

## **B. Prashanth Hegde vs State Bank Of India & Anr on 17 December, 2021**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 68 of 2019  
&  
I.A. No. 1078 of 2021

IN THE MATTER OF:

B. Prashanth Hegde Suspended Managing Director, Metal Closures Pvt. Ltd. S/o Late Rathnakar Hegde, R/o No. 261, Indira Nagar, Bangalore-560038.	...Appellant
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Versus

State Bank of India Stressed Assets Management Branch, 2nd Floor, LH0 Campus, No. 65, St. Mark's Road, Bangalore - 560001.	...Respondent No. 1
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M/s. Metal Closure Pvt. Ltd. Through Mr. Abhishek Nagori, IRP No. 39/4-B, 12th KM, Kanakpura Main Road, Bangalore-560062/	...Respondent No. 2
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Present:

For Appellant:	Mr. Rana Mukherjee, Sr. Advocate with Mr. Pranjal Kishore, Advocate
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For Respondent:	Mr. Krishnan Venugopal, Sr. Adv. with Mr. Sanjay Kapur, Mr. V M Kannan, Ms. Shubhra Kapur and Mr. Arjun Bhatia, Advocates for Respondent No. 1- SBI. Mr. Mukund P. Unny, Advocate for Respondent No. 2 - RP.
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Company Appeal(AT) (Ins) No. 68 of 2019  
&  
I.A. No. 1078 of 2021

JUDGMENT

(Date:17.12.2021) (Through Virtual Mode) {Per. Dr. Alok Srivastava, Member (Technical)}

1. This appeal has been filed against order dated 14.12.2018 of the Adjudicating Authority (National Company Law Tribunal, Bengaluru) in CP (IB) No. 103/BB/2018, by which the Appellant has assailed the order of admission under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "IBC") in respect of the Corporate Debtor M/s Metal Closure Private Ltd.

2. The Appellant had earlier filed appeal bearing CA (AT) (Ins) No. 68/2019 in NCLAT against the admission order passed by the Adjudicating Authority dated 14.12.2018, which was allowed vide judgment dated 14.12.2020 of NCLAT. Thereafter, SBI (Respondent No.1) filed Civil Appeal No. 3765/2021 in Hon ble Supreme Court, which was disposed vide order dated 15.4.2021. Relevant paragraphs no. 6, 7 and 8 of this order of Hon ble Supreme Court are reproduced below for ready reference:-

"6. There can be no doubt whatsoever that the Appellant has been completely remiss and deficient in pleading acknowledgment of the liabilities on the facts of Company Appeal(AT) (Ins) No. 68 of 2019 & this case. However, given the staggering amount allegedly due from the Respondents, we offer one further opportunity to the Appellant to amend its pleadings so as to incorporate what is stated in the written submissions filed by it before the NCLAT, subject to costs of Rs.1,00,000.00 to be paid by the Appellant to the Respondent within a period of four weeks from today.

7. We, therefore, allow the appeal, set aside the judgment of the NCLAT dated 14.10.2020, and restore the appeal to the filing to be decided in light of judgment on Civil Appeal No. 323 of 2021.

8. Interim Order passed by this Court on 16.12.2020 stand vacated."

3. Thus, in the light of the above-mentioned order, Hon ble Supreme Court afforded one further opportunity to the Appellant to amend its pleadings, to incorporate what is stated in the written submissions filed by it before NCLAT, subject to the payment of Rs. 1,00,000/- by the Respondent No. 1 - State Bank of India (in short "SBI") to the Appellant who is the Corporate Debtor within four weeks from the date of the order, thereby setting aside the order passed by NCLAT in CA No. 68 of 2019 and restoring the appeal to its original number.

4. A cross appeal to Civil Appeal No. 3765 of 2021 bearing Civil Appeal No. 3741 of 2020 was also filed in the Hon ble Supreme Court, was also disposed of by the composite judgment of 15.4.2021. The relevant portion of the order of Company Appeal(AT) (Ins) No. 68 of 2019 & Hon ble Supreme Court is reproduced below:-

"Since the NCLAT has not, in any manner, adverted to this cross appeal, which was pending before it, we request the NCLAT to take up the cross appeal together with the

remanded appeal of State Bank of India. As a result, we also make it clear that all pleas available to both the parties including maintainability may be gone into by NCLAT."

5. In compliance of Hon ble Supreme Court s order in CA no. 3765 of 2021, the Appellant filed amended section 7 application before this Tribunal, which was annexed with IA No. 1091 of 2021.

6. The brief facts of the case as stated and argued by the Appellant is that a section 7 application under IBC was filed against the Corporate Debtor by one of the financial creditors State Bank of India. The Corporate Debtor is engaged in production of metal crown caps, shoe polish containers, composite closure battery covers, plastic torches etc. and it was granted various credit facilities by a consortium of banks consisting of State Bank of India, Punjab National Bank, Corporation Bank and UCO Bank. These credit facilities were secured in favour of financial creditors by way of hypothecation of all its movable and mortgage of other immovable properties. Company Appeal(AT) (Ins) No. 68 of 2019 &

7. It is claimed by the Appellant that SBI granted credit facility to Corporate Debtor from 2007 onwards, and as on 21.11.2008, State Bank of India had granted credit of Rs. 91.08 crores to the Corporate Debtor. An additional Term Loan-II Facility of Rs. 26 crores was sanctioned to the Corporate Debtor vide SBI s sanction letter dated 28.5.2009. Corporation Bank granted credit facility of Rs. 43.73 crores vide sanction letter dated 14.8.2009, and subsequently two more banks, viz. Punjab National Bank and UCO Bank also gave credit facility to the Corporate Debtor as part of bank consortium. Since the Corporate Debtor did not repay its loans to the creditor banks on time, the respective banks declared the loan accounts of Corporate Debtor NPA as follows: SBI classified it as NPA on 31.1.2010, Punjab National Bank (PNB in short) on 30.6.2014, Corporation Bank on 10.10.2014 and UCO Bank on 31.12.2014.

