Laxmi Pat Surana vs Union Bank Of India on 26 March, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1707, AIRONLINE 2021 SC 170

Author: A.M. Khanwilkar

Bench: Krishna Murari, B.R. Gavai, A.M. Khanwilkar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2734 OF 2020

LAXMI PAT SURANA ...APPELLANT

Versus

UNION BANK OF INDIA & ANR. ...RESPONDENTS

JUDGMENT

A.M. Khanwilkar, J.

1. Two central issues arise for our determination in this appeal, as follows: □

(i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 20161 can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had 1 for short, "the Code" committed default and is not a "corporate person" within the meaning of the Code?

(ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Non□performing Asset2, being the date of default, is not barred by limitation?

2. Briefly stated, respondent No. 1 bank 3 extended credit facility to M/s. Mahaveer Construction 4, a proprietary firm of the appellant, through two loan agreements in years 2007 and 2008 for a term loan of Rs.9,60,00,000/□(Rupees nine crore sixty lakhs only) and an additional amount of Rs.2,45,00,000/□(Rupees two crore forty□five lakhs only), respectively. The loan amount was

disbursed to the Principal Borrower. M/s. Surana Metals Limited5, of which the appellant is also a Promoter/Director, had offered guarantee to the two loan accounts of the Principal Borrower. The stated loan accounts were declared NPA on 30.1.2010. The Financial Creditor then issued a recall notice on 19.2.2010 to the Principal Borrower, as 2 for short, "NPA" 3 for short, "the Financial Creditor" 4 for short, "the Principal Borrower" 5 for short, the "Corporate Debtor" well as, the Corporate Debtor, demanding repayment of outstanding amount of Rs.12,35,11,548/□(Rupees twelve crore thirty□five lakhs eleven thousand five hundred forty□eight only).

3. The Financial Creditor then filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 19936 against the Principal Borrower before the Debt Recovery Tribunal7 at Kolkata.

4. During the pendency of the stated action initiated by the Financial Creditor, the Principal Borrower had repeatedly assured to pay the outstanding amount, but as that commitment remained unfulfilled, the Financial Creditor eventually wrote to the Corporate Debtor on 3.12.2018 in the form of a purported notice of payment under Section 4(1) of the Code. The Corporate Debtor replied to the said notice of demand vide letter dated 8.12.2018, inter alia, clarifying that it was not the Principal Borrower nor owed any financial debt to the financial creditor and had not committed any default in repayment of the stated outstanding amount. This communication was sent without prejudice.

6 for short, "the 1993 Act" 7 for short, "DRT"

5. The Financial Creditor then proceeded to file an application under Section 7 of the Code on 13.2.2019 for initiating Corporate Insolvency Resolution Proceeding8 against the Corporate Debtor, before the National Company Law Tribunal, Kolkata 9. This application came to be resisted on diverse counts and in particular, on the preliminary ground that it was not maintainable because the Principal Borrower was not a "corporate person"; and further, it was barred by limitation, as the date of default was 30.1.2010, whereas, the application had been filed on 13.2.2019 i.e., beyond the period of three years. These two preliminary objections came to be negatived by the Adjudicating Authority vide judgment and order dated 6.12.2019.

6. The Adjudicating Authority held that the action had been initiated against the Corporate Debtor, being coextensively liable to repay the debt of the Principal Borrower and having failed to do so despite the recall notice, became Corporate Debtor and thus liable to be proceeded with under Section 7 of the Code. As regards the second objection, the Adjudicating Authority found that the Principal Borrower, as also, the Corporate Debtor had admitted and acknowledged the debt time and again, lastly on 8 for short, "the CIRP" 9 for short, the "Adjudicating Authority" or "NCLT", as the case may be. 8.12.2018 and thus the application filed on 13.2.2019 was within limitation.

7. The appellant carried the matter before the National Company Law Appellate Tribunal10, New Delhi by way of Company Appeal (AT) (Ins) No. 77 of 2020. The NCLAT vide impugned judgment and order dated 19.3.2020, dismissed the appeal and affirmed the conclusion reached by the Adjudicating Authority on the two preliminary objections raised by the appellant.

8. The appellant, feeling aggrieved, has approached this Court by way of present appeal reiterating the two preliminary objections referred to above. This Court vide order dated 28.7.2020 issued notice in this appeal, recording the principal ground urged at that time. The order reads thus: ☐"A question has been raised by learned counsel for the appellant that the proprietorship firm had taken the loan, the principal borrower has to be corporate entity, in order to maintain the proceedings under the Insolvency and Bankruptcy Code.

Issue notice confined to the aforesaid aspect returnable in four weeks.

Steps be taken within three days from today. If the steps are not taken within the stipulated time, the civil appeal shall stand dismissed without further reference to the Court.

10 for short, "NCLAT" There shall be interim stay on the operation of impugned judgment till the next date of hearing. List in the last week of August, 2020."

