

Rajendra Narottamdas Sheth & Anr vs Chandra Prakash Jain & Anr on 18 December, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 621 of 2020

[Arising out of Order dated 01st June, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in CP (IB) No. 324/NCLT/AHM/2019]

IN THE MATTER OF:

1.Sh. Rajendra Narottamdas Sheth,
Suspended Board of Director
S/o Late Narottam Das Ratilalsheth
R/o.: A-2020 Parshwadarshan Complex
Opp. Navyug College, RanderRaod
Surat - 395009. (Gujarat)

...Appellant No. 1

2. Smt. Heenaben Rajendra Kumar Sheth,
Suspended Board of Director
W/o Sh. Rajendra Natottamdas Sheth
R/o.: A-202 Parshwadarshan Complex
Opp. Navyug College, Rander Road
Surat - 395009, Gujarat

...Appellant No. 2

Versus

1. Sh. Chandra Prakash Jain,
Appointed IRP for R.K. Infratel Ltd.
Having its registered office at
Block No. 13-14, 2nd Floor,
Annapurna Centre, Adajanpatia Circle,
Rander Road, Surat - 395009(Gujarat)

...Respondent No. 1

2. Union Bank of India
Through Chief Manager,
Nanupura Branch, Ground Floor, Saifee Building,
Opp. Dutch Garden, Surat - 395003 (Gujarat)

...Respondent No. 2.

Present:-

For Appellant: Mr. Nalin Tripathi, Advocate.
For Respondent: Ms. Nikita C. Jain, Advocate for R-1.
Mr. A.K. Shukla, Advocate for R-2.

JUDGEMENT

(18th December, 2020) A.I.S. Cheema, J. :

1. The Respondent No. 2/Union Bank of India filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (In short IBC) against M/s. R.K. Infratel Ltd. (Hereinafter referred as Corporate Debtor).

The Corporate Debtor is now represented by Respondent No. 1/Sh. Chandra Prakash Jain, Insolvency Resolution Professional. The Application of Union Bank of India (Hereinafter referred as "Bank") was admitted on 01st June, 2020 by Adjudicating Authority (NCLT- Ahmadabad Bench, Court -2) (A.A. - in short) which passed the Impugned Order in CP (IB) No. 324/NCLT/AHM/2019 and initiated Corporate Insolvency Resolution Process (CIRP in short). Thus this Appeal has been filed by the Appellants who are Directors of the suspended Board of Directors.

2. It is argued and the Appellants claim in the Appeal that Corporate Debtor had planned to roll out in Surat dedicated dark fibre broadband, Internet, Lease Lines etc. For such purpose, the Corporate Debtor approached the Bank for Loan. The Bank sanctioned Term Loan amounting to Rs. 20 crores 24 lakhs, through three Loan Accounts. The

2|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 Accounts of the Corporate Debtor were classified as Non-Performing Assets (NPA) on 30th September, 2014, by the Bank. The Bank issued Recall Notice dated 01st October, 2014 demanding the outstanding dues reflected in the Statement of Accounts. The Bank filed DRT Proceeding bearing O.A. No. 656 of 2015 under Section 19 of Recovery of Debts Due to Banks and Financial Act, 1993 (RDDB Act) to recover Rs. 19,78,94,660.32 Paise. The Corporate Debtor disputed the calculations of the principal, quantum of interest and penal interest etc. and wanted the entries to be corrected by the Bank in Statement of Account. As this was not done Corporate Debtor filed counter claim under Section 17 (1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, in short) having S.A. No. 193 of 2015. Thus the dispute has been pending.

3. The Appellants have filed copy of the Application under Section 7 of IBC (Annexure A6 Page 93) which shows that on 25th April, 2019 the Application was filed before the Adjudicating Authority. According to the Appellants as Respondents they appeared before Adjudicating Authority and filed Reply on behalf of Corporate Debtor claiming that there were defects in the Application. They claimed that the Account was classified as NPA on 30th September, 2014 and the Application filed in 2019 was time-barred. They questioned the authority of the person who signed the Application under Section 7 on the basis that the Power of Attorney in favour of the person was executed before IBC came into force. Thus,

3|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 according to them, the Application could not be maintained on the basis of signature of such person. Appeal claims that when the matter had come up before Adjudicating Authority for argument on 11th March, 2020 the Learned Counsel for the Appellant appeared but it is stated that the Advocate was not allowed to address the Tribunal and attendance marked of the Learned Counsel in the Order-Sheet was cut out as can be seen from copy of the Order-Sheet filed at Annexure A-8. Thus, the Appellants claim that Principles of Natural Justice were violated and that the Order was passed ex-parte.