8. It is stated by the Appellant that later, State Bank of India executed Working Capital Consortium Agreements whereby the Corporate Debtor was sanctioned credit up to Rs.121.66 crores. Later PNB also joined the Working Capital Consortium Agreement and sanctioned working capital credit to the Corporate Debtor of an amount Rs. 43.07 crores. Thus, UCO Company Appeal(AT) (Ins) No. 68 of 2019 & Bank, Punjab National Bank, Corporation Bank and State Bank of India s total exposure to the Corporate Debtor aggregated to Rs.160.25 crores which included the credit disbursed before 2010. A capital consortium agreement dated 18.4.2013 was entered into by the Corporate Debtor with the consortium of banks aggregating to Rs. 128 crores. Another Working Capital Consortium Agreement dated 21.3.2014, executed by the Corporate Debtor in favour of the consortium of banks, in continuation of an earlier Working Capital Consortium Agreement dated 18.4.2013,acknowledged sanction of working capital credit by State Bank of India. The breakup of the total credit granted by the banks to Corporate Debtor is as follows:-

State Bank of India:	Rs. 56.12 crores
Corporation Bank :	Rs. 32.00 crores

Punjab National Bank: Rs. 36.70 crores UCO Bank: Rs. 15.00 crores Total:- Rs.139.82 crores

9. It is stated by the Respondent No. 1 SBI that as the Corporate Debtor was unable to regularize and repay the loans to all the banks in the consortium, the banks entered into a Master Joint Lenders Forum Agreement dated 21.6.2014 to deal with the loan account of the Corporate Debtor in accordance Company Appeal(AT) (Ins) No. 68 of 2019 & with RBI norms. Thereafter a number of meetings took place between the officials of the Corporate Debtor and SBI resulting in appointment of Auditors to oversee payments and deployment of security guards at the Corporate Debtor's factories. Soon after, State Bank of India and Punjab National Bank started action against the Corporate Debtor under SARFAESI Act. Further, the consortium of banks filed OA No. 21/2016 in DRT seeking recovery of a sum of Rs.200,07,06,237.21 (approx. Rs. 200.07 crores) as on 27.12.2015, from the Corporate Debtor and its guarantors. Forensic audit of CD's loan account was carried out by M/s. Risk Richter at the instance of SBI and upon the discovery of fraudulent transactions, which appeared in the Forensic Audit Report, complaint was lodged with the CBI against the Corporate Debtor. Mr. Prashanth Hegde, Managing Director of the Corporate Debtor was also declared as a willful defaulter by the State Bank of India in 2018.

10. The Appellant has further stated that the first possession notice dated 20.2.2015 issued by State Bank of India under section 13 (2) of the SARFAESI Act, 2002 for Bengaluru unit was subsequently withdrawn vide letter dated 7.7.2015 by SBI without stating any reason. Later a second possession notice Company Appeal(AT) (Ins) No. 68 of 2019 & dated 15.9.2015 was issued by SBI under section 13(2) of the SARFAESI Act, 2002. Possession notices were also issued by SBI under SARFAESI Act for Kunigal and H.P. units of the Corporate Debtor on 28.2.2015.

11. In view of the debts that were due to the banks, an application under section 7 of IBC was filed by SBI against the Corporate Debtor, which was admitted vide order dated 14.12.2018 and a Resolution Professional was appointed with respect to the Corporate Debtor.

12. Respondent No.1 State Bank of India has filed IA No. 2590 of 2021(vide Dy. No. 31183 dated 12.11.2021)in the present proceedings to place the following additional documents on record, for which permission was given:-

(i) Copy of application under section 17 of the SARFAESI Act being S.A. No. 67 of 2017 filed by the Corporate Debtor before the DRT, Bangalore.

(ii) Copy of daily order dated 12.03.2020 in Criminal Petition No. 6885 of 2018 passed by the Hon'ble Karnataka High Court along with Criminal Petition No. 6885 of 2018.

Company Appeal(AT) (Ins) No. 68 of 2019 &

(iii) Copy of the Order dated 30.10.2019 - Case status passed by Hon'ble Karnataka High Court in Criminal Petition No. 4576 of 2019.

(iv) Copies of authority letters from banks along with consent letters authorizing State Bank of India to take action under IBC on behalf of the three other banks, viz. PNB, Corporation Bank and UCO Bank.

13. Respondent No. 1 filed application for incorporating amendment to its section 7 application before Adjudicating Authority (NCLT, Bengaluru) and a copy of the amended application was filed before NCLAT. This Tribunal after considering the response of the Appellant's application I.A. No. 1091 of 2021 allowed it vide order dated 15.7.2021:-

"In the circumstances, IA No. 1091 of 2021 is allowed. Amendment in the pleadings is accepted in term of the Supreme Court order. Reply, if any, may be filed within 7 days from today, with a copy in advance to the opposite party. After that a rejoinder, if any, may be filed within 7 days with a copy to the opposite party."

