Asset Reconstuction Company (India) ... vs Tulip Star Hotels Limited on 1 August, 2022

Author: Indira Banerjee

Bench: J.K. Maheshwari, Indira Banerjee

REPO

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 84-85 OF 2020

Asset Reconstruction Company
(India) Limited App

Versus

Tulip Star Hotels Limited & Ors. Respo

JUDGMENT

Indira Banerjee, J.

These appeals under Section 62 of the Insolvency and Bankruptcy Code 2016 (IBC) filed by the Financial Creditor, Asset Reconstruction Company (India) Limited are against a common judgment and final order dated 11 th December 2019 passed by the National Company Law Appellate Tribunal (NCLAT), allowing Company Appeal (AT)(Insolvency) No.525 of 2019 and Company Appeal(AT) (Insolvency) No.627 of 2019 and holding that the Corporate Insolvency Corporate Debtor, V. Hotels Ltd. was barred by limitation.

2. The Respondent No.1, Tulip Star Hotels Limited and the Respondent No.2 Tulip Hotels Private Limited are the shareholders of the Corporate Debtor, V. Hotels Limited. The Respondent Nos. 1 and 2 each hold 50% share in the Corporate Debtor. Mr. Ajit B. Kerkar is the Managing Director of the Respondent No.1, Tulip Star Hotel Limited, Chairman of the Respondent No.2, Tulip Hotels Private Limited and also the Chairman of the Corporate Debtor.

3. On or about 8th March 2002, a loan agreement was executed by and between a consortium of banks consisting of Bank of India, Punjab National Bank, Union Bank of India, Vijaya Bank, Canara Bank and Indian Bank, led by Bank of India (hereinafter referred to collectively as the Consortium) and the Corporate Debtor, pursuant to which the Consortium collectively sanctioned loan to the extent of Rs.129,00,00,000/- (Rupees One Hundred and Twenty-Nine Crore Only) to the Corporate Debtor.

4. On 5th June 2003, the Corporate Debtor entered into an arrangement with Abu Dhabi Commercial Bank (ADCB) whereby ADCB agreed to advance USD 29,000,000/- to the Corporate Debtor for repayment of the loan taken by the Corporate Debtor from the Consortium under the loan agreement executed on 8 th March 2002. It is stated that the Corporate Debtor repaid the amount disbursed by Bank of India to the Corporate Debtor under the said loan agreement from out of funds disbursed to the Corporate Debtor by ADCB, between August and December 2003.

5. In August/ September 2008, a bank guarantee issued by Bank of India in favour of ADCB, on behalf of the Corporate Debtor was invoked by ADCB and Bank of India paid Rs.24,49,59,208/- (Twenty Four Crores Forty Nine Lakhs Fifty Nine Thousand Two Hundred and Eight) to ADCB under the Bank Guarantee.

6. Around the same time, Bank of India, Punjab National Bank and Union Bank of India also converted their facility under the loan agreement into a non-fund-based bank guarantee.

7. On 1st December 2008, the account of the Corporate Debtor in the Bank of India was classified as non-performing asset (NPA) and on 31st December 2008, an assignment agreement was executed by Bank of India assigning its receivables to the Appellant Financial Creditor.

8. By a letter dated 7th February 2011 addressed to the Appellant, the Corporate Debtor proposed a settlement which is as follows:-

> (i) The Corporate Debtor would pay interest to the Appellant Financial Creditor at an average rate of 21% per annum at quarterly rests.
>
> (ii) The Corporate Debtor would pay a sum of Rs.9,02,00,000/- being 10% of the aggregate assigned debt to the Appellant Financial Creditor immediately on acceptance of the settlement.
>
> (iii) The Corporate Debtor proposed that the balance aggregate assigned debt of Rs.154,13,00,000/- along with interest accrued thereon from the date of the payment of the initial amount up to 30th September 2011 would be repaid in three equated monthly instalments beginning from 15 th October 2011.

9. On or about 10th February 2011, the Corporate Debtor submitted a revised proposal offering to pay interest on its outstanding dues to the Appellant at the rate of 22% per annum with monthly rests with effect from 1st July 2010. The Corporate Debtor also offered to pay Rs.10,00,00,000/- to

the Appellant immediately upon acceptance of the revised proposal.

10. The Corporate Debtor also agreed to pay the settlement amount of Rs.150,75,83,970/- being the aggregate assigned debt as on 30 th June 2010 along with interest at the rate of 22% per annum compounded at monthly rests from 1 st July 2010 till 30th September 2011.

11. On or about 28th February 2011 the parties entered into a Settlement Agreement, the key terms whereof were as follows:-

> (i) The Corporate Debtor agreed to pay the settlement amount of Rs.150,75,83,970/- (Rupees One Hundred Fifty Crores Seventy-Five Lakhs Eighty-three Thousand Nine Hundred and Seventy Only) being the Aggregate amount in default as on 30th June 2010 along with the accrued interest at the rate of 22% per annum to be compounded at monthly rests from 1st July 2010 till 30th September 2011.
>
> (ii) Rs. 10,00,00,000/- (Rupees Ten Crore Only) would be paid as upfront payment upon execution of the Settlement Agreement.
>
> (iii) The balance amount after adjusting the upfront payment of Rs.10,00,00,000/- (Rupees Ten Crore Only) would be repaid on or before 30th September 2011.

12. On 12th September 2011, the Corporate Debtor addressed a letter to the Appellant, seeking an extension of time till 30 th September 2012 to pay its balance outstanding dues towards principal and interest. The Corporate Debtor acknowledged that its aggregate outstanding liability towards principal and interest to the Appellant was Rs.176,83,00,000/-. The Corporate Debtor offered to make an interim payment of Rs.15,00,00,000/- (Rupees Fifteen Crores Only) by 31st December 2011. On 29 th September 2011, the agreement between the Corporate Debtor and the Appellant was modified.

13. On 30th December 2011, the Appellant accepted the request of the Corporate Debtor for extension, subject to the condition that the Corporate Debtor would pay Rs.15,00,00,000/- (Rupees Fifteen Crores Only) by 31st December 2011, and the balance portion of the aggregate assigned debt totalling Rs.150,75,83,970/-, outstanding as on 30th June 2010, along with accrued interest at the rate of 22% per annum, to be compounded at monthly rests from 1st July 2010 till the date of payment, that is, 31st March 2012.

14. On 17th March 2012, the Corporate Debtor confirmed that the aggregate assigned debt outstanding as on 31 st March 2012 was Rs.192,89,46,697/- and requested for a further extension of time from 31st March 2012 to 31st December 2012 to pay the outstanding amounts.

15. On 6th August 2012, the Appellant accepted the aforesaid extension request and agreed to the extension for repayment of the aggregate assigned debt outstanding as on 30th September 2012.

16. On 10th September 2012, the Corporate Debtor sought further extension till 31st March 2013 for payment of outstanding principal and interest aggregating to Rs.211,35,16,073/-. On 5 th December 2012, the Appellant accepted the extension subject to payment of processing fee of Rs.25,00,000/-.