9. According to the appellant, Section 7 plainly ordains that an application can be filed by a financial creditor only against the corporate debtor. A corporate debtor can either be a corporate person, who had borrowed money or a corporate person, who gives guarantee regarding repayment of money borrowed by another corporate person. In other words, the Code cannot apply in respect of "debts" of an entity who is not a "corporate person". This position is reinforced by the fact that initiation of insolvency of firms and/or individuals in terms of Part III of the Code has still not been notified. Further, Section 2 of the Code came to be amended to clarify that partnership firms and proprietorship firms would fall within Part III of the Code on the basis of the differentiation made in the report of the Insolvency Law Committee, February, 2020, which reads thus: ☐"2.DEFINITION OF 'PROPRIETORSHIP FIRMS' 2.1 Part III of the Code is applicable to debtors who are individuals or partnership firms. Section 2 of the Code was recently amended to clarify the different categories of debtors falling within Part III of the Code – (i) personal guarantors to corporate debtors, (ii) partnership firms and proprietorship firms, and (iii) other individuals. Though section 2(f) of the Code now includes the words "proprietorship firms", this term has not been defined in another legislation.

2.2 Proprietorship firms are businesses that are owned, managed and controlled by one person. They are the most common form of businesses in India and are based in unlimited liability of the owner. Legally, a proprietorship is not a separate legal entity and is merely the name under which a proprietor carries on business. Due to this, proprietorships are usually not defined in statutes. Though some statutes define proprietorships, such definition is limited to the context of the statute. For example, Section 2(haa) of the Chartered Accountants Act, 1949 defined a 'sole proprietorship' as "an individual who engages himself in practice of accountancy or engages in services …". Notably, 'proprietorship firms' have also not been statutorily defined in many other jurisdictions." We may also usefully advert to Chapter 7 of the same report. It deals with the issue relating to Guarantors. Paragraph 7.3 thereof reads thus: ☐"7.3 The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower. Further, as discussed above, the creditor is at liberty to proceed against either

the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them." (emphasis supplied) It is urged that any other view would inevitably result in indirectly enforcing the Code even against entities, such as partnership firms and proprietorship firms and/or individuals, who are governed by Part III of the Code, without notifying the same. According to the appellant, a corporate guarantee is one which is extended in respect of a loan given to a "corporate person", coming within the purview of Part II of the Code. That is reinforced by the amendment Act 26 of 2018 on account of insertion of definition of "corporate guarantor" with effect from 6.6.2018, as can be discerned from the portion of report of Insolvency Law Committee, dated 26.3.2018, which reads thus: □"23.1 Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor. It was decided that section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term "corporate guarantor" will also be defined." (emphasis supplied) In substance, it is urged that since an application under Section 7 of the Code cannot be maintained against a principal borrower, who is not a "corporate person", it must follow that in respect of such transaction, no action under Section 7 of the Code can be maintained against a company or corporate person, merely because it had extended guarantee thereto.

10. As regards maintainability of the subject application under Section 7 on the ground of being barred by limitation, it is urged by the appellant that the date of default must be reckoned as 30.1.2010, on which date, the loan accounts were declared as NPA. That fact has been duly noted in the subject application filed on 13.2.2019. Hence, the application was ex facie barred by limitation in view of Article 137 of the Limitation Act, 1963 11. It is urged that Section 18 of the Limitation Act invoked by the Financial Creditor and which commended to the Adjudicating Authority and the NCLAT, has no application to the proceedings under the Code. It applies only to suits for recovery and in respect of property or right. The Insolvency and Bankruptcy Code is a self□contained code. Section 7 thereof merely refers to the factum of default being the cause of action for maintaining the application. The amended provision in the form of Section 238A of the Code, which has come into effect with effect from 6.6.2018, is only a clarificatory provision. It is urged that there is distinction between the proceedings for recovery and winding up under the Companies Act and the action under Section 7 of the Code. It is further urged that action under the Code cannot be invoked nor can be used as a fresh opportunity for creditors and claimants who had failed to invoke remedy in respect of claims which had become time barred under the existing laws. It 11 for short, "the Limitation Act" is finally urged that even if Section 18 of the Limitation Act was to be applied to an action under Section 7 of the Code, the application including Form□1 filed by the financial creditor before the adjudicating authority in no way makes out the case for granting benefit under Section 18 of the Limitation Act. The factual narration in the subject application is that the date of default was

30.1.2010 being the date of declaration of accounts as NPA, and no other fact which is relevant for giving benefit under Section 18 of the Limitation Act as expounded in Shanti Conductors Private Limited vs. Assam State Electricity Board & Ors.12, has been stated therein. In other words, respondent No. 1 has failed to set forth a case in that behalf in the application as filed. Further, letters relied upon do not mention about the factum of acknowledgment of debt by the Principal Borrower or the Corporate Debtor, as the case may be. The said communications were sent without prejudice and cannot be read as an acknowledgment of liability as such. The communication dated 8.12.2018, therefore, will be of no avail to the Financial Creditor. All other relied upon communications have been sent by the Principal Borrower and not the Corporate Debtor, who is an independent legal entity. The so-called 12 (2020) 2 SCC 677 acknowledgment by the Principal Borrower, therefore, cannot bind the Corporate Debtor. Communications sent by the Principal Borrower after the original limitation period had expired, in any case, cannot be taken into account for invoking remedy under Section 7 of the Code. Obviously, there was delay in filing of the application under Section 7 and despite that, it was not accompanied by application for condonation of delay under Section 5 of the Limitation Act. According to the appellant, the factum of application being barred by limitation is a mixed question of fact and law and would involve triable issues. Those aspects can be finally adjudicated after production of evidence in the form of affidavits before the Adjudicating Authority.

