BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P. NO. 45/I&BP/NCLT/MAH/2017

Coram: B. S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical)

In the matter of under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016.

Between

M/s. DF Deutsche Forfait AG and Anr. ... Applicant/ Operational Creditor

V/s.

M/s. Uttam Galva Steel Ltd. ... Corporate Debtor

For Applicants: Mr. Shyam Kapadia i/b. Mr. Sonu Tandon, Advocates for the Applicant/operational Creditor.

For Corporate Debtor: Shri. Janak Dwarkadas, Sr. Counsel, Shri. Ravi Kadam, Sr. Counsel, a/w. Mr. Dhiraj Mhetre, Ms. Smiti Tewari, Advocates for the Respondent/ Corporate Debtor.

ORDER

(Pronounced on 10.04.2017)

Per B.S.V. Prakash Kumar

It is a company petition filed u/s 9 of Insolvency and Bankruptcy Code 2016 (IB Code) by operational creditors viz. DF Deutsche Forfait AG (called as Deutsche) & Misr Bank Europe GmbH (called as Misr Bank) against a corporate debtor company viz. Uttam Galva Steels Limited (referred as Uttam – whose financial statements have already slipped into brackets) stating that Uttam defaulted in making payment of USD 16,542,886.33 (inclusive of interest till 28-02-2017) equivalent to ₹110,40,30,876.44 towards 20,000 tons of prime steel billets supplied by a Germany Company namely AIC Handels GmbH (called as AIC). This debt was initially assigned to Deutsche by entering into a discount agreement by AIC, thereafter Deutsche, in turn, subsequently assigned part of this debt to Misr Bank by Deutsche. When Uttam failed to pay off the amount despite

statutory notice u/s 8 of IB Code has been received by it on 03.03.2017, after completion of 10 days from the date of receipt of notice by Uttam, Deutsche and Misr Bank, on 14th March 2017, filed this company petition u/s 9 of IB Code for initiation of Insolvency Resolution Process by declaring Moratorium with consequential directions as set out under sections 13, 14, 15, and 16 of IB Code.

Brief background of this litigation:

2. The corporate debtor (Uttam) is in steel rolls manufacturing dealing with export and import business in relation to steel, in furtherance of it, on 16th August 2013, Uttam entered into a Sales Contract (Annexure-4) with AIC for purchase of 20,000 metric tons of Prime Steel Billets at the rate of $540 per MT, which would come to $10,800,000 (+/- 10% depending on the exact quantity supplied) agreeing that shipment of the goods be in the month of September 2013 and the agreed money should be payable in 180 days from the Bill of Lading(Annexure-6) date. It is further agreed that payment to be made in effective USD by two Bills of Exchange each with face value of USD 5,400,000 (+/- 10%) to the order of seller i.e., AIC drawn on and accepted by Uttam, maturing on the payment date, payable at a payment domicile acceptable to AIC in Mumbai, it is also said that it would be governed and construed in accordance with English Law and if any dispute in between, it is by arbitration in accordance with Swiss Rules of International Arbitration of the Swiss chambers of commerce by further saying that AIC is entitled to pursue payment obligation of Uttam in the form of inter alia bills of exchange before any competent court where a specially abbreviated form of legal procedure exists.

3. As per the sale contract, AIC on 16th September 2013 shipped 19,976 MT of Prime Steel Billets. A Bill of Lading dated 16th September 2013 came to be issued, then on 18th September 2013, AIC issued an invoice (Annexure-5) for a sum of USD 10,787,040 for the billets in quantity of 19, 976, 40 MT supplied to Uttam at a rate of USD 540 per MT. A reference was

made to two Bills of Exchange dated 18.9.2013 drawn by AIC on Uttam, one (Annexure-7) for USD 5, 387,040 and another (Annexure-8) for USD 5,400,000 to pay on 15th March 2014 (maturity date after 180 days) against these two Bills of Exchange and Uttam unconditionally accepted the Bills.

4. Besides this, Uttam sent confirmation (Annexure-13) stating that the shipment to Chttagong Port Bangladesh has been duly executed by AIC under the sale contract dated 16.8.2013 and received all documents under the contract, therefore buyer (Uttam referred to itself as buyer) accepted AIC (seller) faultless performance without any reservation by confirming that there exists no further obligation or liabilities of seller (AIC), Uttam further confirmed that the amount set out in the invoice represents 100% of the purchase price, therefore buyer (Uttam) irrevocably and unconditionally has undertaken to pay AIC as set out in the invoice waiving all rights of objection and defence and buyer would effect the payment at maturity without any deduction for and free of any taxes, charges, impost, levies or duties present or future of any nature whatsoever in effective USD. It further stated that this confirmation should form an integral part of the contract governed by English Law and Arbitration as mentioned in the sale contract.

5. In the process of risk management, AIC entered into a discount (*forfaiting*) agreement which means, financing used by exporters that enables them to receive cash immediately by selling their receivables (the amount an importer owes the exporter) at a discount, and eliminate risk by making the sale without recourse, meaning the exporter has no liability regarding possible default by the importer on paying the receivables. The *forfaiter* is the individual or entity that purchases the receivables, so the importer is then obligated to pay the receivables amount to the *forfaiter*. A *forfaiter* is typically a bank or a financial firm that specializes in export financing.

6. On 7th October 2013, AIC issued a letter of notification (Annexure -11) to Uttam informing that AIC had entered into *forfeiting* agreement (Annexure-10 dated 9/10th of October 2013) with Deutsche stating that it had assigned the entire debt with present and future rights, claims and demands to it by endorsing the bills of Exchanges, as against that notification, Uttam acknowledged and confirmed the agreement between AIC and Operational Creditor.

7. On 27th December 2013, Deutsche sent a notification (Annexure 14) to Uttam notifying that part of receivables due to it under the sales Contract and Bills of Exchange which were to mature on 15th March 2014 has been unconditionally assigned to Misr Bank through another *Forfating* Agreement (Annexure – 12) dated 27.12.2013. It is pertinent to say that this further forfaiting to Misr Bank has not been confirmed by Uttam.

8. When Uttam failed to make payment even after maturity date 15.3.2014 had been passed by, a protest was recorded on 19.4.2014 as required under law.

9. As Uttam failed to make payment of the above debt even after maturity date, Deutsch and Misr Bank were constrained to issue notice dated 8th December 2016 u/s 433 and 434 of the Companies Act 1956, to which, Uttam replied raising various allegations such as goods delivered to third party i.e., Aartee Commodities Ltd, subsequent assignment to Misr Bank by Deutsch is not valid, but this Uttam had not raised any law suit on any of the issues until statutory notice u/s 8 of the Code issued by them.