17. On 6th April 2013, the Corporate Debtor again sought extension of the date for repayment of the then outstanding amount. The Corporate Debtor acknowledged the outstanding aggregate assigned debt (inclusive of principal and interest) which had increased to Rs.239,88,27,673/- as on 31st March 2013. The Corporate Debtor offered to make an interim payment of Rs.91,00,00,000/- (Indian Rupees Ninety One Crores Only) by 31 st August 2013 and the balance outstanding amounts by 30th September 2013.

18. On 19th April 2013, the Corporate Debtor paid Rs.17,50,00,000/- to the Appellant, towards part repayment of the aggregate assigned debt. On 29th May 2013, the Appellant again accepted the request of the Corporate Debtor for extension of time.

19. Ultimately, on 17th June 2013, the Appellant revoked the settlement and in terms of the default obligations under the Settlement Agreement, the rate of interest under the Deed of Variation was revised to 22%. By its letter dated 1 st July 2013, the Corporate Debtor acknowledged its obligation to repay the aggregate assigned debt inclusive of interest.

20. On 10th July 2013, the Appellant sent the Corporate Debtor a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) in order to enforce security interests against the Corporate Debtor. On 14th October 2013, the Appellant, through its authorized officer, issued a possession notice under Section 13(4) of the SARFAESI Act.

21. On 6th May 2014, the Appellant invoked the personal guarantee of Mr. Ajit Kerkar, Managing Director of the Corporate Debtor. The aggregate assigned debt as on 6 th May 2014 of principal and interest at 22% per annum was Rs.235,46,34,381/-.

22. The Corporate Debtor apparently acknowledged its liabilities towards the Appellant in its Financial Statements from 2008-09 to 2016-17.

23. The Appellant has filed an application to bring on record additional documents which were part of the records below including the copies of the financial statements.

24. Mr. Neeraj Kishan Kaul, Senior Advocate appearing on behalf of the Appellant, rightly submitted that the Financial Statements provide a true and fair view of the state of affairs of a company in view of Sections 128 and 129 read with Section 134 of the Companies Act 2013 as also Sections 210, 211, 215, 216 and 217 of the Companies Act, 1956.

25. On 3rd April 2018, the Appellant, as Financial Creditor, filed an application under Section 7(2) of the IBC in the National Company Law Tribunal (NCLT), Mumbai for initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor which was registered and

numbered CP(IB) No.532 of 2018.

26. The Corporate Debtor filed a Miscellaneous Application being Misc. App. No.693 of 2018 in CP (IB) No.532 of 2018 before the NCLT, Mumbai praying for dismissal of the application of the Appellant under Section 7(2) of the IBC, inter alia, contending that the application was barred by limitation. By an order dated 1 st May 2019, the Adjudicating Authority (NCLT), Mumbai dismissed the said Miscellaneous Application filed by the Corporate Debtor.

27. By an order dated 31st May 2019, the Adjudicating Authority (NCLT) admitted the said application under Section 7(2) of the IBC and appointed one Mr. Anish Nanavaty as the Interim Resolution Professional (IRP). The Committee of Creditors confirmed the appointment of Mr. Anish Nanavaty as the Resolution Professional of the Corporate Debtor.

28. The Corporate Debtor filed an appeal being Company Appeal (AT) (Insolvency) No.525 of 2019 before NCLAT against the order dated 1st May 2019, dismissing the Miscellaneous Application filed by the Corporate Debtor, seeking dismissal of the application of the Appellant Financial Creditor under Section 7(2) of the IBC.

29. The shareholders of the Corporate Debtor, that is, the Respondent No.1, Tulip Star Hotels Limited and the Respondent No.2, Tulip Hotels Private Limited, filed an appeal being Company Appeal (AT) (Insolvency) No.627 of 2019 in the NCLAT against the order dated 31st May of the Adjudicating Authority, admitting the application of the Appellant under Section 7(5)(a) of the IBC.

30. Both the appeals have been allowed by the common judgment of the Appellate Tribunal (NCLAT) dated 11th December 2019, impugned in these appeals.

31. On behalf of the Corporate Debtor, it has been argued:

> (i) There is no debt due and payable from the Corporate Debtor to the Appellant. The amounts advanced by the Consortium to the Corporate Debtor have been repaid.
>
> (ii) In the statutory notice issued by the Appellant to the Corporate Debtor under Section 13(2) of the SARFAESI Act, the Appellant had claimed that principal amount of Rs.90.35 Crores was due from the Corporate Debtor to the Appellant.
>
> (iii) The Corporate Debtor has paid the Appellant much more than the Principal amount claimed by the Appellant, as per the table set out below:-
>
> DATE CHEQUE/PAY ORDER NO. DRAWN ON AMOUNT (RS.) 28-Feb-11 744705 Axis Bank, Nariman Point, Mumbai 10,00,00,000 31-Dec-11 846341 Axis Bank, Nariman Point, Mumbai 5,00,00,000 15-Feb-12 846422 Axis Bank, Nariman Point, Mumbai 10,00,00,000 18-Apr-13 81863 Axis Bank, Nariman Point, Mumbai 17,50,00,000 A. Total Payment As per Settlement with ARCIL 42,50,00,000 25-Feb-14 248177 Axis Bank, Nariman Point, Mumbai 12,50,00,000 15-May-14

248422 Axis Bank, Nariman Point, Mumbai 2,50,00,000 30-Jun-14 248524 Axis Bank, Nariman Point, Mumbai 10,00,00,000 B. Total Payment As per DRT I Order dated 28.01.2014 25,00,00,000 16-Jun-16 63039 Axis Bank, Nariman Point, Mumbai 5,04,30,672 12-May-17 67071 Axis Bank, Nariman Point, Mumbai 10,00,00,000 19-May-17 67192 Axis Bank, Nariman Point, Mumbai 2,40,00,000 26-May-17 67260 Axis Bank, Nariman Point, Mumbai 2,40,00,000 02-Jun-17 67322 Axis Bank, Nariman Point, Mumbai 2,40,00,000 23-Jun-17 68070 Axis Bank, Nariman Point, Mumbai 7,20,00,000 30-Jun-17 68130 Axis Bank, Nariman Point, Mumbai 2,40,00,000 07-Jul-17 68360 Axis Bank, Nariman Point, Mumbai 2,40,00,000 14-Jul-17 68353 Axis Bank, Nariman Point, Mumbai 2,40,00,000 21-Jul-17 68437 Axis Bank, Nariman Point, Mumbai 2,40,00,000 C. Total Amount Deposited with DRT 39,04,30,672 TOTAL PAYMENT (A+B+C) 1,06,54,30,672

(iv) Even though the principal amount had been paid in the full, in the Application under Section 7 of the IBC, the Appellant claimed that principal amount of Rs.35,43,72,852/- and Rs.149,91,24,581/- towards interest.

(v) There is no amount outstanding towards principal, and there is a long standing dispute in respect of the amount of interest payable by the Corporate Debtor to the Appellant.

(vi) In the Application under Section 7 of the IBC, the Appellant has claimed a principal amount of Rs.35,43,72,852/- and interest of Rs.149,91,24,581/- on the basis of the settlement agreement dated 28.02.2011 which was later revoked by the Appellant on 17.06.2013.