11. Reliance is placed by the appellant on the dictum of this Court in Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Private Limited & Anr. (I)13, B.K. Educational Services Private Limited vs. Parag Gupta and Associates 14, Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Limited & Anr.15, Vashdeo R. Bhojwani vs. 13 (2019) 15 SCC 209 14 (2019) 11 SCC 633 15 (2019) 10 SCC 572 Abhyudaya Co-operative Bank Limited & Anr.16 and Sagar Sharma & Anr. vs. Phoenix Arc Private Limited & Anr.17.

12. The Financial Creditor has refuted the plea regarding maintainability of the application against the Corporate Debtor. According to the Financial Creditor, the liability of the Principal Borrower and of the Guarantor is coextensive or coterminous, as predicated in Section 128 of the Indian Contract Act, 1872 18. This legal position is well-established by now (see –Bank of Bihar Ltd. vs. Dr. Damodar Prasad & Anr. 19). Section 7 of the Code enables the financial creditor to initiate CIRP against the principal borrower if it is a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person. The Financial Creditor besides placing reliance on Section 7, would also rely on definition of expressions “corporate debtor” in Section 3(8), “debt” in Section 3(11), “financial creditor” in Section 5(7) and “financial debt” in Section 5(8) of the Code. It is urged that upon conjoint reading of these provisions, it is crystal clear that a 16 (2019) 9 SCC 158 17 (2019) 10 SCC 353 18 for short, “the Contract Act” 19 (1969) 1 SCR 620 “financial debt” includes the amount of any liability in respect of any guarantee or indemnity for any money borrowed against interest. Resultantly, the money borrowed by sole proprietorship of the appellant against payment of interest for which the Corporate Debtor stood guarantee or indemnity, was also a “financial debt” of the Corporate Debtor and for that reason, the Financial Creditor -respondent No. 1, could proceed under Section 7 of the Code. It is further urged that the definition of “corporate guarantor” introduced by way of amendment of 2018 is to define a corporate guarantor in relation to a corporate debtor against

whom any CIRP is to be initiated, in reference to Section 60 of the Code. The objection regarding maintainability of the application against a corporate guarantor, is, therefore, devoid of merit and needs to be rejected.

13. As regards the second issue of application being barred by limitation, it is contended that this Court had issued limited notice in the present appeal only to examine the question noted in the order dated 28.7.2020. Hence, the second objection of limitation need not be examined. It is then urged that in any case, there is no substance even in this objection. Referring to the decisions relied upon by the appellant, it is urged that it was open to the Financial Creditor to maintain the application even after three years from the declaration of accounts as NPA because of the acknowledgment of debt including by the Corporate Debtor from time to time and lastly on 8.12.2018, whereby it admitted the initial loan granted by the Financial Creditor in favour of the Principal Borrower and also of having provided collateral security to secure the liability of the Principal Borrower. The Adjudicating Authority, as well as, the NCLAT had justly taken due cognizance of the said admission to conclude that fresh period of limitation commenced because of such acknowledgment by the Corporate Debtor. Further, the default committed by the Corporate Debtor is a continuing one. It is urged that the Court must look behind the veil of corporate entity M/s. Surana Metals Limited, being the alter ego of the appellant herein. The Code is a special enactment for resolution of a financial debt and it is in larger public interest that financial debts are recovered and the debts of corporate person are restructured to revive the failing corporate entity. Thus understood, the process is not for recovery as such, but for resolution of the insolvency of the corporate person. It is further urged that there is no need to relegate the parties before the Adjudicating Authority on the question of limitation. It is not a mixed question of fact and law as contended, but on the facts discerned from the communication and as stated in the subject application, it is obvious that the Corporate Debtor had admitted the liability vide communication dated 8.12.2018, for which reason the application filed on 13.2.2019 was within limitation. The Financial Creditor□respondent No. 1 pressed for dismissal of the appeal.

14. We have heard Mr. Abhijit Sinha, learned counsel for the appellant and Mr. O.P. Gaggar, learned counsel for respondent No. 1.

15. It is no more res integra that the Code is a complete code — provisioning for actions and proceedings relating to, amongst others, reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto. ISSUE (i):

16. Section 7 of the Code propounds the manner in which corporate insolvency resolution process (CIRP) may be initiated by the “financial creditor” against a “corporate person being the corporate debtor”. It predicates that a financial creditor either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default is committed by it. The expression “default” is expounded in

Section 3(12) to mean non-payment of debt which had become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.

17. Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate person assuming the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt.

18. The term "financial creditor" has been defined in Section 5(7) read with expression "Creditor" in Section 3(10) of the Code to mean a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. This means that the applicant should be a person to whom a financial debt is owed. The expression "financial debt" has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. It is so provided in sub-clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression "debt" has been defined separately in the Code in Section 3(11) to mean a liability or obligation in respect of "a claim" which is due from any person and includes a financial debt and operational debt. The expression "claim" would certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower. The expression "claim" has been defined in Section 3(6), which means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment in respect of specified matters.

19. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.

20. A priori, in the context of the provisions of the Code, if the guarantor is a corporate person (as defined in Section 3(7) of the Code), it would come within the purview of expression "corporate debtor", within the meaning of Section 3(8) of the Code.

21. It may be useful to also advert to the generic provision contained in Section 3(37). It postulates that the words and expressions used and not defined in the Code, but defined in enactments referred to therein, shall have the meanings respectively assigned to them in those Acts. Drawing support from this provision, it must follow that the lender would be a financial creditor within the meaning of the Code. The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in Section 3(8) of the Code.