14. In the amended application under section 7 filed by SBI on behalf of the banks consortium, Part-IV which relates to particulars of financial debt is as follows:-

Company Appeal(AT) (Ins) No. 68 of 2019 & Company Appeal(AT) (Ins) No. 68 of 2019 & Company Appeal(AT) (Ins) No. 68 of 2019 & Company Appeal(AT) (Ins) No. 68 of 2019 & Company Appeal(AT) (Ins) No. 68 of 2019 & Company Appeal(AT) (Ins) No. 68 of 2019 &

15. In the application seeking permission to amend application filed under section 7 of IBC before the Hon'ble Supreme Court, Respondent No. 1 has stated the following:-

"The cause of action/date of default would start on 28.05.2014, 30.06.2014, 10.10.2014 and 31.12. 2014 when the accounts were declared NPA by SBI, PNB, Corporation Bank, UCO Bank respectively and would get extended on 30.09.2015 when the Corporate Debtor admitted the dues of the Banks in the Balance Sheets for the years ending 31.03.2014 and 31.03.2015 and also get further extended on 13.11.2015 when the Corporate Debtor issued reply to the 13(2) notice issued by the Banks and admitted the debts as also on 09.08.2018 when the Corporate Debtor filed a counter claim against the Banks admitting the dues of the Banks.

(i) The present application u/s 7 was filed on 25.04.2018, which was well within the period of limitation in as much as the Corporate Debtor has acknowledged / admitted the debts of the Banks in the balance sheets dated 30.09.2015 for the years ending 31.03.2014 and 31.03.2015. The amount borrowed from the Financial Creditors is shown in the balance sheets and it amounts to acknowledgment and a fresh period of limitation would start from the said date viz. 30.09.2015 -

annexed as ANNEXURE C1.

(ii) Further, in the counter claim filed by the Corporate Debtor on 09.08.2018 before the DRT, Bangalore, there is an acknowledgment made by the Corporate Debtor as under:-

(iii) "It may not be out of place if it is mentioned that the only term loan outstanding of SBI was due for full Company Appeal(AT) (Ins) No. 68 of 2019 & repayment and closure in mid-2016 and the account has been serviced properly as per schedule."

(iv) Copy of the counter claim filed by the CD is Annexure C2.

(v) Apart from this, the Corporate Debtor in their reply dated 13.11.2015 to the notice issued under section 13 (2) of SARFAESI Act has admitted the dues of the Financial Creditors - annex as ANNEXURE C3.

(vi) It is submitted that while originally the account of the CD was classified as NA on 21.01.2010, it is undisputed that thereafter there were attempts to restructure the account of the CD as a result of which many subsequent consortium agreements were executed between SBI, PNB, Corporation Bank, UCO Bank and the CD where under the CD, in unequivocal terms, admitted its liability to the above mentioned Banks. Due to failure of the CD to repay the debts in accordance with the said Agreements, the account of the CD turned NPA with SBI on 28.05.2014 and the date of NPA was shifted to 31.01.2010 in view of failed restructuring and for the purpose of provisioning as per RBI Circular. As per the RBI Master Circular dated July 1, 2013, if the performance of the restructured account is not satisfactory - "the asset classification of the restructured account would be governed as per the applicable prudential norms with reference to the pre-restructuring payment schedule". Therefore, the date of NPA being 31.01.2010 is only for the purposes of the RBI guidelines - annexed as Annexure C4.

(vii) It is submitted that Rule 155 of the National Company Law tribunal rules, 2016 gives ample power to amend for the purpose of determining the real question or issue, - the rules are annexed as ANNEXURE C5."

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16. Respondent No. 1 has filed its reply to the original appeal CA (AT) (Ins.) No. 68 of 2019 after effecting amendment of section 7 application, which was filed vide Dy. No. 28064 on 13.07.2021. In its reply, Respondent No. 1 has sought leave of this Tribunal to treat the contents of the amendment application under section 7 of the IBC as part and parcel of its counter affidavit in CA (AT) (Ins) No. 68 of 2019 which is granted. Furthermore, Respondent No. 1 has submitted that the cause of action, which is the date of default, would start on 28.5.2014, 30.6.2014, 10.10.2014 and 31.12.2014 when the restricting of debts owed to the four banks failed.

17. Respondent No. 1 has also submitted in the reply that the limitation period would get an extension of limitation on 30.9.2015 in view of the acknowledgment of debt made by the Corporate Debtor in the balance sheets of the Corporate Debtor for the years ending 31.3.2014 and 31.3.2015, both being filed on 30.9.2015 (attached at pp. 98-135 of Written Submissions and Convenience

Compilation filed by Respondent No. 1, Vol. I). Furthermore, the limitation period in terms of section 18 of the Limitation Act would get a further extension on 13.11.2015, when in reply to the section 13(2) notice under SARFAESI Company Appeal(AT) (Ins) No. 68 of 2019 & Act(attached at pp. 147-173 of Written Submissions and Convenience Compilation of Appellant, Vol. I), the Corporate Debtor acknowledged the debt and also acknowledged it later in its counter-claim filed before the DRT on 9.8.2018 (attached at pp. 174-211 of Written Submissions and Convenience Compilation of Appellant, Vol. I). According to Respondent No. 1 State Bank of India, the section 7 application was filed on 25.4.2018 which is within three years from the date of last acknowledgment on 13.11.2015, and therefore well within the period of limitation as prescribed under section 18 of the Limitation Act.

18. Respondent No. 1 State Bank of India has also submitted statement of accounts of the respective banks for the period 20.7.2015 to 14.12.2017 with Annexures in support of entries in bankers books. These documents have been submitted alongwith verified affidavit in support of application under section 7 of IBC given by Respondent No. 1.