The amount of principal claimed in the Application under Section 7 of the IBC is at complete variance with the principal amount claimed in the statutory Notice under Section 13(2) of the SARFAESI Act.

(vii) By an order dated 19.10.2018, passed in relation to proceedings between the Appellant and the Corporate Debtor in the Debt Recovery Tribunal, the High Court had held that the Appellant was not entitled to claim 22% interest since it had revoked the settlement agreement on the basis of which such interest had been claimed.

(viii) The High Court had, by its aforesaid order dated 19.10.2018, directed DRT to determine the interest payable by the Corporate Debtor to the Appellant. Since no determination has been done by the DRT, the interest amount has not become due and payable.

(ix) The Appellant could not have appropriated the amounts paid by the Corporate Debtor towards interest.

(x) The principal having been paid and the interest not being due, there is no financial debt payable by the Corporate Debtor to the Appellant.

(xi) The Application of the Appellant under Section 7 of the IBC is hopelessly barred by limitation, the same having been filed about eight/nine years after the account of the Corporate Debtor was declared NPA on 01.12.2008.

(xii) Even assuming the Corporate Debtor had acknowledged liability, the last letter of acknowledgment was written in April 2013. The period of limitation still expired in April 2016.

(xiii) The Corporate Debtor has not acknowledged any debt in its financial statements.

(xiv) The Corporate Debtor and/or its Promoters have paid its entire Principal dues to the CoC (Committee of Creditors) consisting of the Appellant and Pegasus.

32. The NCLAT held:

> "23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in writing by the 'Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgement of liability in respect of debt payable to the 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') signed by the 'Corporate Debtor' or its authorised signatory.

****

25. In fact, the case of 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') is covered by its own decision in "Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And Another" (supra)

26. The Adjudicating Authority having failed to appreciate the aforesaid fact, the impugned order dated 1 st May, 2019 rejecting the objections of the 'Corporate Debtor' and the impugned order dated 31st May, 2019 passed by the Adjudicating Authority admitting the application under Section 7 are set aside. 'V. Hotels Limited'- ('Corporate Debtor') is released from all the rigours of law and is allowed to function independently through its Board of Directors from immediate effect. The 'Interim Resolution Professional'/ 'Resolution Professional' will submit its fees and costs of 'Corporate Insolvency Resolution Process' before the Adjudicating Authority who will determine the same and amount as is payable is to be paid by 'Asset Reconstruction Company (India) Ltd.' who moved application under Section 7 which was not maintainable. The 'Interim Resolution Professional' will hand over the management, assets and records to the Board of Directors.

Both the appeals are allowed. No costs."

33. Citing Asset Reconstruction Company (India) Limited. v.

Bishal Jaiswal and Anr 1 Mr. Nakul Dewan, Senior Advocate argued that all financial statements issued by a company would not amount to acknowledgment for the purpose of Section 18 of the

Limitation Act and thereby extend the period of limitation under the Code.

34. In Bishal Jaiswal (supra) this Court:

> "21. Importantly, this judgment in Bengal Silk Mills [Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, 1961 SCC OnLine Cal 128 : AIR 1962 Cal 115] holds that though the filing of a balance sheet is by compulsion of law, the acknowledgment of a debt is not necessarily so. In fact, it is not uncommon to have an entry in a balance sheet with notes annexed to or forming part of such balance sheet, or in the auditor's report, which must be read along with the balance sheet, indicating that such entry would not amount to an acknowledgment of debt for reasons given in the said note.
>
> ***

35. A perusal of the aforesaid sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by Section 134(7). Equally, the auditor's report may also enter caveats with regard to acknowledgments made in the books of accounts including the balance sheet. A perusal of the aforesaid would show that the statement of law contained in Bengal Silk Mills [Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, 1961 SCC OnLine Cal 128 : AIR 1962 Cal 115] , that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgment of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act." 1 (2021) 6 SCC 366

35. The Respondents argued that the Appellant was relying on the Financial Statements from 2014-15 onwards as acknowledgments to save limitation. It was argued that the said Financial Statements would not constitute acknowledgement for the reasons as demonstrated in the Written Notes of submissions of the Corporate Debtor reproduced hereinbelow:

> (i) Financial Statement for 2014-15 (Pages 6-18 of IA 125766) wherein:
>
> (a) At page 8 of IA 125776, it is stated that 'indebtness' is to be read with Note No.5 in the notes of Accounts.
>
> (b) At page 15-16 of IA, in the Notes of Accounts, the Respondent No.3 has clearly stated that pursuant to the Orders of this Court, the parties entered into a Settlement which was unilaterally revoked by the Appellant on 17.06.2013 and thus the Respondent No.3 had been legally advised that the interest for the loans cannot be 22% as stated in the revoked settlement but 12.85% and that the rate of interest will be subject to the decision of the DRT, Mumbai.

(ii) Financial Statement for 2015-2016 (Pages 19-30 of IA 125766), wherein similar disputes are raised in the notes (at page 21, 29-30 of IA).

(iii) Financial Statement for 2016-17 (pages 31-42 of IA 125766) where a similar statement is made as stated above in the Notes to the Financial Statement for 2015-16 (at page 33, 41-42 of IA).

36. Counsel argued that a perusal of the above Statements from 2014-2015 to 2016-2017 shows that the Corporate Debtor has not made any unequivocal acknowledgment of debt and has further questioned the interest sought to be recovered by the Appellant. Thus, it is submitted that the present case falls within the category provided in the judgment in Bishal Jaiswal (supra), where this Court noted that "it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgment of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act."

37. It was also argued that contrary to the claims of the Appellant, the recovery in the present case is not of "public monies". Nor is the recovery beneficial to the public. There is no public funding in the form of holdings by any Public Sector Banks in the subject transaction. Such arguments are irrelevant to the issue in this appeal of whether the Application of the Appellant Financial Creditor under Section 7 of the IBC should have been rejected, and that too on the sole ground of the same being barred by limitation.

38. For the purpose of computing limitation, the most relevant balance-sheet is the balance-sheet for the financial year 2014-15, which, as pointed out by Mr. Kaul, was signed on 14.5.2015. The balance-sheet acknowledged the continuance of the jural relationship of debtor and creditor between the Appellant and the Corporate Debtor and the existence of financial liability of the Corporate Debtor to the Appellant. The only remark made by the Corporate Debtor related to the rate of interest which, according to the Corporate Debtor, would be 12.85% and not 22% in view of the revocation of the Settlement Agreement by the Appellant. The application of the Appellant under Section 7 of the IBC was filed on 3.4.2018, well within three years from 14.5.2015, being the date on which the balance- sheet was signed. Similarly, the balance-sheet for the following financial year signed on 29.8.2016 also acknowledged the existence of jural relationship of debtor and creditor between the Appellant and the Corporate Debtor and the existence of financial liability of the Corporate Debtor to the Appellant. The balance-sheet only contained a similar additional remark with regard to the rate of interest.