22. Thus understood, it is not possible to countenance the argument of the appellant that as the principal borrower is not a corporate person, the financial creditor could not have invoked remedy under Section 7 of the Code against the corporate person who had merely offered guarantee for such loan account. That action can still proceed against the guarantor being a corporate debtor, consequent to the default committed by the principal borrower. There is no reason to limit the width of Section 7 of the Code despite law permitting initiation of CIRP against the corporate debtor, if and when default is committed by the principal borrower. For, the liability and obligation of the guarantor to pay the outstanding dues would get triggered coextensively.

23. To get over this position, much reliance was placed on Section 5(5A) of the Code, which defines the expression "corporate guarantor" to mean a corporate person, who is the surety in a contract of guarantee to a Corporate debtor. This definition has been inserted by way of an amendment, which has come into force on 6.6.2018. This provision, as rightly urged by the respondents, is essentially in the context of a corporate debtor against whom CIRP is to be initiated in terms of the amended Section 60 of the Code, which amendment is introduced by the same Amendment Act of 2018. This change was to empower NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor in the same Tribunal pertaining to same transaction, which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. That does not mean that proceedings under Section 7 of the Code cannot be initiated against a corporate person in respect of guarantee to the loan amount secured by person not being a corporate person, in case of default in payment of such a debt.

24. Accepting the aforementioned argument of the appellant would result in diluting or constricting the expression "corporate debtor" occurring in Section 7 of the Code, which means a corporate person, who owes a debt to any person. The "debt" of a corporate person would mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. The expression "debt" in Section 3(11) is wide enough to include liability of a corporate person on account of guarantee given by it in relation to a loan account of any person including not being a corporate person in the event of default committed by the latter. It would still be a "financial debt" of the corporate person, arising from the guarantee given by it, within the meaning of Section 5(8) of the Code.

25. Notably, the expression "corporate guarantee" is not defined in the Code. Whereas, expression "corporate guarantor" is defined in Section 5(5A) of the Code. If the legislature intended to exclude a corporate person offering guarantee in respect of a loan secured by a person not being a corporate

person, from the expression "corporate debtor" occurring in Section 7, it would have so provided in the Code (at least when Section 5(5A) came to be inserted defining expression "corporate guarantor"). It was also open to the legislature to amend Section 7 of the Code and replace the expression "corporate debtor" by a suitable expression. It could have even amended Section 3(8) to exclude liability arising from a guarantee given for the loan account of an entity not being a corporate person. Similarly, it could have also amended expression "financial debt" in Section 5(8) of the Code, "claim" in Section 3(6), "debt" in Section 3(11) and "default" in Section 3(12). There is no indication to that effect in the contemporaneous legislative changes brought about.

26. The expression "corporate debtor" is defined in Section 3(8) which applies to the Code as a whole. Whereas, expression "corporate guarantor" in Section 5(5A), applies only to Part II of the Code. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of loan given to a person other than corporate person. The liability of the guarantor is coextensive with that of the principal borrower. The remedy under Section 7 is not for recovery of the amount, but is for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard. It is open to the corporate debtor to pay off the debt, which had become due and payable and is not paid by the principal borrower, to avoid the rigours of Chapter II of the Code in general and Section 7 in particular.

27. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of "corporate guarantor" in Section 5(5A) of the Code needs to be so understood.

28. A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant. ISSUE (ii):

29. As noted earlier, this Court while entertaining the present appeal in its order dated 28.07.2020 had adverted to only one contention □which already stands answered against the appellant. However, the appellant would contend that the other plea taken by him and having been dealt with by the NCLT as well as the NCLAT, the appellant ought to be allowed to pursue that plea — regarding the maintainability of application under Section 7 of the Code, on the ground of being barred by limitation. Inasmuch as, if this ground is answered in favour of the appellant, it would go to the root of the matter touching upon the jurisdiction of the NCLT to entertain the subject application under Section 7 of the Code. Hence, despite the objection of the respondent (financial creditor) not to permit the appellant to canvas this ground, in our opinion, it is necessary to answer

this ground as well in the interest of justice; and also, because it is the duty of the court under Section 3 of the Limitation Act, to answer the stated issue at the threshold or at appropriate stage, as the case may be, even if it is not expressly raised by the opposite party.

30. The objection regarding limitation has been negatived by the NCLT vide judgment dated 06.12.2019. It observed in paragraph 7 of its judgment as follows:

> "7. It is seen from the evidence on record that not only the original borrower but also the Corporate Debtor admitted and acknowledged the debt time and again on 27.05.2015 (exhibit J□1) and 08.12.2018 (exhibit K). The Corporate Debtor replied the notice issued by the Bank clearly admitting the debt. We have gone through his reply to the notice. We hold that his reply is in form of admission of debt and nothing else. The Corporate Debtor contended that recovery proceeding is pending in Debt Recovery Tribunal, Kolkata against the Corporate Debtor. It cannot be said that debt become due and payable. We hold that it is admission of debt and his only defense is that it is yet to become due and payable. In this case, by virtue of guarantee in favour of the Bank, the Corporate Debtor undertook to clear loan of the original borrower in case original borrower commit default and it is duty of the Corporate Debtor to clear the outstanding. His defence is that debt is yet to become due is not sustainable." (emphasis supplied)
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> 31. After so observing, the NCLT proceeded to advert to the decision in Gaurav Hargovindbhai Dave (supra) and distinguished the same on the ground that in that case the original borrower and the corporate debtor had not admitted or acknowledged the debt after the date of default, which had occurred three years before the filing of the application. In the present case, however, the principal borrower as well as the corporate debtor had acknowledged the debt time and again after 30.01.2010 and lastly on 08.12.2018, which was the basis of filing of subject application under Section 7 of the Code on 13.02.2019.
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> 32. Even the NCLAT noted this ground urged by the appellant in paragraph 21 of the impugned judgment as follows:
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> "21. In the instant case the Corporate Debtor (M/s Surana Metals Ltd.) had duly executed the Letter of Guarantor dated 2.2.2007, 17.2.2007 and 3.8.2008 for the Loan facilities Sanctioned by the Bank to M/s Mahaveer Construction also that the Corporate Debtor had acknowledged its debt on 16.9.2010, 3.3.2012, 27.5.2015, 24.10.2016, and executed by the Appellant (Vide Page. No.196, 197, 140, 198) and on 8.12.2018 executed by the (M/s Surana Metals Ltd.) page no.141 respectively against the execution of the Letters of Guarantee. Significantly, the Corporate Debtor in its Reply dated 8.12.2018 had tacitly admitted the execution of Guarantors Agreement dated 2.2.2007, 17.2.2007, 3.8.2008 in and by which the Corporate Debtor had agreed to pay Rs.12,05,00,000/□crore and interest on such sum." (emphasis supplied) Finally, in paragraph 30 of the impugned judgment, the NCLAT after

> analysing the relevant decisions relied upon by the parties in B.K. Educational Services Private Limited (supra), Jignesh Shah and Anr. vs. Union of India and Anr.20 and Gaurav Hargovindbhai Dave (supra), concluded as follows:
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> "30. In the light of detailed qualitative and quantitative discussions aforesaid and also this Tribunal keeping in mind the present facts and circumstances of the instant case in an integral fashion, which float on the surface case comes to an inescapable conclusion that there is an acknowledgment of 'Debt' on various dates like 2.2.07, 17.2.07, 3.8.07 for the loan facilities availed by Mahaveer Construction the Letters of Guarantee Acknowledged by the Corporate Debtor (M/s Surana Metals Ltd.) on 16.9.10, 3.3.12, 27.5.15, 24.10.16 executed by the Appellant and on 8.12.18 by the Surana Metals Ltd.

etc. This apart, here is an acknowledgment of Debt by the Principal Borrower but also the Corporate Debtor on 27.5.15 & 8.12.18 respectively. The object of specifying time limit for limitation is undoubtedly based on 'Public Policy'. The application projected before the Adjudicating Authority (NCLT) Kolkata Bench, on 13.2.19 is well within limitation and not barred by Limitation. Looking at from any angle, the present Appeal sans merits and the same is dismissed without costs. ..." 20 (2019) 10 SCC 750 (emphasis supplied)

33. We may straight away advert to the decision of this Court in Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Private Limited & Anr. (II)21 wherein after analysing the earlier decisions of this Court, the Court summed up the position in the following words:

> "32. When Section 238□A of the Code is read with the above noted consistent decisions of this Court in Innoventive Industries22, B.K. Educational Services , Swiss Ribbons , K. Sashidhar25, Jignesh Shah , Vashdeo R. Bhojwani , Gaurav Hargovindbhai Dave28 and Sagar Sharma29 respectively, the following basics undoubtedly come to the fore:
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> (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
>
> (b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
>
> (c) that intention of the Code is not to give a new lease of life to debts which are time□ barred;
>
> (d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, 21 (2020) 15 SCC 1 22 Innoventive Industries Ltd. vs. ICICI Bank, (2018) 1 SCC 407 23 supra at footnote 14 24 Swiss Ribbons (P) Ltd. vs. Union of India, (2019) 4 SCC 17 25 K. Sashidhar vs. Indian Overseas Bank, (2019) 12 SCC 150 26 supra at footnote 20 27 supra at footnote 16 28 supra at footnote 15 29 supra at footnote 17 that is to say, that the right to apply under the Code accrues on the date when default occurs;

(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application."

34. In the earlier part of this reported decision, the Court did advert to the exposition in Jignesh Shah (supra). In that decision, the Court had analysed the provisions of the Code by first adverting to the decision in B.K. Educational Services Private Limited (supra) in which Section 238A of the Code was referred to. Paragraphs 7 and 8 of the decision in Jignesh Shah (supra) read thus:

"7. Having heard the learned Senior Counsel for the parties, it is important to first advert to this Court's decision in B.K. Educational Services (P) Ltd.30 in which Section 238-A of the Code was referred to, which states as follows:

"238-A. Limitation.—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 Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be."

8. In para 7 of the said judgment, the Report of the Insolvency Law Committee of March 2018 was referred to 30 supra at footnote 14 as follows: (B.K. Educational Services case, SCC pp. 644-45, para 11) "11. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238-A into the Code. This is to be found in the Report of the Insolvency Law Committee of March 2018, as follows:

'28. Application of Limitation Act, 1963 28.1. The question of applicability of the Limitation Act, 1963 ("the Limitation Act") to the Code has been deliberated upon in several judgments of NCLT and NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.31 In light of the confusion in this regard, the

> Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.32 This requires being read with the definition of "debt" and "claim" in the Code.

