O.A. No. 477 of 2012 and by the order passed by the Ld. Tribunal the main application was adjourned sine die.

15. It is further averred that the Corporate Debtor provided all necessary assistance to the Applicant and complied with the terms and conditions of the said Settlement Agreement; however, was shocked to receive a letter from the Applicant dated 10th April, 2017 terminating the said Settlement Agreement without giving any proper grounds and without complying with the terms of termination in terms of the said Agreement. Thereafter, the Applicant also filed an application under section 7 of the IBC, 2016 against ACIL as a corporate guarantor before the Hon'ble National Company Law Tribunal, Guwahati for having failed to make payment of the said loan amount. The aforesaid application was admitted by the Guwahati Bench on 26th October, 2017 and modified the order vide order dated 2nd November, 2017 and Interim Resolution Professional (IRP) was appointed.

16. It was submitted that the Financial Creditor filed its claim to the IRP for an amount of Rs.648.81 Crores towards its dues recoverable

from the Corporate Debtor for the said loan amount provided to the Corporate Debtor. However, the IRP only admitted an amount of Rs.357.29 Crores towards the claim of the Applicant and thereafter, upon collation of all claims constituted a committee of Creditors comprising of the Financial Creditors including the Applicant, who was allocated 27.06% of voting powers in the CoC meetings based upon the claim as lodged by the Applicant. The Applicant actively participated in all the meetings of the CoC held during the Corporate Insolvency Resolution Process and even voted for resolution proposed by the RP.

17. It is further submitted that when the IRP was replaced by Resolution Professional (RP), he rectified/corrected the claim amount of the Applicant and admitted only an amount of Rs.241.27 Crores as dues. Aggrieved by the decision of the RP, the Applicant filed an interlocutory application before the Hon'ble NCLT, Guwahati challenging the amount as corrected/rectified by the RP by which the claim of the Applicant came down from Rs.357.29 Crores to Rs.241.27 Crores. The same was dismissed by the Guwahati Bench vide its order dated 23rd July, 2018 and confirmed the amount as modified and corrected by RP of 241.27 Crores as the claim of the Applicant.

18. It was averred that during the course of the CIRP, RP floated an Expression of Interest inviting potential resolution Applicants to participate in the CIRP by submitting their resolution plans with regard to ACIL. RP received six resolution plans from resolution applicants and the resolution plan of BRS Ventures Investment Ltd was accepted through e-voting by the CoC in the meeting held on 10th August 2018. The Applicants also voted in favour of the aforesaid resolution plan. The abovementioned Resolution Plan in totality was approved by the Guwahati Bench vide its order dated 20th September, 2018.

19. It is further averred that the resolution plan provided an amount of Rs. 50 crores to the Unsecured Financial Creditor against the total Claim of Rs.290.22 Crores as full and final settlement of all the dues and claims which also included an amount of Rs.38.87 crores to the Applicant. The amount was paid by BRS Ventures Investments Ltd., through State Bank of India, the lead banker in CoC. Hence, upon acceptance of the resolution plan and the amount received in terms of the said plan, the Applicant is estopped from claiming any further amount either from the Corporate Debtor. Moreover, section 31(1) of IBC, 2016 specifically states that upon approval of the resolution plan by the Hon'ble NCLT, Guwahati it shall become binding on all employees,

members, creditors, guarantors and other stakeholders involved in the resolution plan. Therefore, upon approval and payment received by the applicant, there is no reason to file application under section 7 of the IBC, 2016 against Corporate Debtor and declaring the corporate debtor to be in default of an amount of Rs.1428,84,56,867/- and it is clear that the application under consideration has been filed with *mala fide* intentions.

20. It is submitted that save and except what are matters of record and what may appear therefrom, all the allegations contained in the application under consideration are denied and disputed, as if same are set out herein and traversed in seriatim. Furthermore, the application under consideration is nothing but an abuse of process and therefore ought to be nipped in a bud and/or dismissed at the threshold. Moreover, application under consideration is not in proper form and barred by the limitation, hence, ought to be rejected by this Hon'ble Tribunal.