10. In the meanwhile, having IB Code come into force, Deutsch and Misr Bank issued statutory notice (Annexure – 2) of demand u/s 8 of IB Code on 28th February 2017 calling upon Uttam to pay a sum of USD 16,542,886.33 i.e., a principal sum of USD 10,787,040 and interest of USD 5,755,846.33. On 3rd March 2017, a reply (Annexure – 3) came from Uttam denying all claims with a caveat that advocates were in the process of obtaining detailed instructions from the corporate debtor and would reply in due course.

Another reply notice dated 11th March has been sent by Uttam to the Deutsch and Misr Bank through e-mail (Annexure – A1 in additional affidavit) stating that its obligations under the sales contract were dependent on payment by Aartee Commodities Ltd. and Uttam already filed a suit before Honorable High Court of Bombay on 10th March 2017. But this Bench has not noticed any such averment of payment by Uttam is dependent upon payment by Aartee in any of the correspondence with either AIC or Deutsch or Misr Bank until Uttam wrote reply to the notice given by present operational creditors.

11. Since Deutsche & Misr Bank, on receipt of reply from Uttam on 3.3.2017 and second reply on 11.3.2017 informing the operational creditors that Uttam filed suit in respect of this claim against the creditors before Honorable Bombay High Court subsequent to receipt of the notice u/s 8 of the Code, noticed that no suit or Arbitration proceedings filed before receipt of notice u/s 8, they have filed this company petition u/s 9 of IB Code for initiation of insolvency resolution process by declaring Moratorium with consequential directions as set out under sections 13, 14, 15, and 16 of IB Code.

Objections of Uttam:

12. On the date of hearing, Senior Counsel Sri Janak Dwarak Das appearing on behalf of Uttam raised objection to admitting this petition arguing, one – this petition is not maintainable for the debtor company timely raised notice of dispute within 10 days after receipt of the notice u/s 8, two – an affidavit has not been filed as enunciated u/s 9 (3) (b) stating that there is no notice has been given by Corporate debtor (Uttam) relating to the dispute of unpaid operational debt, hence petition is incomplete (when reply has been given there could not be any occasion to the operational Creditor to file an affidavit saying that no reply has been given), three – that Deutsche & Misr Bank are not operational creditors of Uttam, four – the petition is bound to be rejected u/s 9 (5) (ii) (d) once

notice of dispute has been received by Deutsche & Misr Bank, here notice was received by the petitioners within 10 days from the date of receipt of notice u/s 8, five – since Deutsche & Misr Bank never initiated any recovery proceedings though the alleged debt is payable since March 15, 2014 until this petition u/s 9 has been filed, six – since disputed questions on fact are involved in respect to Deutsche further assigning to Misr Bank has not been confirmed by Uttam and it has to be tried by Trial Court not as summary proceeding u/s 9, moreover since sales contract is governed by English Law, it has to be tried before court of law, if any modification is made to the contract, under clause 18 of the Sales Contract, it has to be with the consent of Uttam only, seven – interest on the principal amount is not admitted by Uttam, therefore claim including 18% interest is arbitrary figure which is not substantiated by any document, eight – the counsel argued that since Power of Attorney given to file this case has not specifically authorized to initiate proceedings under IB Code, it has to be dismissed basing on the order dated 30.3.2017 passed by special Bench on reference; lastly – the counsel says Uttam is listed company providing employment to 1, 400 people and it has impeccable track record, hence this Insolvency Resolution Process cannot be thrust upon a company like this.

Discussion:

13. As to 14 days' time, we must say that this case has come for hearing within 14 days but whereas the corporate debtor itself argued several times, of course petitioners side also argued and filed written submissions, not once, twice, indeed first time written submissions from Uttam came before this Bench on 1st April 2017, second time submissions came on 5th April 2017, later, for there being several issues to be addressed, this Bench also took three four days' time for passing orders. This Bench cannot simply pass it on to some other forum saying there are many issues to be addressed when answers to all factual aspects are available in the material placed by the petitioners and as to legal issues, when no evidence is

required to decide those issues, we firmly believe that onus lies upon this Bench to decide all these issues.

14. Before going into merits of the petition, two three issues one must bear in mind, one – as such there cannot be any pleadings part in the Forms to be filed to initiate action u/s 7, 9,& 10, except giving information column wise; two – no pleading or defending party, the terminology like petitioner/respondent or plaintiff/defendant is not present under this Code, most of the procedure is inbuilt in the Code itself, therefore this has been named as Code, not as Act; three - by reading the Code, it will not give an impression that it is an adversarial proceeding and no such law is existing in India saying that court proceedings in India shall be adversarial only, therefore we have to go by what law says, we can't read into something that is not present; four – we cannot hang on to conventional approach which has become inherent in us that a legal proceeding shall be adversarial only, we are governed by a democratic system, henceforth we have to go by the mandate given by legislature. There are countries where legal system is inquisitorial. Of course a system can be something different from the existing systems like adversarial or inquisitorial, may be, if something other than these two systems is good, then if legislature says it is good for the country, then we have to follow. We have to grow along with changing times to come out of bottlenecks suffocating the system.

Owing to the time constraint, since issues are overlapping, instead of point wise, we have dealt with them together, which is as follows:

By now everybody is by heart with the provisions of section 7,8 9 and 10 of the Code, therefore it is needless to say that reply has to be given to the notice under section 8 of the code within 10 days of receipt of the notice, no doubt Uttam gave reply on the very next day of receipt of the notice denying the averments of the notice u/s 8, but without any averment of any suit or arbitration pending since before receipt of notice u/s 8.

15. According to the definition of "dispute" in section 5 (6) of the Code, which is as follows:

"Section 2: In this Part the context otherwise requires, -

(6) ***"dispute" includes*** *a suit or arbitration proceedings relating to –*

(a) the existence of the amount of debt;

(b) the quality of goods; or

(c) the breach of representation or warranty;"

16. On perusal of this definition, it is evident dispute includes a suit or arbitration proceeding, now the point for determination is as to whether the word "includes" is extensive as generally understood or in any other way. If we go through section 7, 8, 9 and 10 of this code, this word "dispute" nowhere appears except in section 8 and 9, therefore this definition primarily meant for application when notice is issued by the operational creditor u/s 8 and when case is filed by an operational creditor u/s 9 of the Code, therefore the definition has to be understood in a meaningful way to cater the intent and purpose behind sections 8 & 9, not otherwise.