Further, debts in winding-up proceedings cannot be time-barred33, and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2. Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is 'to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches' 34. Though the Code is not a debt recovery law, the trigger being "default in payment of debt" renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants 31 Ravula Subba Rao vs. CIT, AIR 1956 SC 604 32 Punjab National Bank vs. Surendra Prasad Sinha, 1993 Supp (1) SCC 33 Interactive Media and Communication Solution (P) Ltd. vs. GO Airlines Ltd., 2013 SCC OnLine Del 445 34 Rajender Singh vs. Santa Singh, (1973) 2 SCC 705 (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30(4) of the Code.

28.3. Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case-to-case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy.'" (emphasis in original and supplied)" (emphasis supplied) In paragraph 21 after analysing the decisions on the point, the Court noted as follows:

> "21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding." (emphasis supplied)

35. The purport of such observation has been dealt with in the case of Babulal Vardharji Gurjar (II) (supra). Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case so warrants. Considering that the purport of Section 238A of the Code, as enacted, is clarificatory in nature and being a procedural law had been given retrospective effect; which included application of the provisions of the Limitation Act on case□to□case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case of giving new lease to time barred debts under the existing law (Limitation Act) as such.

36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be.

After enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application under Section 7 of the Code would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:

"18. Effect of acknowledgment in writing.—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment 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 acknowledgment was so signed.

(2) Where the writing containing the acknowledgment 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 acknowledgment 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."

37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non□payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non□payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code.

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor □corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.

39. In the application under Section 7 of the Code filed by the financial creditor on 13.02.2019, in Part IV thereof, it has been clearly stated that the corporate debtor duly secured the credit facilities from time to time. The relevant portion of paragraph 1 of Part IV of the application and paragraph 2 of the same Part reinforces this position. The same reads thus:

"PART IV PARTICULARS OF FINANCIAL DEBT

1. TOTAL AMOUNT OF .....

DEBT GRANTED The aforesaid credit facilities duly AND DATE(S) OF secured from time to time by the DISBURSEMENT Corporate Guarantor being the Corporate Debtor herein as follow:

2.02.2007:

i. Letter of Guarantee for Rs.9,60,00,000/-;
17.02.2007:
i. Letter of Guarantee by the Corporate Debtor;
30.08.2008:
i. Letter of Guarantee for Rs.12,05,00,000/-;
ii. Memorandum of Extension of Mortgage;
iii. Declaration of the Director of the Corporate Debtor;

Copies of all the aforesaid Documents are annexed hereto and marked with Letter 'F', 'F□1', 'F□2', 'F□3' and 'F□4'.

In addition to the above the aforesaid Credit facility not only secured by execution of Guarantee by the Corporate Debtor as aforesaid but also by deposit of Title Deed being No. for the year in respect of its immovable property being ALL THAT piece and parcel of Government Khas Mahal Land measuring about 50 Cottahs comprised in Touzi No.1298 in Dihi Panchanan Gram, Division II, together with Building and Structure standing thereon P.S. Maniktala being Municipal Premises No.17, Ultadanga Main Road, Kolkata with an intent to create equitable Mortgage in favour of the Financial Creditor.

Creation of such Mortgage in respect of the immovable property as aforesaid duly extended by the Corporate Guarantor lastly on 25.08.2008.

Creation of such charge filed with the Registrar of Companies, West Bengal by the Corporate Debtor in Form No.8 Under Section 125/127/137 of the Companies Act, 1956 dated 19.09.2008 and a copy

of the Title Deed is annexed hereto and marked with Letter ‘G’ and ‘G□1’.

Initially while sanctioning the Term Loan□1 dated 19th January, 2007, the Financial Creditor also send a Letter on 19 th January, 2007 to the said Pantaloons Retail (India) Limited being the Sub□ Licensee whose monthly Rent of Rs.21,45,000/□payable to the said Principal Borrower intimating its conformation sending therewith a copy of the General Power of Attorney executed by the Principal Borrower assigned its right of collecting and receiving Monthly rents from the said Pantaloons Retail (India) Limited in favour of the Financial Creditor. A copy of the said Letter of the Financial Creditor dated 19.01.2007 is annexed hereto and marked with Letter ‘H’.

Due to default in repayment in both the said account of the Principal Borrower maintained with the Financial Creditor at its said Strand Road Branch, Kolkata the said accounts maintained in the name of the said principal Borrower with the Financial Creditor duly were Classified and declared as NPA with effect from 30.01.2010 and as such the Financial Creditor on 19th February, 2010 issued Recall Notice to the Principal Borrower as well as its Corporate Guarantor being the Corporate Debtor herein demanding a total sum of Rs.12,35,11,548/□including interest as of 31.01.2010. A copy of the said Recall Notice dated 19.02.2010 is annexed hereto and marked with Letter ‘I’. However, both the Principal borrower and the Corporate Debtor being the Corporate Guarantor had defaulted in repayment of the dues to the Applicant Bank. The Principal Borrower vide its Letter dated 3rd March, 2012 requested the Financial Creditor regarding outstanding of its liability as on 29.02.2012 and on 27 th May, 2015 requested to provide Statement of accounts. Copies of both the said letters dated 3.03.2012 and 27.05.2015 are annexed hereto and marked with Letter ‘J’ and ‘J□’.