39. As held by this Court in Innoventive Industries Ltd. v. ICICI Bank and Anr2., the Adjudicating Authority, considering an application under Section 7 of the IBC, is only required to see if there is the existence of a debt and default. Any dispute with regard to the quantum of debt is immaterial. The relevant part of the judgment of 2 (2018) 1 SCC 407 this Court in Innoventive Industries Ltd. (supra) is set out hereinbelow:-

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.
>
> 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."
>
> 40. As argued by Mr. Kaul appearing on behalf of the Appellant, any part payments made by the Respondent would first be appropriated towards the interest amount due, as held by this Court in Industrial Credit & Development Syndicate Now Called I.C.D.S. Ltd. v.

Smithaben H. Patel (Smt.) and Others3.

41. In Industrial Credit & Development Syndicate (supra), this Court held :-

> 6. In Venkatadri Appa Row v. Parthasarathi Appa Row [(1920-21) 48 IA 150 : AIR 1922 PC 233] the Judicial Committee of the Privy 3 (1999) 3 SCC 80 Council had held that upon taking an account of principal and interest due, the ordinary rule with regard to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of the interest. This Court in Meghraj v. Bayabai [(1969) 2 SCC 274: (1970) 1 SCR 523] reiterated the position of law and held that the normal rule was that in the case of a debt due with interest, any payment made by the debtor was in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It was for the debtor to plead and prove the agreement, if any, that the amounts paid or deposited in the Court by him were accepted by the creditor/decree-holder subject to the condition imposed by him. ..."

42. Even otherwise, in this case, the quantum of debt was well in excess of Rs. 1 crore and many times in excess of Rs.1 lakh, being the threshold amount under the IBC for initiation of CIRP

proceedings at the material time. Subsequently, in 2020, the threshold limit was enhanced to Rs.1 crore.

43. In our view, the NCLAT erred in law in holding that the Books of Account of a company could not be treated as acknowledgement of liability in respect of debt payable to a financial creditor.

44. Under the scheme of the IBC, the Insolvency Resolution Process begins, when a default takes place, in the sense that a debt becomes due and is not paid. Some of the relevant provisions of the IBC, are set out hereinbelow for convenience:-

> "3 Definitions..—In this Code, unless the context otherwise requires,— ...
>
> (6) "claim" means—
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (b) 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, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> (7) "corporate person" means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider; (8) "corporate debtor" means a corporate person who owes a debt to any person;
>
> .....
>
> (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;
>
> (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt; (12) "default" means 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;

4. Application of this Part.—(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

5. Definitions.—In this Part, unless the context otherwise requires— ...

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire- purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) 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 this clause;

6. Persons who may initiate corporate insolvency resolution process.—Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

7. Initiation of corporate insolvency resolution process by financial creditor.—(1) 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 corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6-A) of Section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board. (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3):

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.] (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5). (7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

***

12. Time-limit for completion of insolvency resolution process.—(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject-matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once:

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

12-A. Withdrawal of application admitted under Section 7, 9 or 10.— The Adjudicating Authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

13. Declaration of moratorium and public announcement.—(1) The Adjudicating Authority, after admission of the application under Section 7 or Section 9 or Section 10, shall, by an order—

(a) declare a moratorium for the purposes referred to in Section 14;

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under Section 15; and

(c) appoint an interim resolution professional in the manner as laid down in Section 16.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

14. Moratorium.—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely—

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

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

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period. (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to—

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
>
> ...
>
> 16. Appointment and tenure of interim resolution professional.—(1) The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under Section 7 or Section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him. (3) Where the application for corporate insolvency resolution process is made by an operational creditor and—

(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

(b) a proposal for an interim resolution professional is made under sub- section (4) of Section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

(5) The term of the interim resolution professional shall continue till the date of appointment of the resolution professional under Section 22.

17. Management of affairs of corporate debtor by interim resolution professional.—(1) From the date of appointment of the interim resolution professional,—

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

18. Duties of interim resolution professional.—(1) The interim resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board. Explanation.— For the purposes of this section, the term “assets” shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

20. Management of operations of corporate debtor as going concern.—(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

21. Committee of creditors.—(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

> Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub- section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:
>
> Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

22. Appointment of resolution professional.—(1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

(3) Where the committee of creditors resolves under sub-section (2)—

(a) to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form. (4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

23. Resolution professional to conduct corporate insolvency resolution process.—(1) Subject to Section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

> Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of Section 31 or appointing a liquidator under Section 34 is passed by the Adjudicating Authority.
>
> (2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.
>
> (3) In case of any appointment of a resolution professional under sub-

sections (4) of Section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

***

25. Duties of resolution professional.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under Section 28;

***

27. Replacement of resolution professional by committee of creditors.-

(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under Section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

***

30. Submission of resolution plan.—(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29-A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor. Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

31. Approval of resolution plan.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:

> Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

***

33. Initiation of liquidation.—(1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30;

or

(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. (3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1). (5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority."

45. Where any Corporate Debtor commits default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate Corporate Insolvency Resolution Process in respect of such Corporate Debtor, in the manner as provided in Chapter II of the IBC.

46. The provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, upon imposition of a moratorium, to give the Corporate Debtor some reprieve from coercive litigation, which could drain the Corporate Debtor of its financial resources.

47. Under Section 7(2) of the IBC, read with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, hereinafter referred to as "2016 Adjudicating Authority Rules" made in exercise of powers conferred, inter alia, by clauses (c) (d) (e) and (f) of sub-section (1) of Section 239 read with Sections 7, 8, 9 and 10 of the IBC, a financial creditor is required to apply in the prescribed Form 1 for initiation of the Corporate Insolvency Resolution Process, against a Corporate Debtor under Section 7 of the IBC, accompanied with documents and records required therein, and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, hereinafter referred to as the "2016 IB Board of India Regulations".

48. Statutory Form 1 under Rule 4(1) of the 2016 Adjudicating Authority Rules comprises Parts I to V, of which Part I pertains to particulars of the Applicant, Part II pertains to particulars of the Corporate Debtor and Part III pertains to particulars of the proposed Interim Resolution Professional. Parts IV and V which require particulars of Financial Debt with Documents, Records and Evidence of default, is extracted hereinbelow:-

PART IV PARTICULARS OF FINANCIAL DEBT 1 TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT 2 AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM) PART V PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT] 1 PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.

ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY) 2 PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE

DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER) 3 RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD) 4 DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY) 5 THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY) 6 A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY) 7 COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY) 8 LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL, DEBT, THE AMOUNT AND DATE OF DEFAULT

49. Since a Financial Creditor is required to apply under Section 7 of the IBC, in Statutory Form 1, the Financial Creditor can only fill in particulars as specified in the various columns of the Form. There is no scope for elaborate pleadings. An application to the Adjudicating Authority (NCLT) under Section 7 of the IBC, in the prescribed form, cannot therefore, be compared with the plaint in a suit, and cannot be judged by the same standards, as a plaint in a suit, or any other pleadings in a Court of law.

50. Section 7(3) requires a financial creditor making an application under Section 7(1) to furnish records of the default recorded with the information utility or such other record or evidence of default as may be specified; the name of the resolution professional proposed to act as an Interim Resolution Professional and any other information as may be specified by the Insolvency and Bankruptcy Board of India.