17. To know how it is to be understood, we must also read part of section 8 and section 9, which goes as follows:

"8. Insolvency resolution by operational creditor —(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed –

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) ***existence of a dispute****, if any,* ***and record of the pendency of the suit or arbitration proceedings*** *filed before the receipt of such notice or invoice in relation to such dispute;*

....."

"9. Application for initiation of corporate insolvency resolution process by operational creditor—

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or ***notice of the dispute under sub-section (2) of section 8,*** *the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

2.....
3.....
4.....
5.....
6....."

18. The corporate debtor counsel says the word dispute has to be understood as mere denial to the claim as dispute. The definition to dispute is inclusive definition enlarging the scope to the extent it can travel, therefore inclusion of pendency of suit or arbitration will not curtail the inclusivity of the definition.

19. Now the test is how to understand this definition, is it to be said that wherever denial to assertion is present in the reply within ten days, it is to be construed as dispute? Or, is it to be understood that dispute is qualified and restricted as dispute only when suit or arbitration is pending since before receipt of notice u/s 8?

20. In the definition, at the beginning of section 2 itself, it is mentioned that definition has to be taken in the way it is defined as long as the context otherwise does not require, suppose context demands to take it otherwise, this definition will become sub-silentio in the said context, of course this definition, it is nowhere explicitly looking that this definition is exhaustive. The word 'etc.' is also not added to apply ejusdem generis rule.

21. If we see section 8, which is precursor to invoke section 9, it is evident that upon notice u/s 8 from the operational creditor to the debtor on the ground of default occurrence, if the debtor fails to reply to the notice

within 10 days stating dispute is in existence on the footing of suit or arbitration pending or if the debtor fails to repay the unpaid debt within 10 days, then if the notice of the dispute as stated under sub section (2) of section 8 of the code is given to the creditor and other compliances, the operational creditor gets cause of action to file application u/s 9.

22. The argument of the debtor counsel is since the debtor disputed the debt within 10 days by giving reply within 10 days to the creditors, it has to be construed as dispute on two grounds, one – the definition for dispute is inclusive, two – the word "and" in sub section 2 (a) of section 8, has to be read as "or" so as to harmonize with the inclusive definition to the word "dispute".

23. We respectfully disagree with this view; definition has always to be harmonized with the context in which it is said in the substantive section, not otherwise. This caution is very much implicit in section 2 itself saying it has to be understood as defined unless context otherwise, therefore two things are clear, one – defining section will not govern the substantive section, two – definition has to be construed in the context of substantive section, not otherwise. When a word is defined, it has to be understood meaningfully, if definition is only to say dispute includes suit or arbitration, no definition needs to be given, because pendency of suit or arbitration always connotes dispute, this need not be said separately, indeed dispute is genesis, pendency of suit or arbitration is species. No doubt it is true that word "includes" is normally considered as extensive, but there are situations to read "includes" as "means" to enable the courts to achieve the purpose of legislation. If reply is given **denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence? If that is so, it will be virtually ousting operational creditor filing any case under section 9.** If this scenario emerges, then it will be nothing but throwing this law into dust bin. We all know how much

time is taking for logical end to winding up proceedings, by the time company liquidation happens, not even bones remain to creditors. All this exercise under new Code is to maximization of value of assets in a time bound manner to promote entrepreneurship and availability of credit, to balance the interests of all the stake holders.

24. If we start looking at this as draconian law gobbling the companies and branding orders under this law as harsh, then we remain where we are, perhaps will go down further, yes, one can understand to get conversed to new law and to see fruits of it, it will take time, but just for the sake of this reason, we cannot wish away the mandate of this nation come through Parliament.

25. In this situation, we cannot resist ourselves from giving an illustration that is aptly similar to the present controversy. It is like a snake charmer playing out a cobra without fangs for entertaining people, tomorrow, if a claim under section 8 is considered as "dispute" by looking at bare denial, sections 8 and 9 will become exactly like a cobra without fangs in the basket of a snake charmer. But I strongly believe, it is not the idea of Parliament to make this law to mere show up, had it been so, the Parliament would not have wasted its valuable time in including sections 2 (6), 8 and 9 in the statute book.

26. Though there are many decisions of the Hon'ble Supreme Court holding that the word "includes" is extensive in nature, there are equally many number of cases saying that this word has to be understood in the context it is applied.

27. In this line, in ***South Gujarat Roofing Tiles Manufacturers Association vs. State of Gujarat, (1976) 4 SCC 601,*** it has been held that there could not be any inflexible rule that the word "includes" should be read always as a word of extension without reference to the context, in the said case the word includes has been used in the sense of "means", this is only construction that the word can bear in the context. In that sense,

"include" is not a word of extension, but limitation, it is exhaustive of the meaning which must be given to potteries industry for the purpose of Entry 28. The use of word "includes" in the restrictive sense is not unknown. So, the manufacturer of Mangalore Pattern Roofing Tiles is outside the purview of Entry 22.

29. Likewise, in ***N.D.P. Namboothiripad vs. Union of India (2007) 4 SCC 502,*** it has been held that the word "includes" has different meanings in different contexts. It can be used in interpretation clauses either generally in order to enlarge the meaning of any word or phrase occurring in the body of a Statute, or in the normal stand sense to mean "comprises" or "consists of"

or "means and includes depending on the context".

30. In another case in between ***Karnataka Power Transmission Corporation and another vs. Ashok Iron Works Pvt. Ltd. (2009) 3 SCC Page No.240*** in para 17, it has been held as follows: -

"It goes without saying that interpretation of a word expression must depend on the text and the context. The resort to the word "includes" by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that the word "includes" may have been designed to mean "means". The setting context and object of an enactment may provide sufficient guidance for interpretation of word "includes" for the purpose of such enactment.

31. If we see definition to "a person" in General Clauses Act, it says "person" shall include any company or association or body of individuals whether incorporated or not.

32. The normal meaning of a "person" is a living person, whereas if the statute feels necessary to include some other categories which on their own do not fall under a particular category, then an inclusive definition will be given to include other categories, the same is the thing happened to the definition of "a person". Likewise, if any dispute that normally does not

fall within the definition of "dispute", then such items not falling within the definition dispute will be shown as included so as to enlarge the meaning of dispute. A dispute pending in a suit or arbitration can never be said as different from the general word "dispute". The dispute in a suit or arbitration is inherently included in the definition of the word "dispute ". Therefore, if at all the suits and arbitration proceedings pending to be said as included in a dispute, it need not be shown as included, because the category of the dispute in a suit and arbitration will automatically fall within the ambit of dispute. Henceforth, the only meaning that could be drawn out from the word "includes" is that the dispute means the dispute pending in a suit or arbitration proceeding, whereby in the light of the ratio given by Hon'ble Supreme Court, here the word "includes" in the definition of "dispute" has to be read as "means" not as "includes". So, the word dispute is qualified as the dispute in a suit or arbitration pending not otherwise.