Rejoinder on Behalf of Financial Creditor

21. The Applicant/Financial Creditor, at the outset denied all allegations, averments, submissions and proposition of law contained in the reply save and except expressly admitted hereinafter. All the defenses/averments raised by the Corporate Debtor are bald, baseless and hold no merit.

22. The applicant/Financial Creditor submitted that the application under consideration is within limitation as the Loan was recalled by the applicant on 15.12.2012, after that the application under section 7 of IBC, 2016 against the ACIL was admitted by the Guwahati Bench on 26.10.2017. The applicant recovered an amount of Rs. 38,85,60,743/- in pursuance of the approved resolution plan of Corporate Guarantor on 19 December 2018. Therefore, the applicant has filed the present proceedings for recovery of the balance amounts which stand due and payable only after adjusting the amounts received in pursuance of the approved resolution plan of the corporate guarantor of the Corporate Debtor, i.e. Assam Company (India) Limited. Therefore, the application is within limitation.

23. It was further submitted by the Applicant that although a debt repayment and settlement agreement (DRSA) was entered between the parties on 24.03.2015, wherein it was decided that the financial Creditor herein would facilitate and jointly develop/ sell the project land to recover its dues. However, the terms of the said agreement could not be complied with as no considerable progress was made even after 2 years post execution of the said agreement, and thereupon the Financial Creditor herein was constrained to issue the DRSA termination letter on 10.04.2017. Thereupon both

parties mutually decided to terminate the DRSA by way of a Cancellation Agreement, it was categorically acknowledged by both parties that the outstanding amount due and payable on the said date was Rs. 231,48,67,202/- and the said cancellation agreement was duly signed by the respective representatives of the Financial Creditor, the Corporate Debtor and the Guarantors.

24. It is averred by the applicant that it is settled position of law that in view of the provisions of section 128 of the Indian Contract Act, 1872, the liability of the guarantor/surety is co-extensive with that of the principal debtor. Therefore, the creditor has a right to obtain a decree against the surety as well as the principal debtor. It is also a settled law that the surety has no right to restrain execution of the decree against it until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has repaid the dues of the creditor or not. The surety does not have a right to dictate terms to the creditor as how it should make the recovery and pursue its remedies against the principal debtor at its instance. The similar position is also true in the case of the recovery where the creditor has sought to make recovery of its dues from the guarantor first. Any recovery of its dues from guarantor does not absolve the principal debtor of its financial obligations, except to

the extent of the amount already recovered by the creditor from the guarantor. The financial Creditor relied on the Hon'ble Apex Court's judgment titled, **State Bank of India V. Ramakrishnan & Ors (Civil Appeal No. 3595/2018)**. In this judgment *Hon'ble Supreme Court set aside the impugned judgment of Hon'ble NCLAT dated 28.02.2018 and relied heavenly upon the Insolvency Law Committee proceedings that made it amply clear that the CIRP and more particularly, moratorium under section 14 of the IBC does not extend to the guarantor as the object of the IBC was not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why section 14 of the IBC is not applicable to them.* Furthermore, the applicant also quoted the judgment of Hon'ble NCLAT passed in the matter of **Vishnu Kumar Agarwal Vs Piramal Enterprises Limited (Company Appeal (AT) (Insolvency) No. 346 of 2018)**. It was held that *the creditor can initiate CIRP against the principal borrower and one or more simultaneously until the CIRP is admitted against any one of them, in which case, the proceedings cannot be proceeded against the remaining. That however, even in such a case, the liability of the remaining sureties is not absolved but is simply suspended till the creditor has exhausted its remedy against the principal borrower.* This clearly implies inversely that

CIRP against a guarantor does not absolve the liabilities of the principal borrower, which in the present case is the principal debtor. The applicant also cited the judgment of Hon'ble NCLAT namely, **Ferro Alloys Corporation Ltd. Vs. Rural Electrification Corporation Ltd.** It was held that *it is not necessary to initiate Corporate Insolvency Resolution Process against the Principal borrower before initiating Corporate Insolvency Resolution Process against the Corporate Guarantors. Without initiating any Corporate Insolvency Process against the Principal Borrower, it is always open to the financial Creditor to initiate Corporate Insolvency Resolution Process under section against the Corporate Guarantor, as the creditor is also the Financial Creditor qua Corporate Guarantor.*