19. During the currency of the appeal, we heard the arguments of both the parties on 15.7.2021 regarding the amendment in application u/s 7 of IBC, and thereafter allowed Company Appeal(AT) (Ins) No. 68 of 2019 & filing of the amendment in the pleadings in accordance with the order of the Hon ble Supreme Court in Civil Appeal No. 3765 of 2021.

20. We also heard arguments on the main appeal advanced by the Learned Senior Counsels for Appellant and Respondent No. 1 and carefully considered the pleadings, including amended pleadings submitted by Appellant and Respondent No.

1.

21. The Learned Senior Counsel for Appellant has argued that the application of Respondent No.1 under section 7 ought to be dismissed because it was vitiated by fraud, malice and suppression of material facts and in accordance with section 35 and 75 of IBC, the issue of maintainability of section 7 application should be decided first before going into its merits. He has claimed that the IBC proceedings have been initiated by Respondent No. 1 not to resolve any insolvency of the Corporate Debtor, but with the intention of overcoming various proceedings initiated by the Corporate Debtor against the consortium of banks. In this regard, he has referred to FIRs filed by the Appellant against various officials of the banks which were investigated by CID (Economic Offences Wing), Company Appeal(AT) (Ins) No. 68 of 2019 & Bengaluru, and which have culminated into charge-sheets under various provisions of IPC. He has claimed that the numerous illegalities committed by the officials of the consortium banks include forging of cheques with Appellant's signatures, forging statements of accounts, siphoning of money, sale of machinery in the open market, unauthorized RTGS payments and forging of bills of lading for making unauthorized payments etc. He has also claimed that there are findings recorded in the charge-sheet dated 5.5.2018 that the officials of Respondent No. 1 State Bank of India had invoked SARFAESI Act proceedings with the view to shut down the operations of the Corporate Debtor, and by taking over possession of the company as well as placing security personnel at its various factories, Respondent

No. 1 has made efforts to close down its manufacturing units thereby causing harm to its business. He has further referred to various illegalities pointed out in the charge-sheet dated 5.5.2018 in FIR No. 580/2016 and charge- sheet no. 25 of 2018 in FIR No. 486/2015 to expand on the various illegalities and criminal acts of the officials of Respondent No. 1.

22. The Learned Senior Counsel for Appellant has further claimed that in the application filed by State Bank of India Company Appeal(AT) (Ins) No. 68 of 2019 & under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 on 28.12.2015 before the DRT, Bangalore seeking to recover a sum of Rs. 200,07,06,237.21 from the Corporate Debtor, the Corporate Debtor had filed a counter- claim seeking Rs.1299 crores from State Bank of India. The Corporate Debtor has also filed an application under section 17 of the SARFAESI Act seeking quashing of the taking over the physical possession of the plants and appointment of concurrent auditor, and also filed an application under section 9 of the SARFAESI Act, seeking further cost and compensation of Rs. 410crores. He has claimed that the banks have availed, and continue to pursue parallel remedies in DRT under the SARFAESI and RDDB Act and also under IBC -all for the same cause of action. He has cited the judgment of NCLAT in the case of Indian Overseas Bank vs. Patel Woods Products Limited, CA (AT) (Ins) No. 54/2020 wherein it was held that a section 7 application, filed after taking possession of the assets under SARFAESI Act, 2002 and after having moved the DRT, was vitiated by section 65 of IBC. He has also cited the judgment of Hon ble Supreme Court in the matter of Invent Assets Securitization and Reconstruction Private Limited vs. Xylon Electrotechnic Private Limited, Civil Appeal No. 3783 of 2020 wherein in view of recovery proceedings pending before Company Appeal(AT) (Ins) No. 68 of 2019 & the DRT, Hon ble Supreme Court dismissed the application under section 7 that was barred by limitation, after taking note of the pendency of recovery proceedings.

23. The Learned Senior Counsel for Appellant has further argued that section 7 application was filed with an incomplete form with deliberate suppression of the date of default, and a specific date of default has not been identified even after filing of amended pleadings by the Respondent No. 1 after being permitted by Hon ble Supreme Court. He has argued that the date of NPA cannot be automatically taken as date of default in all cases, as has been recognized by Hon ble Supreme Court in the matter of Laxmi Pat Surana vs. Union of India & Ors. (2021 SCC online SC 267) where it was held that section 7 comes into play when the Corporate Debtor commits default and section 7 consciously uses the expression „default , and not the date of notifying the loan account of the corporate debtor as NPA.

24. In addition, Learned Senior Counsel for Appellant has also presented the following arguments:-

Company Appeal(AT) (Ins) No. 68 of 2019 &

(i) The application filed by the Financial Creditor is incomplete because under section 7 (2) of the IBC, it is mandatory for the Financial Creditor to file an application only in the form and manner prescribed and under section 7(3)(a). Further, the Financial Creditor has to furnish record of default recorded with the information utility of such other record or evidence of the default as many be specified which has not been done



by the Financial Creditor.

(ii) The balance sheet that the Financial Creditor is seeking to rely on were filed after the final hearing of the matter during the earlier round of proceedings and the Financial Creditor did not disclose at that time that these were not the audited balance sheets of the Corporate Debtor, which had not been filed with the RoC. The Auditor's Reports, which were filed belatedly, along with the balance sheets contained a qualification that the debts allegedly due to State Bank of India are disputed and that the Corporate Debtor's counterclaim before the DRT exceeds the claim of SBI.