33. In the above discussion we have noticed what is meant by a dispute, now let us see what is meant by the existence of dispute in sub-section 2 of section 8 of the Code. In Section 8 it has been said when notice is given u/s 8 (1) of the Code, the corporate debtor shall, within a period of 10 days of the receipt of demand notice, bring it to the notice of the operational creditor that dispute is in existence by way of suit or arbitration proceeding before the receipt of notice under Sub-section 1 of Section 8 of the Code. If we go by this section, existence of dispute means pendency of either suit or arbitration proceeding before the receipt of section 8 notice from the operational creditor, it has to be understood that pending of suit or arbitration proceeding alone will amount to existence of dispute. In Clause (a) of Sub Section 2 of Section 8, it has been said that the corporate debtor must bring two things to the notice of the operational creditor, one – existence of dispute "and" record of pendency of the suit or arbitration proceeding before receipt of section 8 notice. In point no. 1 "existence of

dispute" has to be understood as dispute pending in a suit or arbitration proceeding as mentioned in definition to "dispute", in point No.2 "it has been said what dispute will become considered as "existence of dispute". It can be "existence of dispute" only when pendency of suit or arbitration proceeding in existence before receipt of notice, it does not matter to invoke section 9 if the suit or arbitration proceeding filed subsequent to receipt of section 8 notice. Indeed, section 8 is a cause of action section to section 9, if cause of action does not arise under section 8, no grievance could be invoked under section 9, section 9 is an application to file a case if at all the information that is required under section 9 is given, thereby any provision in section 9 of the Code cannot be considered as a governing provision to find out as to any cause of action arose for filing a case under section 9. For that reason only, in sub section 1 of section 9, a provision is made to file an application, in sub section 2 a provision is made to file an application in such form and manner as prescribed, in sub section 3, a provision is made to guide as to what documentation is to be filed along with the form under sub section 1 of section 9, when it comes to sub section 4, it is a provision enunciating to propose a resolution professional, it has been further said when an application is to be admitted and when an application is to be rejected, lastly in sub section 6 it has been said that insolvency resolution process will be commenced once application is admitted under sub section 5 of section 9. Thereby whether case is made out to file application u/s 8 is to be seen going back to section 8 but not under section 9, whereby if at all any provision appears inconsistent with cause of action section that is section 8, that provision has to be read in harmony with cause of action section. Cause of action section will never be harmonized to a procedural aspect mentioned in section 9.

34. In the given situation, this debtor company figures have gone into minus, P &L statement as on 31st March 2016 of the company reflects profit after tax has gone down to -1551.51crores. This company has not paid

single rupee to these creditors in the last three years, it is admitted on record millions of dollars' worth goods purchased from them in the year 2013 by this company showing itself up as purchaser giving all kinds of undertakings waiving right of defence. Now, it says that these goods were delivered to some third party, not to it. It is in between the debtor and that third party, what business these creditors have with that third party, it does not appear in any documentation and that third party is privy to any transaction.

35. These are the figures showing on the website of Uttam signed by Managing Director of the company on 9th February 2017.

Reconciliation of profit between Ind-AS and previous IGAAP for earlier periods and as at 31.03.2016	Quarter Ended	9 months Ended	Year Ended
Name of Adjustments	**31.12.2015**	**31.12.2015**	**31.03.2016**
Net Profit as per IGAAP	(424.50)	(418.56)	(1551.51)
Capital Incentive from Government of Maharashtra	12.63	42.91	58.61
Other Comprehensive Income	(2.33)	(73.64)	489.40
Total Comprehensive Income as per Ind-AS	**(414.20)**	**(449.29)**	**(1003.50)**

36. Nowadays, corporate world is running on credit facility, if we ask to ourselves, how many companies are doing business with their own money, then surely it will be negligible in number, daily many startups coming, some doing, some failing, the reasons may be myriad. If companies are funded by creditors and mostly run on their money, can it be said that shareholders of the company are real owners, or creditors? Don't creditors have a right at least to realize their money before company is fully sunk into? It is not that, every case coming to NCLT has been allowed or every case dismissed; NCLT has been applying its judicial discretion to find as to whether company is solvent enough to discharge its obligations towards creditors, some admitted, some dismissed, because every situation is fact sensitive, therefore adjudication is subject to the facts of the case.

37. In view of this, the principles and doctrines relevant in service jurisprudence and courts dealing purely with law in issue cannot be

bulldozed upon fact finding courts, every decision turns on its facts. In Service Tribunals, mostly cases are dealt with basing on flouting some government order of memorandum, therefore cases filed on a particular order will logically end in the same manner, there, this rule of following coordinate Bench order is applicable. Here it can't be seen as strait-jacket formula to pass same order which other coordinate Bench has passed, may be facts looking alike, but when gone into those facts some difference will be there which changes the fate of the case. As to court of record, mostly they decide cases either at second appellate stage or on writ side, where facts will not have any role to play in such situations, law can't be changed from case to case, obviously outcome may be the same.

38. The objection of the corporate debtor is that so many complexities are existing in this dispute, for which since they have filed a suit before Hon'ble High Court of Bombay after receipt of notice, therefore taking pendency of the suit filed subsequent to receipt of section 8 notice, this IB petition is to be dismissed. But the argument of the corporate debtor counsel not being in consonance with the mandate of the statute u/s 8, this petition can't be dismissed going by the argument of the counsel of Uttam because filing of a suit or arbitration proceedings subsequent to receipt of notice u/s 8 will not amount to existence of dispute as stated u/s 8 of IB Code.

39. Under any stretch of imagination, the argument of the corporate debtor counsel does not make out any case to construe the corporate debtor filing a suit over this claim subsequent to receipt of notice as dispute in existence, henceforth this point is decided against the corporate debtor.

40. The corporate debtor counsel made a thumping argument saying that since this very Bench dismissed an operational creditor case (M/s Kirusa Software Pvt. Ltd v. M/s Mobilox Innovations Pvt. Ltd dated 27, January 2017) on the ground the claim is disputed in the reply, it is right, it happened in the formative days when this Code has come into existence,

moreover this point that dispute means pendency of suit or arbitration, to our remembrance, had not been argued by the counsel of operational creditor, frankly speaking that was not noticed by us. It does not mean a miss out in one case can become a ratio to repeat the same mistake again and defeat the object of enactment. For this reason, is it that this case has to be sent to Larger Bench? In corporate cases, time is money; this Tribunal must render justice one way or other as expeditiously as possible so that money stuck in unyielding asset can be released to fund it meaningfully. To effectuate the objects of this code, larger picture is to be visualized.