51. Section 7(4) of the IBC casts an obligation on the Adjudicating Authority to ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor within fourteen days of the receipt of the application under Section 7. As per the proviso to Section 7(4) of the IBC, inserted by amendment, by Act 26 of 2019, if the Adjudicating Authority has not ascertained the existence of default and passed an order, within the stipulated period of time of fourteen days, it shall record its reasons for not doing so in writing. The application does not lapse for non-compliance of the time schedule. Nor is the Adjudicating Authority obliged to dismiss the application. On the other hand, the application cannot be dismissed, without compliance with the requisites of the Proviso to Section 7(5) of the IBC.

52. Section 7(5)(a) provides that when the Adjudicating Authority is satisfied that a default has occurred, and the application under sub- section (2) of Section 7 is complete and there is no disciplinary proceeding pending against the proposed resolution professional, it may by order admit such application. As per Section 7(5)(b), if the Adjudicating Authority is satisfied that default has not occurred or the application under sub-Section (2) of Section 7 is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application, provided that the Adjudicating Authority shall, before rejecting the application under sub-section (b) of Section 5, give notice to the applicant, to rectify the defects in his application, within 7 days of receipt of such notice from the Adjudicating Authority.

53. The Corporate Insolvency Resolution Process commences on the date of admission of the application under sub-section (5) of Section 7 of the IBC. Section 7(7) casts an obligation on the Adjudicating Authority to communicate an order under clause (a) of sub-section (5) of Section 7 to the Financial Creditor and the Corporate Debtor and to communicate an order under clause (b) of sub-section (5) of Section 7 to the financial creditor within seven days of admission or rejection of such application, as the case may be. Sections 8 and 9 of IBC pertain to Insolvency Resolution by an Operational Creditor and are not attracted in the facts and circumstances of this case. Section 10 pertains to initiation of Corporate Insolvency Resolution Process by the Corporate Debtor itself, and is also not attracted in the facts and circumstances of the case.

54. Section 12(1) of the IBC requires the Corporate Insolvency Process to be completed within a period of 180 days from the date of admission of the application to initiate such process. The period of 180 days is not extendable more than once.

55. The IBC is not just a statute for recovery of debts. It is also not a statute which only prescribes the modalities of liquidation of a corporate body, unable to pay its debts. It is essentially a statute which works towards the revival of a corporate body, unable to pay its debts, by appointment of a Resolution Professional.

56. In Swiss Ribbons Private Limited & Anr. v. Union of India and Ors.4, authored by Nariman, J. this Court observed: -

> 4 (2019) 4 SCC 17 “28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process.

The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

57. IBC has overriding effect over other laws. Section 238 of the IBC provides that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any other instrument, having effect by virtue of such law.

58. Unlike coercive recovery litigation, the Corporate Insolvency Resolution Process under the IBC is not adversarial to the interests of the Corporate Debtor, as observed by this Court in Swiss

Ribbons Private Limited v. Union of India (supra).

59. On the other hand, the IBC is a beneficial legislation for equal treatment of all creditors of the Corporate Debtor, as also the protection of the livelihoods of its employees/workers, by revival of the Corporate Debtor through the entrepreneurial skills of persons other than those in its management, who failed to clear the dues of the Corporate Debtor to its creditors. It only segregates the interests of the Corporate Debtor from those of its promoters/persons in management.

60. Relegation of creditors to the remedy of coercive litigation against the Corporate Debtors could be detrimental to the interests of the Corporate Debtor and its creditors alike. While multiple coercive proceedings against a Corporate Debtor in different forums could impede its commercial/business activities, deplete its cash reserves, dissipate its assets, moveable and immoveable and precipitate its commercial death, such proceedings might not be economically viable for the creditors as well, because of the length of time consumed in the litigations, the expenses of litigation, and the uncertainties of realisation of claims even after ultimate success in the litigation.

61. It is, therefore, imperative that the provisions of the IBC and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute.

62. On a careful reading of the provisions of the IBC and in particular the provisions of Section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules, there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed.

63. The time stipulation of fourteen days in Section 7(4) to ascertain the existence of a default is apparently directory not mandatory. The proviso inserted by amendment with effect from 16 th August 2019 provides that if the Adjudicating Authority has not ascertained the default and passed an order under sub-section (5) of Section 7 of the IBC within the aforesaid time, it shall record its reasons in writing for not doing so. No other penalty is stipulated.

64. Furthermore, the proviso to Section 7(5)(b) of the IBC requires the Adjudicating Authority to give notice to an applicant, to rectify the defect in its application within seven days of receipt of such notice from the Adjudicating Authority, before rejecting its application under Clause (b) of sub-section (5) of Section 7 of the IBC. When the Adjudicating Authority calls upon the applicant to cure some defects, that defect has to be rectified within seven days. However, in the absence of any prescribed penalty in the IBC for inability to cure the defects in an application within seven days from the date of receipt of notice, in an appropriate case, the Adjudicating Authority may accept the cured application, even after expiry of seven days, for the ends of justice.

65. The Insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were already time barred. Thereafter Section 238A was incorporated in the IBC

by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6 th June 2018.

66. Section 238A of the IBC provides as follows:-

> "238A. The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

67. In Sesh Nath Singh & Anr. v. Baidyabati Sheoraphuli Cooperative Bank Ltd.5 , authored by one of us (Indira Banerjee, J.), this Court held:-

> "91. Legislature has in its wisdom chosen not to make the provisions of the Limitation Act verbatim applicable to proceedings in NCLT/NCLAT, but consciously used the words 'as far as may be'. The words 'as far as may be' are not meant to be otiose. Those words are to be understood in the sense in which they best harmonise with the subject matter of the legislation and the object which the Legislature has in view. The Courts would not give an interpretation to those words which would frustrate the purposes of making the Limitation Act applicable to proceedings in the NCLT/NCLAT 'as far as may be'.
>
> xxx xxx xxx
>
> 94. The use of words 'as far as may be', occurring in Section 238A of the IBC tones down the rigour of the words 'shall' in the aforesaid Section which is normally considered as mandatory.

The expression 'as far as may be' is indicative of the fact that all or any of the provisions of the Limitation Act may not apply to proceedings before the Adjudicating Authority (NCLT) or the Appellate authority (NCLAT) if they are patently inconsistent with some provisions of the IBC. At the same time, the words 'as far as may be' cannot be construed as a total exclusion of the requirements of the basic principles of Section 14 of the Limitation Act, but permits a wider, more liberal, contextual and purposive interpretation by necessary modification, which is in harmony with the principles of the said Section."

68. There is no specific period of limitation prescribed in the Limitation Act, 1963, for an application under the IBC, before the 5 2021 SCC Online SC 244 Adjudicating Authority (NCLT). An application for which no period of limitation is provided anywhere else in the Schedule to the Limitation Act, is governed by Article 137 of the Schedule to the said Act. Under Article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply.

69. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default. In Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd.6authored by Nariman, J. this Court held:-

> "6. .....The present case being "an application" which is filed under Section 7, would fall only within the residuary Article
>
> 137."