(iii) The balance sheets that have been filed in these proceedings are not the actual balance-sheets of the Company Appeal(AT) (Ins) No. 68 of 2019 & Corporate Debtor. These are the provisional balance sheets which were filed before DRT and the comparison of the original balance sheets brought on record by the Corporate Debtor with the balance sheet for the year ending 31.3.2013 filed by the Financial Creditor clearly establish that the documents filed by the Financial Creditor are manipulated.

(iv) Hon'ble NCLAT in its judgment dated 14.10.2020 in CA (AT) (Ins) No. 68 of 2019 had held that the limitation would start running from the date of default i.e. 30.1.2010. This finding has not been interfered with by the Hon'ble Supreme Court.

Thus the limitation of 3 years to file an application under section 7 expired on 30.1.2013. Even assuming that the balance sheets and other documents relied on are authentic and do contain acknowledgements, these acknowledgements have purportedly been made well after the expiry of limitation period on 30.1.2013

(v) The statutory auditor of the Corporate Debtor has, through an affidavit, certified that the balance sheets of the Corporate Debtor for the financial Company Appeal(AT) (Ins) No. 68 of 2019 & years 2013-14 and 2014-15 produced by the Financial Creditor before the Hon'ble Supreme Court and Hon'ble NCLAT are fabricated and forged. Further, only such balance sheets that are duly passed by the shareholders at an appropriate meeting can be relied upon for the purpose of section 18 of the Limitation Act.

(vi) In order to extend limitation, the balance sheet must contain a clear acknowledgement of liability. A balance sheet containing a qualification to the alleged debt does not extend limitation as has been held in the matter of Bengal Silk Mills Company vs. Ismail Golam Hussain Ariff, (1961 SCC Online CAL 128), Reliance Asset Reconstruction Company Limited vs. Hotel Poonja International Private Limited (2021 SCC Online SC 289), and ARCIL vs. Bishal Jaiswal (2021 SCC Online SC

321).

(vii) Far from being acknowledgement of debt, the reply dated 13.11.2015 of the Corporate Debtor submitted before DRT is a document in which a demand of about Rs. 1500 crores has been made by

the Corporate Debtor. The reply makes a Company Appeal(AT) (Ins) No. 68 of 2019 & categorical statement that there is no amount due to the bank. Therefore, on reading the document as a whole, it cannot be relied upon as an acknowledgement of liability.

(viii) The counter claim was filed by the Corporate Debtor on 9.8.2018, which is after the filing of the section 7 Application on 25.4.2018. Therefore, the filing of counter claim is a subsequent event and any admission included in it cannot be taken to extend limitation for the application under IBC that was filed at an early date.

25. The Learned Counsel for Appellant has also cited the following judgments in support of his case:-

(1) Swiss Ribbons (P) Ltd. vs. Union of India [(2019) 4 SCC 17].

(2) Innoventive Industries Ltd. v ICICI Bank [(2018) 1 SCC].

(3) B.K. Educational Services (P) Ltd. v Parag Gupta & Associates [(2019) 11 SCC 633].

(4) Bengal Silk Mills co. V. Ismail Golam Hossain Ariff (1961 SCC Online Cal 128).

Company Appeal(AT) (Ins) No. 68 of 2019 & (5) Reliance Asset Reconstruction Co. Ltd. v. Hotel Poonja International Pvt. Ltd. (2021 SCC Online SC

289.) (6) Pandam Tea Co. Ltd. v. Unknown [1973 SCC Online Cal 93]

26. Arguments of Learned Senior Counsel for Respondent No. 1 (State Bank of India on behalf of the Consortium of Banks

(i) In Civil Appeal No. 323 of 2021 vide judgment dated 15.4.2021 Hon ble Supreme Court has held that acknowledgments in balance sheet would extend the period of limitation under section 18 of the Limitation Act in connection with an application under section 7 of IBC.

(ii) Consequently, Respondent No. 1 has filed IA No. 1091 of 2021, placing on record an amended application under section 7, for consideration in terms of the judgment of Hon ble Supreme Court dated 15.4.2021 (supra). The amended application under section 7 has been taken on record by order dated 15.7.2021 passed by Hon ble NCLAT. Company Appeal(AT) (Ins) No. 68 of 2019 &

(iii) The starting dates of cause of action i.e. right to apply in respect of each financial creditor (member of the consortium of banks) which are relevant for the purpose of counting limitation are as follows: -

(a) State Bank of India - 28.05.2014

(b) Punjab National Bank (PNB) - 30.06.2014

(c) Corporation Bank - 10.10.2014

(d) UCO Bank - 31.12.2014

The above dates have been taken as such because the Corporate Debtor and the banks of consortium took actions relating to restructuring of loans between 2010 and 2014. Even though the restructuring efforts failed and the dates of NPA with reference to RBI Master Circular dated July 1, 2013 (attached at pp. 166-167 of Written Submissions and Convenience Compilation of Respondent No. 1, Vol. I) were moved back to 2010, all through the period from 2010 upto 2014 there was a clear and explicit acknowledgment of the previous debts of the Corporate Debtor and hence Company Appeal(AT) (Ins) No. 68 of 2019 & the cause of action for section 7 application arose on the dates given earlier in this paragraph.

(iv) The documents submitted by Respondent No. 1 in the amended application u/s 7 that are being relied upon for the purpose of extension of limitation are:-

(a) Balance sheets for financial years 2013-14 and 2014-15, both dated 30.09.2015 (attached at pp 17-32 of the Written Submissions and Convenience Compilations filed by Respondent No. 1, volume 1).