25. It was further averred that the amount recovered by the applicant under the approved resolution plan of Assam Company (India) Limited was a meagre sum of Rs. 38.85 crores against the approved claim of Rs.241 Crores. Further, as per the resolution plan, upon payment under the resolution plan, all assets of Assam Company (India) Limited that were encumbered to its lenders or third parties stood released/extinguished. Moreover, even in Resolution Plan in respect of the Assam Company (India) Limited no-where it is stated that post-receipt of the dues under the

resolution plan, the Financial Creditor shall relinquish its rights to recover the balance dues from the principal borrower. Apart from it, the claim of the Financial Creditor is in nature of public money. Furthermore, in the balance sheet of Corporate Debtor as on March 31, 2019 under nos. 24, 25 and 26, the Corporate Debtor has recognized the debt due to the Applicant after adjusting the amount received by the Applicant under the aforesaid resolution plan. In addition to it, in the annual report for the Financial Year 2018-2019 of Assam Company (India) Limited, it is mentioned that 51% shares of the Corporate Debtor held by Assam Company (India) Limited, as the holding company of the Corporate Debtor, is still pledged to the Applicant as a security for the loan availed by the Corporate Debtor. Thus, the aforesaid financial statements clearly prove the existence of the financial debt. Hence, the submissions and averments of the Corporate Debtor that all claims of the Applicant are settled are completely false and the Applicant is not stopped from proceeding against the Corporate Debtor for recovering its outstanding dues, which are due and payable under the Loan Agreement.

26. At the end, prayed for the initiation of Corporate Insolvency resolution process against the Corporate Debtor as soon as possible as the time is the essence IBC. Otherwise, the genesis of

the IBC shall be defeated and the rights and interest of the Applicant/Financial Creditor shall be totally defeated.

27. ISSUES:

i. Whether the Application filed under section 7 of IBC by Applicant/Financial Creditor is maintainable against the Corporate Debtor?

ii. Whether the Application is filed within Limitation?

Arguments of Applicant/Financial Creditor:

Issue No.i

Amount received from the Resolution Plan of the corporate guarantor (ACIL) does not act as full and final settlement of outstanding due and claims with respect to the remainder amount of the Debt against the Corporate Debtor:

- Under Clause 12.3 and Clause 13.3 of the Resolution Plan of ACIL (Pg 250 and 253 of the Reply), all claims against ACIL were written off and all corporate guarantees, indemnities, undertakings provided by ACIL were extinguished. Hence, the guarantee stood extinguished on approval of the resolution plan. Such extinguishment of the guarantee cannot extinguish the right of a lender available against the principal borrower. Discharge from guarantee cannot be construed as a discharge of the principal borrower. The approved Resolution Plan nowhere stated that the

right of the Financial Creditor against the principal borrower stands extinguished.

- As per Section 128 of the Indian Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.
- In the matter of **Ferro Alloys Corporation Ltd. Vs Rural Electrification Corporation [Comp App. (AT)(Ins) 92/2017 dated 08.01.2019]**, the Hon'ble NCLAT held that insolvency proceedings can be initiated against corporate guarantor without initiating proceedings against the Principal Debtor. (Para 39)
- In the matter of **Dr. Vishnu Kumar Agarwal vs M/s. Piramal Enterprises Ltd. [Comp. App. (AT)(Ins) 346/2018 dated 08.01.2019]**, the Hon'ble NCLAT has further held that for the same set of claims, when an Application has been admitted against one of the Corporate Debtors (i.e. principal borrower or corporate guarantor), second Application for same financial creditor for same set of claims/default cannot be admitted against the Corporate Debtor simultaneously. (Para 31,32) In the present case, the Financial Creditor was pursuing its remedies against the Corporate Guarantor and now proceeding initiate CIRP against principal borrower.