In reply of to the Notice of Demand dated 3rd December, 2018 issued by the Financial Creditor, the Corporate Debtor vide its letter dated 8 th December, 2018 not only admitted the initial Loans Granted by the Financial Creditor in favour of the Principal Borrower but also providing Collateral Security by the Corporate Debtor to secure the liability of the principal borrower. A copy of the said letter of the Corporate Debtor dated 8.12.2018 is annexed hereto and marked with Letter ‘K’.

2. AMOUNT CLAIMED Amount in default:□TO BE IN DEFAULT Rs.23,90,35,759.00 as on 31st January, AND THE DATE ON 2019 as per the following particulars:□WHICH THE Statement of Account of the Principal DEFAULT Borrower is attached herewith.

OCCURRED (ATTACH THE Date of default was 30/01/2010 and the WORKINGS FOR total claim of the Financial Creditor as of COMPUTATION OF the date of default is Rs.11,76,80,270.00 AMOUNT AND DAYS OF DEFAULT IN However, since the Principal Borrower as TABULAR FORM) well as its Corporate Guarantor being the Corporate Debtor herein had defaulted to pay any part or portion of the outstanding amount to UNION BANK OF INDIA the Financial Creditor thereafter the Financial Creditor on 14th July, 2010 filed an application Under Section 19 of the RDDB Act, 1993 before the Debts Recovery Tribunal□3, Kolkata being O.A. No.130 of 2010 which is still pending for final adjudication and in that proceeding the said Principal Borrower as well as Corporate Debtor are appearing and several interim orders have been passed from time to time related to collection of rents from the sub□Licensee.” (emphasis supplied in italics) Again, in Part V specifying about the particulars of financial debt in paragraphs 5 and 8, it is mentioned as follows:

"PART V PARTICULARS OF FINANCIAL DEBT .....

5. THE LATEST AND Attached to this application.

COMPLETE COPY Sanction letters dated 19.01.2007 and OF THE FINANCIAL 25.08.2008 and Letter dated 08.12.2018 CONTRACT written by the Corporate Debtor REFLECTING ALL acknowledging their liability towards AMENDMENTS AND Financial Creditor□Union Bank of India. WAIVERS TO DATE (ATTACH A COPY)

8. LIST OF OTHER Letter dated 08.12.2018 written by the DOCUMENTS Corporate Debtor acknowledging their ATTACHED TO THIS liability towards Financial Creditor□APPLICATION IN Union Bank of India." ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT.

(emphasis supplied)

40. Besides the clear assertion made in the application about the last acknowledgment on 08.12.2018 resulting in fresh period of limitation, the Tribunal adverted to the correspondence exchanged between the principal borrower, corporate guarantor (corporate debtor) and the financial creditor (Bank) during the relevant period after 30.01.2010 until filing of application under Section 7 of the Code on 13.02.2019. The last such acknowledgement by the (corporate) guarantor/corporate debtor taken note of by the NCLT as also the NCLAT reads thus:

> "SURANA METALS LIMITED 12, BONFIELD LANE, KOLKATA□700001 CIN:L27209WB1983PLC36141 SML/SB/2/18□19/08 December 08, 2018 The Chief Manager, WITHOUT PREJUDICE Union Bank of India, Asset Recovery Branch, Kolkata, 15, India Exchange Place, KOLKATA□700 001.
>
> Sir, SUB: Notice regarding initiation of proceedings under the Insolvency and Bankruptcy Code, 2016.
>
> We acknowledge the receipt of your Notice being No.ARB:KOL:198:18□19 dated 03.12.2018 issued under Section 4(1) of The Insolvency and Bankruptcy Code, 2016 and are really surprised to note its contents. We deny each and every allegation contained therein including the nature of loan and quantum of claim and wish to inform you as under:
>
> 1. No Term Loan was sanctioned by you to M/s.

Mahaveer Construction, 12, Bonfield Lane, Kolkata for a sum of Rs.9,45,00,000/□and Rs.2,45,00,000/□as alleged by you in your above stated letter. We understand that a loan for Rs.945 lacs and Rs.245 lacs was sanction by you to M/s Mahaveer Construction of No.12, Bonfield Lane, Kolkata□700001 under "rent securitization" i.e. against future rent receivables from M/s Pantaloon Retail (India) Ltd. (now known as Future Retail Ltd.) for the development of a

commercial complex at Kharagpur, on a government land, on the basis of securities provided by them of which you are fully aware of. We also understand that M/s Mahaveer Construction has executed a power of attorney in your favour authorizing you to collect the future rent receivables from M/s Pantaloon Retail (India) Ltd. and you have been collecting the rent from them directly and/or through a Receiver appointed by the Ld. DRT□III, Kolkata, without any intimation to M/s Mahaveer Construction. As such M/s Mahaveer Construction is a lawful borrower and the guarantee for repayment has been provided to you by M/s Pantaloon Retail (India) Ltd. which was unconditionally accepted by you. We are not the borrowers and/or the corporate debtor as claimed by you in your aforesaid notice.

2. We have, at the request of M/s Mahaveer Construction, provided you a collateral security only in the form of a premises being No.17, Ultadanga Main Road, Kolkata by way of creation of a paripassu charge with Syndicate Bank, of which we are a Lessee only. It is a Debutter Trust Estate. Our corporate guarantee was issued in accordance with the provisions of The Companies Act, 1956 only.