(b) Reply dated 13.7.2015 filed by the Corporate Debtor in response to notice under Section 13(2) of SARFAESI Act (attached at pp 33-59 of the Written Submissions and Convenience Compilation filed by Respondent No.1, volume 1).

(c) Counterclaim dated 9.8.2018 filed by the Corporate Debtor before DRT, Bengaluru (attached at pp 60 - 97 of the Written Company Appeal(AT) (Ins) No. 68 of 2019 & Submissions and Convenience Compilation filed by Respondent No.1 volume 1.

(v) Corporate Debtor has acknowledged the debt to different banks in its balance sheets (supra), both dated 30.9.2015, relating to financial years 2013-14 and 2014-15 in the heading "Long Term Borrowing"

(page 18 and 27 of Written Submissions and Convenience Compilation of Respondent No.1, Vol.I) and "Short Term Borrowings" (at pages 19 and 28 of Written Submissions and Convenience Compilation, Vol. I). They also appear under the heading "Other Current Liabilities" (page 19 and 28 of Written Submissions and Convenience Compilation of Respondent No.1, volume 1) and Letter of Credit (attached at page 21 and 30 of Written Submissions and Convenience Compilation filed by Respondent No.1, Vol.I).

(vi) Appellant's contention that the balance sheets filed application are forged and fabricated is untenable and incorrect, because the balance sheets dated Company Appeal(AT) (Ins) No. 68 of 2019 & 30.9.2015 were actually filed by the CD in DRT proceedings in January 2016. It is surprising as to how the Auditor's reports have not been shown as part of the balance sheets filed before DRT when the balance sheets are purported to have been prepared on 30.9.2015, much before their filing before DRT in January, 2016. Thus, the Auditor's reports, which form part of both balance sheets dated 30.9.2015 are clearly forged and added as afterthought. In order to further misguide the tribunal, an attempt has been made by the Corporate Debtor by filing an affidavit of the Auditor to contend that the balance sheets filed by SBI are fabricated and forged. This is a tactic adopted by the Corporate Debtor to mislead this Hon ble Tribunal.

(vii) The qualified opinion given in the Auditor's Report (attached at pp. 98-104 of Written Submissions and Convenience Compilation of Respondent No. 1, Vol. I) is as follows: -

"In view of the bank taking over physical possession of secured assets of the company all the business activities are closed down, we are unable to express Company Appeal(AT) (Ins) No. 68 of 2019 & an opinion on the company's affairs as a going concern in the case of financial statements of the company as at 31st March 2014".

Even assuming the Auditor's Report was part of the balance sheets as is claimed by the Appellant, the above statement is only about the company's status as a going concern, and it is certainly not any caveat which could detract from the fact of acknowledgment of debt by the Corporate Debtor. The above statements in both balance sheets are clearly the same and therefore there cannot be any confusion about the debt and their acknowledgment.

(viii) The only point canvassed by the Appellant is that he has made a counterclaim which is recorded by the auditor even though the debt is acknowledged through separate entries in the balance sheets. Even if there is valid counterclaim (which is yet to be adjudicated), the acknowledgment of debts is sufficient for the purpose of Section 18 of Limitation Act.

(ix) If the contention of the Appellant were to be Company Appeal(AT) (Ins) No. 68 of 2019 & accepted, it would lead to undesirable and disastrous consequences inasmuch as the corporate debtors in various cases could then go ahead and make fanciful and wrong set-

off/counterclaims to defeat the limitation aspect based on acknowledgment of debt.

27. The point is to be seen in this appeal is whether the limitation of the cause of action relating to application under section 7 for the consortium of banks comprising of State Bank of India, Punjab National Bank, Corporation Bank and UCO Bank, are within a period of three years from 25.4.2018, which is the date of filing of section 7 application by SBI, (who has been authorized by the other three banks to file section 7 application on their behalf), after considering the acknowledgements in

the balance sheets and other documents filed by the Corporate Debtor as part of amended section 7 application, which are mentioned earlier in this judgment.

28. Section 18(1) of the Limitation Act, 1963 is as follows:-

"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 Company Appeal(AT) (Ins) No. 68 of 2019 & 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."

29. Article 137 in the Schedule included in the Limitation Act with reference to Section 2 and Section 3, stipulating periods of limitation, is as follows:

Description of application Period of Time from which limitation period begins to run

137. Any other application Three When the right to for which no period of years apply accrues limitation is provided elsewhere in this division.

30. In accordance with Section 18(1) and Article 137, the limitation period for an application under Section 7 of IBC is three years. According to Section 18 (1), where before the expiration of the prescribed period i.e three years for an application under Section 7, an acknowledgment of liability has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Thus, it is to be seen whether the acknowledgments of the liability of debt has been made in writing signed or acknowledged by the Company Appeal(AT) (Ins) No. 68 of 2019 & Corporate Debtor within a period of three years from the date when the limitation starts to run to provide fresh lease of life to limitation, upto the time when section 7 application was filed.