- In the matter of **Gouri Shankar Jain Vs. Punjab National Bank and Ors. (2019 SCC OnLine Cal 7288)**, the Kolkata High Court has considered the issue that when a secured financial creditor received a haircut in respect of its pursuit of claim against a guarantor, what is the effect of a secured financial creditor receiving payment of a part of its claim, on full and final settlement basis, in terms of the Resolution Plan, on the guarantor's liability. The HC held that the liability qua a surety gets extinguished. However, it cannot be said that, the financial creditor entered into a voluntary compromise with the corporate debtor with regard to the quantum of the claim. Acceptance of the haircut amount from approval of a resolution plan where the FC is a member of the COC, does not mean that the right of the financial creditor to recover the balance amount from the guarantor of the corporate debtor is impaired. (Para 14, 25, 26).
- In the matter of **IDBI Bank Limited Vs. M/s. Neueon Towers Limited (2020 SCC OnLine NCLT 535)**, the NCLT Hyderabad has held that after exhausting the remedy before the RP appointed for the Principal Borrower and if any balance was remaining to be paid to the creditor, the creditor can make claim for the balance before the RP appointed for Corporate Guarantor. (Para 14-15)

- In the matter of **Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta [2019 SCC OnLine SC 1478]**, the Hon'ble Supreme Court allowed the financial creditor to go after the guarantors for debt that has not been settled under the Resolution Plan. (Para 84-87)

Issue No.ii

The present Application filed by the Financial Creditor is held to be within the period of Limitation on the grounds as follows:

- The present application is within period of limitation. The reason is that although the loan was defaulted for the very first time on 15.04.2012, the parties were exploring settlement by way of DRSA. The DRSA was entered within three years from the date of default where the loan amount was expressly acknowledged. The DRSA was cancelled by way of Cancellation Deed dated 29.05.2017, on that date, both parties once again unequivocally admitted the outstanding liability to the tune of Rs. 231,48,67,202/- as due and payable by the CD to the Financial Creditor. The said acknowledgment gave rise to a new and fresh period of limitation. The present petition filed in February, 2020, is within three years from the last date of express and

undisputed acknowledgment dated 29.05.2017 and is within limitation from such date of acknowledgment.

- In case of **B.K Educational Services Pvt Ltd v. Parag Gupta and Associates ((2019) 11 SCC 633)**, the Hon'ble Supreme Court held that the Limitation Act, 1963 ("Limitation Act") is applicable to applications filed under Section 7 and Section 9 of the Code and will be governed by Article 137 of the Schedule of the Limitation Act, which provides three years' period of limitation for initiation of the proceedings.
- Section 18 of the Limitation Act provides that written acknowledgement of liability, which if made before the expiration of limitation period, starts a fresh period of limitation from the date of such acknowledgement. In the matter of **MM Ramachandran vs. South Indian Bank & Ors.(2020 SCC Online NCLAT 503)**, the Hon'ble NCLAT, while referring to an email and letter of acknowledgment of debt in writing held that there will be commencement of new limitation period from such date of acknowledgment.(Para 1,4,5, 7)
- In the matter of **Vivek Jha vs. Daimler Financial Services India Pvt. Ltd. & Anr. (Company Appeal (AT) Insolvency No. 756 of 2018 decided on 13 January, 2020)**, Hon'ble

NCLAT has held that the acknowledgement of debts by the Corporate Debtor within the prescribed period will give rise to a new limitation period for the Creditor to set out its claim against the Debtor under the Insolvency and Bankruptcy Code (IBC). The Appellate Tribunal while referring to a decision given by the Hon'ble Supreme Court, has observed that an application if filed before the expiration of the three years from the date of the previous acknowledgment of debts will not be barred by limitation and gets the protection of Section 18 of the Limitation Act, 1963. Acceptance of debts by the Debtor not only protects the limitation period but also provides for the continuous cause of action to the Creditor to submit its claim. Pertinently, the Appellant in the said matter had sought to argue that the date of default cannot be extended relying on the judgment of Jignesh Shah & Ors. Vs UOI (2019) SCC Online SC 1254 and Gaurav Hargovind Bhai Dave Vs ARC (India) Limited & Ors. (2019) SCC Online SC 1239, which was not applicable to the facts of the case.