3. You have initiated legal proceedings for recovery of your loan against Mahaveer Construction in the Learned Debt Recovery Tribunal □III, at Kolkata treating them as defaulters and the said proceeding is awaiting adjudication. We have not committed any default as alleged by you and therefore cannot be termed as a defaulter, far less to speak of corporate defaulter, by any stretch of imagination. You are, therefore, not authorized legally to initiate further proceedings for the self same cause under the pretext of The Insolvency and Bankruptcy Code, 2016.

4. Until the recovery proceedings initiated by you against M/s Mahaveer Construction in the Learned Court of Debt Recovery Tribunal □III at Kolkata attains finality you are, under the provisions of law, not authorized to further threaten us and/or initiate any proceedings against us for recovery of loan granted to M/s Mahaveer Construction.

5. The Insolvency and Bankruptcy Code, 2016 proceeds to secure the benefits of all creditors, dealing with the assets of the debtor in The Insolvency and Bankruptcy Code, 2016. Therefore before proceeding under The Insolvency and Bankruptcy Code, 2016 you have to surrender all the securities for the benefit of all the creditors (COC). That would also include the assets involved in SARFAESI Act and RDBA, 1973 proceedings. Thus the Bank has to choose before proceeding under The Insolvency and Bankruptcy Code, 2016 whether to surrender the security or to exclusively deal with the same as a secured creditor. If you choose to deal with the property as secured creditor you cannot proceed under The Insolvency and Bankruptcy Code, 2016. O.A. and S.A. are the remedies. Per contra if the Bank chooses to offer and/or surrender its security then it has to waive its right over the secured asset and proceed under The Insolvency and Bankruptcy Code, 2016 but not OA and SA.

6. You have not made demand against the Principal Borrower – Mahaveer Construction. Thus without any demand being made against/from the Principal Borrower the issuance of deemed notice upon the Corporate Guarantor is bad in law.

7. The IBC cannot be made as a tool to recover debt. Issuance of the purported notice is nothing but a threat to recover debt. We are commercially solvent and the alleged debt is disputed since O.A. No.310 of 2010 and is pending adjudication before the Learned Debt Recovery Tribunal □III at Kolkata, and therefore the debt is not yet crystallized, wherein you have unequivocally stated that Pantaloon Retail (India) Ltd. is liable to repay the loan granted to Mahaveer Construction under rent securitization. Thus the Bank cannot proceed under The Insolvency and Bankruptcy Code, 2016.

8. There is no mis□match between the asset and liability. In fact asset held as security is for more valuable than liability. Thus venturing upon the provisions of The Insolvency and Bankruptcy Code, 2016 is unfounded/untenable in law.

9. This letter is issued reserving our rights to add further points of law and/or to act further as may be advised in the matter.

Under the circumstances it is most humbly requested to refrain from taking any action against us for the reasons stated above as otherwise it will only be an abuse of the process of law and you would be doing so at your own peril and cost.

Please acknowledge the receipt of this letter. Thanking you, Yours faithfully, For Surana Metals Limited.

Sd/□SURANA METALS LIMITED 12, BONFIELD LANE, KOLKATA□700 001" (emphasis supplied) Indeed, this communication has been sent without prejudice by the corporate guarantor (corporate debtor). Nevertheless, it does acknowledge the liability of M/s. Mahaveer Construction (principal borrower); and of corporate guarantee having been offered by the corporate debtor in that behalf. As aforesaid, the liability of the corporate guarantor (corporate debtor) is coextensive with that of the principal borrower and it gets triggered the moment the principal borrower commits default in paying the debt when it had become due and payable. The liability of the corporate debtor (corporate guarantor) also triggers when the principal borrower acknowledges its liability in writing within the expiration of prescribed period of limitation, to pay such outstanding dues and fails to pay the acknowledged debt. Correspondingly, right to initiate action within three years from such acknowledgment of debt accrues to the financial creditor. That however, needs to be exercised within three years when the right to sue/apply accrues, as per Article 137 of the Limitation Act. This is the effect of Section 18 of the Limitation Act. In that, a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed by the principal borrower or the corporate guarantor (corporate debtor), as the case may be, provided the acknowledgment is before expiration of the prescribed period of limitation. Thus, the conclusion reached by the NCLT and affirmed by the NCLAT on the basis of the asservation in the application under Section 7 of the Code, read with the relevant undisputed correspondence, is a possible view.

41. The appellant was at pains to persuade us that the intention behind the communication dated 08.12.2018 sent to the financial creditor by the corporate guarantor (corporate debtor) is a triable matter, as it was sent without prejudice. We are not impressed by this submission. The fact that the

principal borrower had availed of credit/loan and committed default and that the (corporate) guarantor/corporate debtor had offered guarantee in respect of the loan account is not disputed. What is urged by the appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor). Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.

42. Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent□financial creditor under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.

43. As no other issue arises for our consideration — except the two grounds urged by the appellant regarding the maintainability of the application for initiating CIRP by the financial creditor (Bank) under Section 7 of the Code, we dispose of this appeal leaving all “other grounds” and contentions available to both the sides open to be decided in the pending proceedings before the NCLT. The same be decided uninfluenced by any observation(s) made in the impugned judgment or in the present judgment.

44. Accordingly, this appeal is disposed of in the above terms with no order as to costs. Pending applications, if any, also stand disposed of.

……..……J. (A.M. Khanwilkar) ……..……J. (B.R. Gavai) .....J. (Krishna Murari) New Delhi;

March 26, 2021.