70. In B. K. Educational Services Private Limited v. Parag Gupta and Associates7, this Court speaking through Nariman, J. held:-

> "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation 6 (2019) 10 SCC 572 7 (2019) 11 SCC 633 Act may be applied to condone the delay in filing such application."

71. In Jignesh Shah v. Union of India8 this Court speaking through Nariman, J. reiterated the proposition that the period of limitation for making an application under Section 7 or 9 of the IBC was three years from the date of accrual of the right to sue, that is, the date of default.

72. In Radha Exports (India) (P) Ltd. v. K.P. Jayaram 9, this Court held:-

> "32. The proposition of law which emerges from Innoventive Industries Ltd. [Innoventive Industries Ltd. v. Icici Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] is that the insolvency resolution process begins when a default takes place. In other words, once a debt or even part thereof becomes due and payable, the resolution process begins. Section 3(11) defines "debt" as a liability or obligation in respect of a claim and the claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of Rs 1,00,000 or more. Once the adjudicating authority is satisfied that a default has occurred, the application must be admitted, unless it is otherwise incomplete and not in accordance with the rules. The judgment is however, not an authority for the proposition that a petition under Section 7 IBC has to be admitted, even if the claim is ex facie barred by limitation.
>
> 33. On the other hand, in B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528] , this Court held : (SCC p. 664, para 42) "42. It is thus clear that since the Limitation Act is applicable to applications filed under

> Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application." 8 (2019) 10 SCC 750 9 (2020) 10 SCC 538 ***
>
> 35. It was for the applicant invoking the corporate insolvency resolution process, to prima facie show the existence in his favour, of a legally recoverable debt. In other words, the respondent had to show that the debt is not barred by limitation, which they failed to do."

73. In Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd.10, relied upon by the Respondents, this Court, speaking through Dinesh Maheshwari, J., reiterated that the period of limitation for an application seeking initiation of CIRP under Section 7 of the IBC, was governed by Article 137 of the Limitation Act, 1963 and was, therefore, three years from the date when the right to apply accrued, i.e., the date when default occurred. In Babulal Vardharji Gurjar (supra), this Court observed and held:-

> "35. Apart from the above and even if it be assumed that the principles relating to acknowledgment as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor do they enure to the benefit of Respondent 2 for the fundamental reason that in the application made before NCLT, Respondent 2 specifically stated the date of default as "8-7-2011 being the date of NPA". It remains indisputable that neither has any other date of default been stated in the application nor has any suggestion about any acknowledgment been made. As noticed, even in Part V of the application, Respondent 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point 8 therein, nothing was at all stated at any place about the so-called acknowledgment or any other date of default.
>
> 35.1. Therefore, on the admitted fact situation of the present case, where only the date of default as "8-7-2011" has been stated for the purpose of maintaining the application under Section 7 of the Code, and not even a foundation is laid in the application for suggesting any acknowledgment or any other date 10 (2020) 15 SCC 1 of default, in our view, the submissions sought to be developed on behalf of Respondent 2 at the later stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite

> evidence is required to be adduced. Indisputably, in the present case, Respondent 2 never came out with any pleading other than stating the date of default as "8-7-2011" in the application. That being the position, no case for extension of period of limitation is available to be examined. In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgment. In this view of the matter, reliance on the decision in Mahabir Cold Storage 11 does not advance the cause of Respondent 2.

***

36. The submissions made on behalf of the respondents that the rules of limitation are not meant to destroy the rights of the parties and reference to the decision in N. Balakrishnan 12 are also misplaced. Application of the rules of limitation to CIRP (by virtue of Section 238-A of the Code read with the above referred consistent decisions of this Court) does not, in any manner, deal with any of the rights of Respondent 2; it only bars recourse to the particular remedy of initiation of CIRP under the Code. Equally, the other submissions made on behalf of the respondents about any stringent application of the law of limitation which was introduced to the Code only after filing of the application by Respondent 2; or about the so-called prejudice likely to be caused to other banks and financial institutions are also of no substance, particularly in the light of the principles laid down and consistently followed by this Court right from the decision in B.K. Educational Services 13. These contentions have only been noted to be rejected. Needless to add that when the application made by Respondent 2 for CIRP is barred by limitation, no proceedings undertaken therein after the order of admission could be of any effect. All such proceedings remain non est and could only be annulled."

74. In Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. & Ors.14 this Court rejected the contention that the default was a continuing wrong and Section 23 of the Limitation Act 1963 would 11 1991 Supp (1) SCC 402 12 (1998) 7 SCC 123 13 (2019) 11 SCC 633 14 (2019) 9 SCC 158 apply, relying upon Balkrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan15.

75. To quote P.B. Gajendragadkar, J. in Balkrishna Savalram Pujari Wagmare (supra):-

> ".....Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be

invoked. ....."

76. There can be no dispute with the proposition of law laid down in Babulal Vardharji Gurjar (supra) that limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. However, as observed above, an application in a statutory form cannot be judged in the manner of a plaint in a suit. Documents filed along with the application, or later, and subsequent affidavits and applications would have to be construed as part of the pleadings.

15 1959 Supp (2) SCR 476

77. The judgment of this Court in Babulal Vardharji Gurjar (supra) was rendered in the facts of the aforesaid case, where the date of default had been mentioned as 8.7.2011 being the date of N.P.A. and it remained undisputed that there had neither been any other date of default stated in the application nor had any suggestion about any acknowledgement been made.

78. In the backdrop of the aforesaid facts, this court observed that even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration, in view of the averments regarding default therein and for want of any other averment with regard to acknowledgment.

79. It is well settled, that a judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. To quote V. Sudhish Pai in "Constitutional Supremacy-A Revisit", "Judicial utterances/pronouncements are in the setting of the facts of a particular case. To interpret words and provisions of a statute it may become necessary for judges to embark upon lengthy discussions, but such discussion is meant to explain not define. Judges interpret statutes, their words are not to be interpreted as statutes." The aforesaid passage was extracted and incorporated as part of the judgment of this Court in Sesh Nath Singh (supra).

80. Babulal Vardharji Gurjar (supra) is not an authority for the proposition that the Books of Accounts of a Corporate Debtor could not be treated as acknowledgement of liability to a Financial Creditor. Nor does the judgment lay down the proposition that any affidavits or documents filed during the pendency of the proceedings cannot be taken into consideration.

81. In Sesh Nath Singh (supra) this Court held that the IBC does not exclude the application of Section 14 or 18 or any other provision of the Limitation Act. There is, therefore, no reason to suppose that Sections 14 or 18 of the Limitation Act do not apply to proceedings under Section 7 or Section 9 of the IBC. In Laxmi Pat Surana v. Union Bank of India16 this Court speaking through Khanwilkar J. held that there was no reason to exclude the effect of Section 18 of the Limitation Act to proceedings initiated under the IBC. In Bishal Jaiswal (supra), this Court, speaking through Nariman J. relied, inter alia, on Sesh Nath Singh (supra) and Laxmi Pat Surana (supra) and held that the question of applicability of Section 18 of the Limitation Act to proceedings under the IBC was no longer res integra.