41. The corporate debtor counsel referred an order dated March 1st 2017 passed by NCLT Principal Bench, New Delhi in ***One Coat Plaster and Others vs. Ambience Pvt. Ltd. and M/s. Shivam Construction Company and Others vs. Ambience Pvt. Ltd. and Philips India Limited vs. Goodwill Hospital & Research Centre Limited*** to say that if at all notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility the petition shall be rejected by reading the definition of dispute as inclusive and the word "and" in clause (a) of sub section 2 of section 8 as "or" in the light of section 9 (5) (ii) (d).

42. With all humility, we cannot agree with the submission of the corporate debtor counsel to rely on the Coordinate Bench order because the reasoning given in this case is based on the ratio legis enunciated in section 8 and 9.

43. Moreover, we have noticed that enough material is there to say that purchase order is present, invoices are present, bill of lading is present, bill of exchanges are present, on the top of all these, confirmation of forfaiting in favor of Deutsche is present, and acknowledging further assignment of part of the debt to Misr Bank is also present. Moreover, the debtor has not denied any of these documents except saying English law alone is applicable. The alarming situation in this case is, this company is consistently in losses, in fact profit after tax is showing to the loss of

1557crores by 31stMarh 2016. If any delay is made in passing this order, it will become nothing but defeating the purpose and object of this Code.

44. The corporate debtor counsel argued that Special Bench at Guwahati passed order dated 30.3.2017 stating that attorney holder exceeded his power by filing case under section 7 of the Code basing on a power of attorney given two years before, by the time Insolvency and Bankruptcy Code was not even contemplated.

45. At eleventh hour, the corporate debtor counsel placed an order dated 30-03-2017 passed by Special Bench of NCLT at Guwahati on a direction given by the Hon'ble President of NCLT to decide the matter regarding passing of different orders in a CP 37/2017 u/s of Insolvency and Bankruptcy Code 2016 by Division Bench, NCLT at Kolkata in relation to an issue as to whether Power of Attorney in question had specifically empowered Shri Srinjoy Bhattacharjeet to do variety of acts which included the power to initiate resolution process under IB Code, 2016 as well.

46. Since this point goes to the root of maintainability, this point has also been elaborately discussed.

47. Before going into the above decision of NCLT Guwahati, we mention that Deutsche & Misr Bank, separately and independently have given power of attorney to one Pankaj Sachdeva and Vandana S. Saxena on 20th September, 2016 and 11th October,2016 to ask or demand the outstanding amount from the present corporate debtor i.e. **Uttam Galva Steels Limited along with overdue interest** and costs thereon and also **to file** and/or defend suits, to sign and verify all the plaints **including winding up petitions**, pleadings, written statements, affidavits, petitions, objections to file execution applications to undertake proceedings, appeals, review, revisions, writ petitions and to furnish evidence and to make statements and to file all sorts of applications and to prosecute all legal proceedings, memorandums of appeal, petitions and to do all other legal matters in all the **courts/tribunals** including the board for Industrial and Financial

Reconstructions (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), from the lowest to the highest concerning any matter in respect of the said outstanding amount and the said petitions/appeals, to engage advocates and technical counsel for the conduct of the proceedings for recovery, except to settle compromise, compound or withdraw the said petition, suits, appeals, reviews, revisions, petitions without obtaining a written consent from the operational creditors, and to appeal in the courts, file civil or criminal review or revisions or appeals or originals.

48. Since the corporate debtor counsel raised an objection that power of attorney is invalid since the power of attorney has not been reflecting to initiate this insolvency proceeding under IB Code. To find out as to whether such argument stands in the light of the coordinate bench, the purport of the power of attorney has been depicted to look into as to whether the power of attorney falling within the definition given in Section 1-A of The Powers of Attorney Act 1882 and also the ratio laid down in the order given by the coordinate Bench. The discussion below is purely to consider as to whether the power of attorney in the present case is valid or not.

49. By looking at the aforesaid order passed by our learned brother sitting at Guwahati, it appears that in Kolkata Bench, one Member has stated that General Power of Attorney was given on 20-10-2014 to initiate proceedings before any court of law including NCLT, but this power of attorney cannot be treated as a specific power of attorney to initiate corporate insolvency resolution process under IB Code 2016. Since the power of attorney must be strictly construed, the rationale behind the principle being that the powers given are not abused by the agent and its actions are restricted within and only to the extent the power indicated or given.

50. As against the aforesaid observation, another member of the same Bench held that the power of attorney mentioned above clearly mentions that the legal manager is empowered to initiate proceedings under NCLT which automatically includes its role as an adjudicating authority under IBC. In case, this is insistent upon in every petition under IBC, involving a financial creditor that the petition be filed on the basis of a specific power of attorney on a board's resolution, it will defeat the very purpose of IBC, which is for speedy resolution of insolvency cases. He also further held that the facts of the outstanding loan and the defaults have been established by the operational creditor and the same has not been denied by the corporate debtor henceforth the same deserved to be admitted.

51. To say that the power of attorney in the case supra cannot be said to have authorized the attorney to initiate a corporate insolvency resolution proceeding u/s 7 of the Code, Guwahati Bench holds that since it is a new act coming to existence in the year 2016 with enormous changes with a complete new regime, therefore it can't be said that the power of attorney holder can go beyond the covenants under power of attorney by relying upon ***PM DasappaNayanimVaru vs. RamabhaktulaRamaiah (AIR 1952 Madras 559)*** and ***Coramandel International Limited vs. Cheamcel Biotech Limited (2011) 166 Comp Cas 676 (AP High Court).***

52. When this Bench has gone through PM Dasappa supra it is evident that the donors themselves filed OS 314/1943 on the file of District Munsif of Tirupati against Ramabhaktula, thereafter due to their inconvenience, the donors had appointed a donee to conduct on their behalf the entire proceedings which had to be taken in the said suit on the file of the court of the District Munsif of Tirupati, to give effect the special power of attorney executed and delivered by them as of consent. When District Munsif returned the plaint on the ground said suit was beyond the pecuniary jurisdiction of that court, the plaint so returned was represented in the subordinate judge's court, then on the contention raised by the defendants

that no power was conferred on the donee to engage an advocate or conduct a suit in the subordinate judge's court, the said subordinate judge dismissed the suit on which an appeal was filed wherein Hon'ble High Court dismissed his plea stating that the document having conferred on the donee to conduct a particular suit in a particular court, because it does not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule. As there was no either explicit or implicit power to the attorney to file before the subordinate court, if the contention raised by the appellant was accepted, it would be nothing but court introducing new words into the power of attorney and confer a new power upon him. Since the plaintiff expressly authorized the attorney to conduct particular suit in a particular court, the Hon'ble High Court held that it could not hold that it intended to empower the attorney to conduct that suit in any other court. In view of this reason, the appeal was dismissed.