31. The table below gives the relevant dates in connection with the debts of the Corporate Debtor owed to the four banks in the consortium, which are as per arguments and pleadings of the Respondent No. 1, and which would be necessary for calculating the limitation and the dates when the Corporate Debtor acknowledged the debts through various documents :-

Action	SBI	PNB	Corporat - ion Bank	UCO Bank
CD s loan accounts declared defaulter by banks with implicit acknowled-	28.5.2014	30.6.2014	10.10.2014	31.12.2014

gement of				
debts which				
is relevant				
for counting				
limitation				
CD s debts	30.9.2015	30.9.2015	30.9.2015	30.9.2015
entered in				
its balance				
sheets for				
year ending				
31.3.2014				
and				
31.3.2015				
CD s reply	13.11.2015	13.11.2015	13.11.2015	13.11.2015
to Section				
13(2)				
SARFAESI				
notice filed				

#### Company Appeal(AT) (Ins) No. 68 of 2019 & with debt details

32. From the dates in the table in the previous paragraph, the Ld. Sr. Counsel for Respondent No. 1 has argued that banks and CD were discussing restructuring of debts, and thereby CD implicitly acknowledged the respective debts as relevant for counting limitation in accordance with the judgment of Hon ble Supreme Court in ARCIL vs. Bishal Jaiswal (2021 SCC Online SC 321). Debt restructuring efforts with SBI went on till 28.5.2014, with PNB till 30.6.2014, with Corporation Bank till 10.10.2014 and with UCO Bank till 31.12.2014. As a result of the restructuring efforts certain letters of arrangement and consortium agreements were entered into by the consortium of banks and the CD. Hence these are relevant dates when debts were in default and cause of action started. As regards the claim of the Appellant that the dates of default of debts of the banks were in 2010, it was clarified by Ld. Senior Counsel for Respondent No. 1 that the date of NPA which was shifted to 2010 was in accordance with an RBI Master Circular dated 1.7.2013 for the purposes of banks working and asset classification. The actions taken by the banks and the CD between 2010 and 2014 when CD s debt was being Company Appeal(AT) (Ins) No. 68 of 2019 & restructured, including signing of new working capital consortium agreements and their sanction, in continuation of the old debts did provide acknowledgments of the loans by CD. The Statement of Accounts are detailed in items 7 & 8 of Part-IV of the section 7 application are, therefore, sufficient for purpose of acknowledgment of debt liability to the four banks.

33. Ld. Senior Counsel for Respondent No. 1 has stated in his written submissions (attached at pp. 33-34 of the Convenience Compilation of the Appellant Vol. I filed vide Diary No. 27721 dated 1.7.2020) that while originally the account of the Corporate Debtor was classified as NPA on 21.1.2010, it is an admitted fact that there were actions taken thereafter during 2010 to 2014 to restructure the account of the Corporate Debtor. As a result, various consortium agreements were executed between the four banks and the Corporate Debtor. The existence of the consortium agreements and letter of arrangement are given in item5 of Part-V of amended section 7 application (attached at pp. 93-114 of Written Submissions and Convenience Compilation of Appellant,

Vol.I).These Working Capital Consortium Agreements and letter of arrangement and their existence has not been denied by the Corporate Debtor. It is the contention of the Respondent No.1 that, through these Company Appeal(AT) (Ins) No. 68 of 2019 & consortium agreements the Corporate Debtor has inter-alia admitted its debt default and liability to pay to all the four banks till the date of signing of the Working Capital Consortium Agreement dated 21.3.2014.

34. The judgments of Hon ble Supreme Court in Swiss Ribbons (P) Ltd.(supra), Innoventive Industries Ltd.(supra) and B.K. Educational Services (P) Ltd. (supra) do not explicitly cover the issue of acknowledgment of debt through document such as balance sheet. In the matter of ARCIL v Bishal Jaiswal (supra), the Hon ble Supreme Court has held that fresh period of limitation will start from the date of acknowledgment in the balance sheet of the CD. This judgment of Supreme Court now holds the fort insofar as calculation of limitation period is concerned taking into account the acknowledgments by CD in certain documents like the balance sheets and in other documents. In the case of Reliance Asset Reconstruction Co. Ltd. v Hotel Poonja International Pvt. Ltd., the balance sheets were not relied upon because no evidence had been put forward to show that they were signed before the expiry of the prescribed period of limitation and there was no pleading to the said effect in the application under section 7 of IBC. As opposed to this situation, in the present Company Appeal(AT) (Ins) No. 68 of 2019 & case the balance sheets relate to the period within 3 years from the date of NPA of the four banks, which are 28.5.2014 for SBI, 30.0.2014 for PNB, 10.10.2014 for Corporation Bank and 31.12.2014 for UCO Bank and hence the acknowledgments which we implicit in these balance sheets are within 3 years of the date of start of limitation, and therefore extend limitation as per section 18 of the Limitation Act.

35. In the case of Indian Overseas Bank vs. Patel Woods Products Limited (2020 SCC Online NCLAT 551), the Securitization Application filed by Indian Overseas Bank had been disposed off. Section 7 application, which was filed thereafter, took the date of default as barred by the limitation and expressly for recovery of amount. Hence the section 7 application was not admitted. In contrast, in the present appeal, there is no decree for execution and the section 7 application is also considered to be within limitation, due to various acknowledgments in balance sheets for the financial years 2013-14 and 2014-15 and reply filed before DRT, which provide fresh lease of life to the issue of limitation.

36. The Learned Counsel for Respondent No. 1 has cited the following judgments of Hon ble Supreme Court in support of his Company Appeal(AT) (Ins) No. 68 of 2019 & contentions:-

(i) Swiss Ribbons (P) Ltd. v. Union of India [(2019) 4 SCC 17]

(ii) Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy and Anr. (2021 SCC Online SC 543).

(iii) ARCIL v. Bishal Jaiswal (2021 SCC Online SC 321).

37. In Swiss Ribbons (P) Ltd. case (supra), Hon ble Supreme Court has held that insofar as set-off and counterclaim is concerned, such set-off may be considered at the stage of filing of proof of

claims during the resolution process by the Resolution Professional. In the present appeal, only counterclaim has been made before DRT, but no set-off amount has been adjudicated upon. Moreover, any amount of counterclaim cannot retract from the fact of acknowledgement of the debts.