82. Section 18 of the Limitation Act is set out hereinunder:-

> "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,— 16 (2021) 8 SCC 481

(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 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."

83. As per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired.

84. In Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad Chamaria and Others17, this Court held:-

> "6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must

> appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be 17 AIR 1961 SC 1236 expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement.

In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter."

85. It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Bishal Jaiswal (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Calcutta High Court in Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff ,18 and Pandem Tea Co.19 Ltd., the judgment of the Delhi High Court in South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana20 and the judgment of Karnataka High Court in Hegde Golay Ltd. v. State Bank of India 21 and held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt.

86. In Bengal Silk Mills Co. (supra), the Calcutta High Court held:-

> 18 1961 SCC Cal 128: AIR 1962 Cal 115 19 AIR 1974 Cal 170 20 ILR (1972) 2 Del 712 211985 SCC Kar 290 : ILR 1987 Kar 2673 "9. ..... I am unable to agree with the reasoning of the Nagpur decision that a balance-sheet does not save limitation because it is drawn up under a duty to set out the claims made on the company and not with the intention of acknowledging liability. The balance-sheet contains admissions of liability; the agent of the company who makes and signs it intends to make those admissions. The admissions do not cease to be acknowledgements of liability merely on the ground that they were made in discharge of a statutory duty. I notice that in the Nagpur case the balance-

sheet had been signed by a director and had not been passed either by the Board of Directors or by the company at its annual general meeting and it seems that the actual decision may be distinguished on the ground that the balance-sheet was not made or signed by a duly authorized agent of the company.

***

11. To come under section 19 an acknowledgement of a debt need not be made to the creditor nor need it amount to a promise to pay the debt. In England it has been held that a balance-sheet of a company stating the amount of its indebtedness to the creditor is a sufficient acknowledgement in respect of a specialty debt under section 5 of the Civil Procedure Act, 1833 (3 and 4 Will — 4c. 42), see Re : Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd., [1928] Ch. 836....."

87. In Re Pandem Tea Co. Ltd. (supra), Sabyasachi Mukharji J. held:-

> "Now the question is whether the statements, which are contained in the profits and loss accounts and the assets and liabilities side indicating the liability of the petitioning creditor along with the statement of the Directors made to the shareholders as Directors' report should be read together and if so whether reading these two statements together these amount to an acknowledgement as contemplated under Section 18 of the Limitation Act, 1963, or Section 19 of the Limitation Act, 1908. In my opinion, both these statements have to be read together. The balance-sheet is meant to be presented and passed by the shareholders and is generally accompanied by the Directors' report to the shareholders. Therefore, in understanding the balance-sheets and in explaining the statements in the balance-sheets, the balance- sheets together with the Directors' report must be taken together to find out the true meaning and purport of the statements. Counsel appearing for petitioning creditor contended that under the statute the balance-sheet was a separate document and as such if there was unequivocal acknowledgement on the balance-sheet the statement of the Directors' report should not be taken into consideration. It is true the balance-sheet is a statutory document and perhaps is a separate document but the balance-sheet not confirmed or passed by the shareholders cannot be accepted as correct. Therefore, in order to validate the balance-sheet, it must be duly passed by the shareholders at the appropriate meeting and in order to do so it must be accompanied by a report, if any, made by the Directors. Therefore, even though the balance-sheet may be a separate document these two documents in the facts and circumstances of the case should be read together and should be construed together. It was held by the Supreme Court in the case of L.C. Mills v. Aluminium Corpn. of India Ltd., (1971) 1 SCC 67 : AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgement was founded should relate to a subsisting liability as the section required and it should be made before the expiration of the period prescribed under the Act. It need not, however, amount to a promise to pay for an acknowledgement did not create a new right of action but merely extended the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question must, however, relate to a present subsisting liability and indicate the existence of a jural relationship between the parties such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not, however, be in express terms and could be inferred by

> implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course did not mean that where a statement was made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. In order to find out the intention of the document by which acknowledgement was to be construed the document as a whole must be read and the intention of the parties must be found out from the total effect of the document read as a whole. ..."

88. In South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana (supra), the Delhi High Court observed:-

> "46. Shri Rameshwar Dial argued that statements in the balance-sheet of a company cannot amount to acknowledgement of liability because the balance-sheet is made under compulsion of the provisions in the Companies Act.
>
> There is no force in this argument. In the first place, section 18 of the Limitation Act, 1963, requires only that the acknowledgement of liability must have been made in writing, but it does not prescribe that the writing should be in any particular kind of document. So, the fact that the writing is contained in a balance-sheet is immaterial. In the second place, it is true that section 131 of the Companies Act, 1913 (section 210 of the Companies Act, 1956) makes it compulsory that an annual balance sheet should be prepared and placed before the Company by the Directors, and section 132 (section 211 of the Companies Act, 1956) requires that the balance-sheet should contain a summary, inter alia, of the current liabilities of the company. But, as pointed out by Bachawat J. in Bengal Silk Mills v. Ismail Golam Hossain Ariff, AIR 1962 Cal 115 although there was statutory compulsion to prepare the annual balance-

sheet, there was no compulsion to make any particular admission, and a document is not taken out of the purview of section 18 of the Indian Limitation Act, 1963 (section 19 of the Indian Limitation Act, 1908) merely on the ground that it is prepared under compulsion of law or in discharge of statutory duty. Reference may also be made to the decisions in Raja of Vizianagram v. Vizianagram Mining Co. Ltd., AIR 1952 Mad 136, Jones v. Bellgrove Properties Ltd., (1949) 1 All ER 498; and Lahore Enamelling and Stamping Co. v. A.K. Bhalla, AIR 1958 Punj 341, in which statements in balance-sheets of companies were held to amount to acknowledgements of liability of the companies.

47. Shri Rameshwar Dial referred to the decision of the Privy Council in Consolidated Agencies Ltd. v. Bertram Ltd., (1964) 3 All ER 282. We shall advert to this decision presently when we deal with another argument of Shri Rameshwar Dial, and it is sufficient to state so far as the argument under consideration is concerned that even in this decision of the Privy Council it has been recognised that balance-sheets could in certain circumstances amount to acknowledgements of liability. It cannot, therefore, be said as a general proposition of law that statements in balance-sheets of a company

cannot operate at all as acknowledgements of liability as contended by Shri Rameshwar Dial."

89. In Hegde & Golay Limited v. State Bank of India (supra) the Karnataka High Court held:

> "43. The acknowledgement of liability contained in the balance- sheet of a company furnishes a fresh starting point of limitation. It is not necessary, as the law stands in India, that the acknowledgement should be addressed and communicated to the creditor."

90. In Reliance Asset Reconstruction Co. Ltd. v. Hotel Poonja International Pvt. Ltd.22, the Appellant had relied on two documents in the Paper Book, that is, (i) the Balance Sheet of the Corporate Debtor dated 16th August, 2017 and (ii) a letter dated 23 rd April, 2019 issued by the Corporate Debtor to contend that the proceedings under Section 7 of the IBC were not barred by limitation, as limitation would start running afresh for a period of three years from the respective dates of those documents in acknowledgment of liability.