53. As to other judgment passed by the Hon'ble High Court of Andhra Pradesh in **Coramandel supra**, the reasoning given for not considering power of attorney to file winding of proceedings is that the power of attorney was authorized to sign and verify plaints written statements petitions, vakalats, claims and objections and the memorandums of all kind in any court in India but not included to file winding-up proceedings, thereby the Hon'ble High Court has not allowed that power of attorney to use for filing winding up proceedings on the ground that the proceedings under 433 of the Act 1956 cannot be equated to suits or for that matter suits for recovery of money because lis in winding up proceedings is not merely between the petitioning party and the company sought to be wound up, once the winding petition is admitted the creditors contributories, shareholders etc. to seek redress in the proceedings and even oppose the winding up. It was further held that the proceedings under Companies Act for winding up are entirely different, a special remedy and a proceeding

not to the parties alone, their range is wide and all steps taken on winding up proceedings are in public interest.

54. The rationale behind the finding by Guwahati is, power of attorney must be strictly construed and that the powers given are not to be abused by the agent and his actions are restricted within and only to the extent the power is indicated are given.

55. In the two cases relied on by Guwahati Bench, as to Madras case, the principals had given power to the attorney to proceed with the suit already initiated by them, they had not said to him to proceed any further beyond the said suit already filed by them. It is purely a special power limited to a special action, therefore, that special power could not be equated or generalized to say that the person authorized is also empowered to file before another court of law where proceedings would be different, therefore the special power cannot be construed as a generalized power. It is an exclusive power given not to include any other power. The ratio to the facts of it is correct, because the power given to the attorney was to continue with suit initiated by the principals, not beyond it, henceforth, the governing ratio where anybody transgresses the special power given to them, it will be undoubtedly abuse of power. If we come to the ratio decided in Coramandel supra, there the principle endowed upon the attorney is the power to institute suits but not to winding proceedings, since the winding up proceedings are by nature different with far implications, the Hon'ble High Court has held that the power given to file suits cannot be elongated to initiate winding up proceedings because it is not a lis between two parties, it involves other creditors, contributors and many other stake holders including public interest.

56. In the case given to us, the creditors authorized the attorney to ask or demand the outstanding amount from Uttam and also to initiate proceedings including winding up proceedings before the courts/tribunals,

the only power that is kept to themselves is in the event of compromise, it has to happen with the written consent of the creditors.

57. Now let us come to see what the definition given in The Powers of Attorney Act says: -

"In this Act, "power-of-attorney" includes <u>any instrument empowering</u> a <u>specified person to act for and in</u> the <u>name of the person executing</u> it."

58. On reading this section, it appears that four elements are important in a power of attorney to know as to whether any action of attorney is in excess to the power given to him or not.

1. There shall be an instrument.
2. There shall be an empowerment to the attorney to do an act or acts.
3. Attorney shall be a specified person.
4. Such action must be for and in the name of the person executing it.

59. All these elements are present in the two powers of attorney, the only rationale to be seen is any excess power has been exercised in moving a case under section 9 of this code, which we have not seen anywhere.

60. Here the creditor companies, simultaneously on 20th September 2016 and 11th October 2016, empowered Mr. Pankaj & Mrs. Vandana to demand the dues outstanding from the corporate debtor i.e. Uttam Galva Steels Limited and to initiate legal proceedings including winding up proceedings before the courts/tribunals, therefore the intention of the creditors is clear and their authorization is very clear that the attorneys can initiate winding up proceedings as well. The point for consideration is to see whether the attorneys proceeding beyond the power given to him or not. When power was given to the attorneys to initiate proceedings for liquidation by filing winding up petition in the months of September and October 2016, an action under 1956 Act for winding up proceedings was very much available, for that reason alone notice was given under section 434 of the Act 1956, but by the time the attorneys to initiate proceedings of winding

up, winding up jurisdiction in respect to 433 (e) of the Act 1956 were metamorphosed into insolvency proceedings under IB Code. In a situation like this, can the application filed under section 8 be simply rejected on the ground since winding up proceedings have become insolvency proceeding and the authority given to winding up proceedings cannot be considered as authority to initiate insolvency proceedings? In fact, this insolvency proceeding against companies had originated from 271-(1)(a) of 2013, therefore, when company is unable to pay, the party has either to proceed under 433 & 439 of the old Act, or under new provision come in the place of 433 (e) of the Act 1956. It is not said in the power of attorney that the attorney holders shall proceed under the Companies Act 2013 alone or under 1956 Act, in fact the creditors categorically mentioned to initiate winding up proceedings when the parties unable to repay the debts. It is not said by the creditors that the attorneys shall directly file winding up proceedings, before filing winding up proceedings, the creditors authorized the attorneys to ask or/demand the repayment of the outstanding amount by Corporate debtor, if the corporate debtor fails to repay, then only the creditors can initiate proceedings under winding up. It is not that power of attorney was given years before. It is hardly given two months before initiating this proceeding, since it is a foreign company it will take its own time to reach this power of attorney to the attorney holders thereafter to ask the debtor for repayment, if the debtor has failed to repay, then to make a demand and then to give a statutory notice as envisaged u/s 8 thereafter to initiate proceedings u/s 9 of the IB Code. All these steps will take about 1 to 2 months to initiate proceedings under this Code. By navigating through all these documentation, we have not seen anywhere that the attorneys transgressed their power to initiate insolvency proceedings. A change of name will not become change of game. This relief under section 9 of the Code was available to the operational creditors under section 433 (e) of the Act 1956. Indeed, the proceedings pending under section 433 (e) of the Act

1956 have been transferred to NCLT to treat them as IB petitions. Therefore, it is not pragmatic, especially in commercial proceedings to go back to square one and then again initiate proceedings from the beginning. Here the debtor company is already in losses and if at all any further delay happens, if the creditors are not in a position to realize their dues or at least to make out something from the residue, this process of restarting the proceedings in the name of want of authority will become hindrance forever in realizing its debt.