- All of the above judgments are expressly applicable to the facts in the present case as in the present case, there is express and unequivocal acknowledgement.

- In addition, the Financial Creditor was seeking its remedies and claims against the Corporate Guarantor, however it had to take a massive haircut in the amount recovered from such proceedings. The Financial Creditor accordingly is pursuing the available remedy against the CD for its balance claims. The time spent in pursuing remedies against the Corporate Guarantor is also to be excluded for the purposes of computation of the period of limitation.
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28. Addl. Points on Behalf of Applicant/F.C Creditor

- It is noted that the Hon'ble NCLAT in the matter of **V. Padmakumar v. Stressed Assets Stabilization Fund (2020 SCC OnLine NCLAT 417)** confirmed its previous ruling given in **G Esawara Raowith's case** with 4:1 majority, holding that for the purpose of filing an application for initiation of the CIRP under the Code, entries in the balance sheet of the company do not constitute an acknowledgement of liability in terms of S.18 of the Limitation Act. This judgment was pertaining to the acknowledgment made on account of balance sheet and no other valid form of acknowledgment. Therefore, the said judgment cannot be applied to the facts of the present case.

- In the matter of **Babulal VardharjiGurjar vs. Veer GurjarAluminium (2020 SCC Online SC 647)** the question before the Hon'ble Supreme Court was whether the limitation period gets extended with acknowledgement of liability in the books of the corporate debtor. It was held that the date of default, in the absence of any other pleading, shall be the date of commencement of limitation. However, the Supreme Court categorically held that there is nothing on record to show different date of default or any acknowledgment. (Para 96). The Court specifically records that there was no pleading for acknowledgment of debt. In the present case however, there is a specific acknowledgment in the Concession Agreement [(@Pg 20 of Rejoinder, Clause 2 of the Agreement (Cancelled))] and the same has not been denied by either party.

- Similarly, the judgments **Jignesh Shah & Ors. Vs UOI (2019) SCC Online SS 1254** and **Gaurav Hargovind Bhai Dave Vs ARC (India) Limited & Ors. (2019) SCC Online SC 1239**, are also not applicable to the facts of the case, as they do not pertain to specific acknowledgment by the CD as is in the present case. It also pertinent to note that in **Jignesh Shah & Ors. Vs UOI**, the Supreme Court has specifically held

that acknowledgment of liability under Section 18 of Limitation Act, will certainly extend limitation. (Para 21).

Accordingly, both the issues are decided in favour of the Financial Creditor and against the Corporate Debtor.

29. Therefore, the plea taken by the CD is devoid of merits and stands rejected for the reasons recorded herein above. The documentary evidence placed on the case file by the Financial Creditor is sufficient to ascertain the existence of a default on the part of the Corporate Debtor. The Financial Creditor has fulfilled all the requirements of law and proposed the name of the Resolution Professional for appointment as the IRP. Hence, the Application stands **admitted** and the commencement of the Corporate Insolvency Resolution Process is initiated.
30. Mr. Rakesh Kumar Agarwal is hereby appointed as IRP as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as reflects from Form-2. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the IBC, 2016, within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.
31. The moratorium is declared which shall have effect from the date of this Order till the completion of CIRP, for the purposes referred to in Section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:

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(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's 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 Securitisation 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.

32. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended, or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.
33. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its Promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under Section 19 for discharging his functions under Section 20 of the IBC, 2016.
34. The Financial Creditor is directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of IBC, 2016. The e-mail and other details of the IRP are as follows:

Name: Mr. Rakesh Kumar Agarwal

Registration No: IBBI/IPA-001/IP-P00443/2017-18/ 10786

Email ID: rakesh202@hotmail.com

35. The Financial Creditor is directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.

36. The Order is pronounced.

-Sd.

NARENDER KUMAR BHOLA
Member (Technical)

-Sd.

CH. MOHD SHARIEF TARIQ
Member (Judicial)