91. This Court, however, did not accept the balance sheet dated 16 th August, 2017 and the letter dated 23 rd April, 2019 in the special facts and circumstances of the case where it could not be ascertained if the documents had been signed before the expiry of the prescribed period of limitation. This Court also found that the two documents could not be construed as admission that amounted to acknowledgement of the jural relationship and the existence of liability, since the balance sheet dated 16th August, 2017 did not acknowledge or admit any liability. Rather the Corporate Debtor had disputed and denied its liability. Similarly, the letter dated 23rd April, 2019 was also found not be an acknowledgment or admission of liability. On the other hand, the language of the letter made it absolutely clear that the liability had in fact been denied.

92. Significantly, in Reliance Asset Reconstruction (supra), the loan had been sanctioned by Vijaya Bank in May 1986. The loan

22. 2021 SCC Online SC 289 amount was declared NPA on 1 st April 1993, an original application moved under the Debt Recovery Act was compromised in 2001 and the DRT had issued a Recovery Certificate in May 2003. Vijaya Bank assigned its Reliance Asset Reconstruction in May 2011 after which amended Recovery Certificate was issued in December 2012. The petition under Section 7 of the IBC was, however filed on 27 th July 2018.

93. Section 18 of the Limitation Act speaks of an Acknowledgment in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgment is undated, evidence might be given of the time when it was signed. The explanation clarifies that an acknowledgment may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent.

94. In Lakshmirattan Cotton Mills Co. Ltd. v. Aluminium Corpn. of India Ltd.23, this Court held:-

> "8. Section 19(1) of the Limitation Act, 1908, provides that where, before the expiration of the period prescribed for a suit 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, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The expression 'signed' here means not only signed personally by such a party, but also by an agent duly authorised in that behalf. Explanation 1 to the section then 23 (1971) 1 SCC 67 provides that an acknowledgment would be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment has not yet come, or is accompanied by a refusal to pay or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right. The new Act of 1963, contains in Section 18 substantially similar provisions.
>
> 9. It is clear that the statement on which the plea of acknowledgment is founded must relate to a subsisting liability as the section requires that it must be made before the expiration of the period prescribed under the Act. It need not, however, amount to a promise to pay, for, an acknowledgment does not create a new right of action but merely extends the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question, however, must relate to a present subsisting liability and indicate the existence of jural relationship between the parties, such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not be in express terms and can be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given.

That of course does not mean that where a statement is made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. (See Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad Chamaria [1962 (1) SCR 140] and Tilak Ram v. Nathu [AIR 1967 SC 935 at 938, 939]). As Fry, L.J., Green v. Humphreys [(1884) 26 Ch D 474 at 481] said "an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received but it is not enough that he refers to a debt as being due from somebody. In order to take the case out of the statute there must upon the fair construction of the letter, read in the light of the surrounding circumstances, be an admission that the writer owes the debt". As already stated, the person making the acknowledgment can be both the debtor himself as also a person duly authorised by him to make the admission. In Khan Bahadur Shapoor Fredoom Mazda case the Court accepted a statement in a letter by a mortgagor to a second mortgagee to save the mortgaged property from being sold away at a cheap price at the instance of the prior mortgagee by himself purchasing it as one amounting to an admission of the jural relationship of a mortgagor and mortgagee, and therefore, to an acknowledgment within Section 19. Also, an agreement of reference to arbitration containing an unqualified admission that whoever on account should be proved to be the debtor would pay to the other has been held to amount to an

acknowledgment. Such an admission is not subject to the condition that before the agreement should operate as an acknowledgment, the liability must be ascertained by the arbitrator. The acknowledgment operates whether the arbitrator acts or not. (See Tejpal Saraogi v. Lallanjee Jain [CA No. 766 of 1962, decided on February, 8, 1965], approving Abdul Rahim Oosman & Co. v. Ojamshee Prushottamdas & Co. [1928 ILR 56 Cal 639]."

95. In Jignesh Shah and Another v. Union of India (supra), this Court relied upon a judgment of the Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited24, and held in effect that an application under Section 7 or 9 of the IBC may be time barred, even though some other recovery proceedings might have been instituted earlier, well within the period of limitation, in respect of the same debt. However, it would be a different matter, if the applicant had approached the Adjudicating Authority after obtaining a final order and/or decree in the recovery proceedings, if the decree remained unsatisfied. This Court held that a decree and/or final adjudication would give rise to a fresh period of limitation for initiation of the Corporate Insolvency Resolution Process.

96. In Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddy and Another25, this Court held:-

> "138. While it is true that default in payment of a debt triggers the right to initiate the corporate resolution process, and a petition under Section 7 or 9 IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three
>
> 24. (1999) SCC Online Pat 1196 25 (2021) 10 SCC 330 years from the date of default by virtue of Section 238-A IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Sections 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.
>
> 139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of one-time settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572 : (2020) 1 SCC (Civ) 1] cited by Mr Shivshankar, this Court had no occasion to consider any proposal for one-time settlement. Be that as it may, the balance sheets and financial statements of the corporate debtor for 2016-2017, as observed above, constitute acknowledgment of liability which extended the limitation by three years, apart from the fact that a certificate of recovery was issued in favour of the appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21-3-2019 [Dena Bank v. Kavveri Telecom Infrastructure Ltd., 2019 SCC OnLine NCLT 7881] .
>
> 140. To sum up, in our considered opinion an application under Section 7 IBC would not be barred by limitation, on the ground that it had been filed beyond a period of

> three years from the date of declaration of the loan account of the corporate debtor as NPA, if there were an acknowledgment of the debt by the corporate debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

142. There is no bar in law to the amendment of pleadings in an application under Section 7 IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 IBC in Form 1. In the absence of any express provision which either prohibits or sets a time-limit for filing of additional documents, it cannot be said that the adjudicating authority committed any illegality or error in permitting the appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the adjudicating authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the adjudicating authority to entertain and/or to allow the request of the appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal."

97. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

98. In this case, the amount of the Corporate Debtor was declared NPA on 1st December 2008. By a letter dated 7th February, 2011, written well within three years, the Corporate Debtor acknowledged its liability and proposed a settlement. This was followed by several requests of extension of time to make payment and revised settlements. On 6th April, 2013, the Corporate Debtor sought extension of time to pay Rs.239,88,27,673 outstanding as on 31 st March 2013. On 19th April, 2013, the Corporate Debtor made payment of Rs.17,50,00,000/-. On 1st July, 2013, the Corporate Debtor acknowledged its liability – this was after the Appellant Financial Creditor revoked the settlement invoking the default clause. The Corporate Debtor acknowledged its liabilities in its financial statements from 2008-09 till 2016-17. The application under Section 7(2) of the IBC was filed on 3 rd April 2018, well within the extended period of limitation.

99. For the reasons discussed above, the impugned judgment and order is unsustainable in law and facts. The appeals are, accordingly allowed, and the impugned judgment and order of the NCLAT is set aside.

.....,J.

[INDIRA BANERJEE] .....,J [J.K. MAHESHWARI] NEW DELHI;

AUGUST 01, 2022