61. In winding up proceedings once enquiry is done liquidator will directly be appointed for liquidation, the better part in IB Code is there will be a resolution process to find out as to whether a distressed company can survive if further funds are infused, if at that juncture also, the company fails, then only the action for liquidation will trigger. Therefore, the nature of insolvency proceedings under IB Code cannot be seen as something different from the winding up proceedings. Maybe it is looking new to us but the outcome is one and the same, the main object behind insolvency proceedings for reorganization and insolvency resolution of the companies and individuals in a time bound manner for maximization of value of the assets of the said companies or said persons to promote entrepreneurship availability of credit and balance of interest of all the stakeholders. In a scenario like this, if we narrow down our perception that company will be closed, business will go down if at all insolvency proceedings are initiated, then it will become nothing but diluting the force of the Code. Assuming that workers will suffer if it goes to IRP, what ultimately happens is the company will die on its own, by that time nothing will come even to workers also, therefore we have not seen any logic in the argument that company shall not go to IRP.

62. When we read either the statute or a covenant between the parties, courts will normally discover what the law or covenant is rather than to make the law or to make the covenant, the courts will only read what a

statute actually states and will not read into the words which are not in the statute. One must not be lost sight of that ***ratio legis*** is as important as ***ratio decidendi,*** ratio legis is rather more important than ***ratio decidendi.*** When sovereign law was not in existence, common law was prevalent, in those timings, destiny and direction to English Country was the ratio decided by the courts to give certainty and predictability to the society to run, but when law is promulgated, the bottom line for certainty and predictability is ratio legis, when any ambiguity is there in law, if law is interpreted in such a way so as to carry the object of the litigation, then it will become purposive interpretation. The purposive approach is to promote the general legislative purpose underlying the provision, but not to crucify the statutory provision by labeling reliefs in the Code as harsh remedy.

63. In ***Haryana Financial Corporation and Another vs. Jagadamba Oil Mills and another (2002) 3 SCC 496,*** it has been held as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits into with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid Theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statues. To interpret words, phrases and provisions of statute, it may become necessary for judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interprets statutes they do not interpret judgments. They interpret words of statues; their words are not to be interpreted as statues. In ***London Graving Dock Co. Ltd. vs. Horton (1951) to All ER 1(HL),*** *Lord MacDermot observed:*

"The matter cannot, of course, be settled merely by treating ipsissimaverba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge".

64. All that is said in the above finding is the words in a judgment is not to be treated as if it were a statutory definition, it will require qualification in new circumstances. There is always a peril in treating the words of a speech or a judgment as if they were words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, if any deviation to the statute is exfacie apparent in any judgment, law governing a particular situation is to be taken abreast. A ratio in a judgment cannot be torn out of context and apply it in a situation where it is not fitting.

65. Here in the present case, the power of attorney was given only two months before filing this case mentioning what are the actions the attorney holders to take up, against whom it is to be taken up, therefore it can't be said that since it is not a winding up proceeding, this power of attorney cannot be used to file insolvency proceeding IB Code. The nature of proceedings under winding up as well as insolvency is more or less same. The procedure is slightly different; the object is to liquidate the assets that are owed to the creditors, as we said earlier; in insolvency proceedings one more step taken into consideration is restructuring which was earlier considered by SICA. If Debtor Company is unable to make payment, what is wrong in notifying it to the public? Here the corporate debtor has not come forward making any payment to the creditors in 180 days 'maturity time given. Thereafter, almost three years are over. Still this company has not made any payment to the creditors, now has come forward making allegations that power of attorney is not valid, bill of exchange is not valid, *forfaiting* to the second creditor is not valid but it is nowhere said that the AIC has not sent the goods to the destination ordered by this debtor in the purchase order. It is also not the case of the debtor that goods were not reached to the destination; in fact, he accepted bill of exchanges and thereafter confirmed the *forfaiting* agreement in between the first creditor and the AIC.

66. The Counsel for the Corporate Debtor relied upon ***S. I. Rooplal & Another vs. Lt. Governor through Chief Secretary Delhi (2000) 1 SCC 644*** that if the earlier judgment of another coordinate bench of the same tribunal is to be held as incorrect by subsequent Bench of the same tribunal, then it ought to have been referred to a larger bench so that the difference of opinion between the two coordinate benches on the same point could have been avoided. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This point has already been answered in the above paras.

67. The Corporate Debtor Counsel submits that Deutsche and Misr Bank do not have any locus to maintain this petition as claim purportedly payable by the Debtor separately is based on two separate claims by two separate claimants, thereby this claim is defective in so much as it seems to claim two complete distinct unconnected debts, and there is no privity of contract between Uttam and Deutsche as much as in between Uttam and Misr Bank, besides this, the assignment by Deutsche to Misr Bank has not been confirmed by Uttam therefore, these two petitioners cannot be recognized as Operational Creditors within the meaning of the Code.

68. The argument of the Corporate Debtor counsel does not stand good for two reasons (1) the debt has been properly assigned to Deutsche and thereafter Deutsche assigned part of the debt to Misr Bank, since the assignment of debt in our country need not be confirmed by the Corporate Debtor, it cannot be said that this Petition is defective, it is two Operational Creditors, who shared debt in between, filed this Company Petition against the debt raised out of one transaction, apart from that since it is only to initiate the insolvency resolutions process, for no prejudice being caused to the Corporate Debtor, this Petition in any sense cannot be treated as defective. As to doctrine of privity of contract, there need not be any separate contract in between the Petitioners and Corporate Debtor, once

that debt is assigned to somebody else, then that third party will automatically come into the shoes of the original operational creditor as stated in the definition to operational creditor. Therefore, this argument of absence privity of contract between Deutsche, Misr Bank and Uttam has no merit.

69. The Corporate Debtor Counsel has developed an argument saying that a Petition under section 9(5)(i) of the Code could be admitted only when, inter alia, no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information was received. He further says Corporate Debtor having sent a notice of dispute on 3.3.2017 itself that is within 10 days from the date of receipt of notice, as envisaged under section 9(5)(ii)(d), the Company Petition by an order shall be rejected.

70. This argument will remain looking plausible, if the word "dispute" is meant as a dispute arising out of assertion and denial, but if the definition of the word "dispute" is taken as pendency of suit or arbitration proceeding in respect to the debt claim mentioned in the Petition, then there would not be any argument to the Debtor Counsel to justify his arguments.