38. In *ARCIL v. Bishal Jaiswal* (supra), Hon ble Supreme Court has very clearly held that section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process Company Appeal(AT) (Ins) No. 68 of 2019 & under section 7 of IBC enures. This ratio is supportive of claim made by Respondent No. 1 SBI in the present case, where acknowledgments in writing signed by the Corporate Debtor come into play to extend the period of limitation under section 18 of the Limitation Act.

39. In the *Bengal Silk Mills Co.* (supra), it was held that a compulsion in law to prepare a balance sheet does not imply compulsion to make any particular admission and if a qualification regarding a particular creditor or credit is made with caveats, the case has to be examined on the basis of its context to establish whether an acknowledgment of liability has, in fact, been made for extending the limitation. In the present case, there is no caveat regarding acknowledgment or otherwise of the debt. On the contrary the Auditor's report in the balance sheet only adverts to the fact that the Corporate Debtor is not a going concern, but makes no qualifying remarks about the debt which is included in the balance sheet.

40. The Learned Counsels for Appellant and Respondent No. 1 both have referred to the Master Circular No. RBI/2013- 14/62 DBOD. No.BP.BC.1/21.04.048/2013-14 dated July 1, 2013 (pp. 166-167 of Written Submissions & Convenience Company Appeal(AT) (Ins) No. 68 of 2019 & Compilation of Appellant, Vol. I) with Appellant interpreting its provisions regarding asset classification as NPA to be year 2010 from which the dates of default should be considered whereas Respondent No. 1 claims that the year should be 2014. We agree with the argument of Ld. Senior Counsel of Respondent No. 1 that while the asset classification of the restructured loan account would be governed as per applicable prudential norms regarding classification as NPA, insofar as acknowledgement of the debts is concerned they were implicitly present in Working Capital Consortium Agreements and other documents executed by the CD and banks and the debts were therefore alive at the time these agreements were entered into.

41. We now consider the contention of the Corporate Debtor that the amount of counterclaim raised against the banks by the Corporate Debtor being Rs. 1500 crores which is much more than the amount of debts, hence there will be a net amount payable to the corporate debtor and not to the banks. Therefore, there is debt in default and liable to be paid to the banks. We note that the counterclaim has not been decided and so it remains just a proposition yet to be adjudicated upon. Moreover, merely raising a counterclaim in DRT proceedings does not in any way detract from the fact that debts are Company Appeal(AT) (Ins) No. 68 of 2019 & acknowledged, and they are in default, and therefore liable to be paid by the Corporate Debtor as the application under section 7 is found to be in limitation.



42. We are convinced by the argument of Respondent No. 1 that the date of NPA of the debt due to SBI is 31.1.2010 only for the purposes of the RBI guidelines. The actual date of default is the dates on which NPAs were initially declared by respective banks viz. 28.5.2014 for SBI, 30.6.2014 for PNB, but 10.10.2014 for Corporation Bank and 31.12.2014 for UCO Bank, since the debts of respective banks were acknowledged by the CD till those dates. This is so because during the period from 2010 to 2014 when efforts were made by the four banks and the Corporate Debtor to restructure the debts, there was admission and implicit acknowledgement of the debts by the corporate debtor.

43. We then find that the acknowledgement of these debts have been made, inter alia, in the CD's balance sheets for year ending 31.3.2014 and 31.3.2015 which were signed on 30.9.2015, which is within three years from the dates the debts were acknowledged in 2014 during debt restructuring process when Working Capital Consortium Agreements etc. were signed Company Appeal(AT) (Ins) No. 68 of 2019 & by the CD and the banks. Thus the debts get a fresh lease of limitation for three years from 30.9.2015. This limitation period will run till 29.9.2018 in accordance with Article 137 of Limitation Act. The section 7 application was filed on 25.4.2018, which is within three years from 30.9.2015. Hence we find that on the basis of amended application under section 7 and the documents attached thereto, as well as pleadings of Respondent No. 1, the section 7 application is found to be within limitation. The debts are in default and they are due and payable to the four banks viz, SBI, PNB, Corporation Bank and UCO Bank.

44. We are also of the view that criminal complaints filed against officials of consortium of banks, and further action thereon have no bearing or relevance to the proceedings under section 7 of the IBC.

45. In the light of discussion in above paragraphs, we are convinced that the debts of the four banks (SBI, PNB, Corporation Bank and UCO Bank) are in default, due and liable to be paid by the Corporate Debtor as on the date of filing of amended section 7 application. The amended section 7 application is found to be in limitation. Thus, State Bank of Company Appeal(AT) (Ins) No. 68 of 2019 & India (Respondent No. 1) and other banks (who have authorized SBI to act on their behalf) have been able to establish to our complete satisfaction that the ingredients of application under Section 7 of IBC against the Corporate Debtor have been met and the application u/s 7 deserves to be admitted.

46. Thus the appeal filed by the Appellant fails as we find no reason to interfere with the order dated 14.12.2018 in CP(IB) No. 103/BB/2018. The CIRP against the corporate debtor will therefore continue in accordance with the admission order of the Adjudicating Authority as per provisions of law. All IAs stand disposed of.

47. There is no order as to costs.

[Justice Jarat Kumar Jain] Member (Judicial) [Dr. Alok Srivastava] Member (Technical) New Delhi  
17th December, 2021 /aks/ Company Appeal(AT) (Ins) No. 68 of 2019 &