71. If we read the sections 5(6), 8 and 9 together, we can visualize the consistency. When the word "dispute" means pendency of suit or arbitration, then "dispute in existence" in section 8 means suit or arbitration proceedings pending since before the receipt of notice under section 8, on this logic, the receipt of notice of dispute under section 9(5)(ii)(d) will obviously become a notice of dispute reflecting pending of suit or arbitration proceedings in respect to the debt claim since before receipt of notice under section 8 of the code. Then next point to be seen is as to whether this understanding is advancing the purpose and object of the Code or not. A provision has been envisaged for an Operation Creditor to initiate Insolvency Resolution process. If section 8 mandate is understood

by reading dispute as mere assertion and denial, then no Operational Creditor can file a petition once the Corporate Debtor sends a reply notice saying that he is denying the claim raised by the Operational Creditor. The outcome of such situation is the doors of IB Code will remain closed for ever to any Operational Creditor. It is quite natural as and when operational creditor sends notice, the Corporate Debtor, whether he is in a position to pay or not, unless colluded, will simply send a reply saying that it is disputing the claim raised by the operational creditor. This eventuality raises a dispute without any support of pending suit or arbitration proceedings, which will become detrimental for enforcing the mandate of this Code. As we already said, one should not start looking at the IB proceedings as harsh. Here in this case, the Debtor company failed to pay for three years since now, after three years, it is saying that Operational Creditor cannot file this case as it remained silent from March 15, 2014. Can it be an argument to say that since the Operational Creditors did not initiate any proceedings until before filing this Insolvency Petition, they are not supposed to pursue the remedies available to them before the case is hit by limitation? It can't be like that. Therefore, this Bench has not found any reason in the argument of the Corporate Debtor Counsel.

72. The Corporate Debtor Counsel raises another argument saying that since this sales contract in between the Seller (AIC) and the Corporate debtor is governed by English Law, the Petitioner cannot proceed without dealing with English law, to which he relied upon **Hari Shanker Jain v/s. Sonia Gandhi AIR 2001 SC 3689,** which is not relevant to the present case.

73. In a reply to the same, the Counsel for the Operational Creditors has relied upon ***Malaysian International Trading Corporation v/s. Megha Safe Deposit Vault Pvt. Ltd. (MANU/MH/0229/2006); Aksh Optifibre Ltd. v/s. Evonik Degussa GmbH (MANU/MH/1361/2014); The Bank of New York Mellon v/s. Zenith Infotech Ltd.*** to say that if any party says that English Law is differing from Indian Law, it is their bounden duty to prove foreign

law is contrary to Indian Law, if they failed to prove it, it has to be presumed that Indian Law is applicable. Therefore, it is not open to the Corporate Debtor to say that as to confirmation in relation to assignment requires the acknowledgement of the Corporate Debtor cannot be construed as law governing this case. Henceforth we have not noticed any merit in the argument of Corporate Debtor. However, since Deutsche Bank is party to the proceeding, and confirmation in respect to that assignment has been agreed upon by Uttam, without prejudice, Deutsche can very well proceed, but this case need not go to that extent, because the counsel of the debtor has not shown that confirmation of assignment is a requisite under Indian law.

74. The Corporate Debtor Counsel vehemently argued that these petitioners cannot claim interest over the operational debt by showing two Bills of Exchange given as collaterals, he says, if it is claimed basing on Bills of Exchange along with interest, then it would become a financial debt, not an operational debt.

75. If we go through the definition of "financial debt", it means that a debt along with interest is disbursed against the consideration for the time value of money and with an inclusive list specifying as to what category of debts will become financial debt. When it comes to operational debt, it is a claim made against the goods supplied or services rendered. There are two types of debts, one operational debt another financial debt, so debt has to fall either under financial debt or operational debt, there cannot be a debt other than these two types. If it is a debt against the company, it has to invariably fall either under financial debt or operational debt and it has to be read as either financial debt or operational debt, it can't be said that a debt against company for a, b, c reasons can't be either financial debt or operational debt. The bottom line in respect to obligation is, a man should repay the value, either in cash or kind, to what he has taken, for this; we have to apply law in such a way that claimant is provided remedy. The

premise for claim is whether "A" has taken something from "B" with a promise to pay back the value or not, if it is prima facie evident that claim has to be paid, then to see what law is applicable to ensure that it is repaid, but not to dismiss the claim on the ground it is not in accordance with law. Legal proposition is to be searched and applied to promote the cause not to negate the cause. We need not say that procedural justice is always subservient to substantial justice.

76. When we see the basic difference to financial debt and operational debt, it is clear that financial debt is money borrowed to repay on future date along with interest, here the money is lent for value addition to the money as agreed between the parties, whereas operational debt is normally based on an agreement to pay to goods or services, it does not mean that interest cannot be claimed in the times to come, it is a normal practice that trade payables are payments deferred for a fixed time, if the party fails to repay within the fixed time, then interest will be claimed over operational debt as well, the same happened over here as well. The corporate debtor himself said in the written submissions that there is email dated April 10,2014 from the corporate debtor in respect to payment of interest, since collaterals are Bills of exchange, even otherwise also, basing on collaterals entitled to interest at the rate of 18% u/s 80 of the Negotiable Instruments Act. The difference in these two transactions is one given to get interest over the money; second transaction happens in business operations, in both the cases money is involved, as days go by after transaction, the time value of money will be there. For that reason, it is nowhere said that the operational creditor is barred from claiming interest. Suppose goods are supplied three years before, the debtor is supposed to return in 6 months, if it is not paid in 6 months maturity period, does it mean that since it is operational debt, the creditor cannot claim interest when the payment is delayed beyond the time given to him? On commercial side, the creditor claiming interest is quite normal and justifying, after all, business always

runs keeping in mind the time value of money, transaction will be operation if payment is to goods or services, transaction is financial if money is lent in contemplation of returns in the form of interest. Therefore, goods or services supplied can't be seen as not valued in terms of money, one is in kind another is in cash, that does not mean only cash has value of money and kind has no value of money.

77. Time value of money definition relates to the value of money in time. How much will a rupee owned today be worth one year from now, i.e. If ₹100 affords a person to purchase say X amount of goods today, how many goods will he be able to purchase with the same ₹100, one year from now. Historically it has been found that the value of money has depreciated over the years, i.e. in one year from now he will be able to purchase less number of goods than X – that he was able to purchase a year back. So this is the proposition that has to be taken into consideration for claiming interest on the value of goods supplied. In this case, credit has been given free of interest for 180 days, the debtor has not paid, from the date of maturity, almost three years over, still no payment has come to the operational creditors.

78. Let us test how far this argument is right, one – it is admittedly true Uttam accepted two bills of exchange promising to pay the value of goods within 180 days, thereafter Uttam has not made any payment, by now more than three years and six months are over.

79. For the reasons above and the material available on record showing compliance under section 9 of the code, this petition is hereby admitted and Registry is hereby directed to refer it to the Insolvency and Bankruptcy Board to recommend the name of an IRP to appoint him in this case.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S. V. PRAKASH KUMAR
Member (Judicial)