4. The Learned Counsel for the Appellant has argued the Appeal on above lines and it is argued that the Adjudicating Authority wrongly held that the Application under Section 7 of IBC was within Limitation. It is argued that under Article 137 of the Limitation Act, 1963 for Application under Section 7 of IBC the period of Limitation is three years and the time began running when the Account of the Corporate Debtor was declared NPA on 30th September, 2014. The date of NPA is seen from the Loan Recall Notice dated 01st October, 2014 (Annexure A3 page 36) which was sent by the Bank. According to the Learned Counsel, the Adjudicating Authority wrongly relied on the Reply filed by the Corporate Debtor and the reference in the Reply where it was stated by the Corporate Debtor that they have paid instalments even after the Account was declared NPA. The Learned Counsel referred to Judgment in the matter of Jagdish Prasad Sarda Vs. Allahabad Bank (Company Appeal

4|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 (AT) (Ins.) No. 183 of 2020) dated 28th August, 2020 passed by this Appellate Tribunal to submit that the other Bench has held that the payments made after declaration of NPA would not give benefit of Section 19 of the Limitation Act if the NPA had not been regularized by the Bank and the date of default continued to be mentioned as date of NPA.

5. The Learned Counsel further submitted that the Bank has in its reply (Diary No. 22385) referred in Paragraph 7 with regard to the instalments and that the Bank had taken benefit of "cut back offer". It is argued that such arrangement of taking cut back would not give benefit of Section 19 of the Limitation Act.

6. It is argued by the Learned Counsel for the Appellant that the authorization or Power of Attorney of the person signing Application under Section 7 was defective as it was given by the Bank before IBC came into force and nothing was shown that Power was given to take action under Provisions of IBC.

7. In response the Learned Counsel for the Bank relied on the reasonings recorded by the Adjudicating Authority and submitted that the Learned Counsel relies on the reasonings and the Judgment is correct and that the Appellant has not shown that the findings recorded are not based on record.

8. The Learned Counsel for the Respondent No. 2/Bank has argued that in the present matter not only Section 19 of the Limitation Act was

5|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 applicable but also Section 18 of the Limitation Act applied. The Learned Counsel stated that the Limitation is three years from the date of accrual of right and the default has to be calculated from the date of NPA which is 30th September, 2014. The Learned Counsel submitted that Bank has with the application furnished all the necessary documents and the relevant particulars were incorporated in the Form which was submitted under Section 7 of IBC and the particulars submitted in the Form read with the documents clearly made out a case which would show that calculated even from the date of NPA dated 30th September, 2014 there were documents to show acknowledgments of debt by the

Corporate Debtor in writing as well as the Statements of Accounts showed various instalments paid even after declaration of NPA which gives benefit under Section 19 of the Limitation Act. The Learned Counsel stated that the date of NPA would not shift but when instalments are paid and acknowledgments are given of the existing liability the period of Limitation would get extended.

9. We have heard the Learned Counsel for both sides and perused record.

Were Principles of Natural Justice Violated?

10. The Appellants have claimed that Principles of Natural Justice were not followed and it is mentioned in Paragraph 7 (p) of Appeal Paper Book that Learned Counsel for the Appellant who appeared on 11th March,

6|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 2020 for final argument was not allowed to address the Tribunal and his attendance in the Order-Sheet dated 11th March, 2020 was cut down, and reliance is placed on Order-Sheet Annexure A 8. However there is nothing to show that the Advocate filed any Application before the Adjudicating Authority that he was not being allowed to argue. The Order-Sheet, copy of which is at Annexure A 8 shows that at Sr. No. 2 some name was put of Advocate appearing for Respondent and some signature was there which particulars have been cut out. The Order which has been typed on the same Order-Sheet clearly states that the Petitioner is represented through Learned Counsel and "None appeared on behalf of Respondents despite repeated call". The Order typed and signed by Adjudicating Authority records that the arguments for Learned Counsel for Petitioner are heard and order is reserved. The Impugned Order also in Paragraph 8 shows that the Adjudicating Authority recorded that on the perusal of the record it was observed that despite repeated calls, none appeared on behalf of Respondents and, therefore Final Hearing of the Application is made in the absence of the representative of the Respondent. The Bank, in Reply (Diary No. 22385) - Para 10 has stated that NCLT provided ample opportunities to both sides, but Corporate Debtor avoided its appearance through Counsel making lame and intentional excuses and ultimately preferred not to appear on 11.03.2020, the last date of hearing. We would rather rely on the Adjudicating Authority for the Order which is passed in the proceeding

7|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 Annexure A8 on 11th March, 2020 and its observations in Paragraph 8 of the Impugned Order rather than accept the allegations now being made by the Appellants merely on the basis that the signature and entry regarding the appearance for Respondent No. 2 was cut out. In Appeal, the original of the affidavit of Advocate Annexure A9 at page 129 to 130 of the Appeal Paper Book has not been filed although depicting that Advocate has filed Affidavit in this Appeal. Even otherwise subsequently preparing such affidavit would not be helpful unless on the day concerned the Advocate filed Application that he is present and wants to argue but is not being permitted to argue or whatever. We do not have response of Adjudicating Authority to such allegation. We do not believe that the Adjudicating Authority would not let the Advocate argue and still record that none appeared for the Respondents. Our experience shows that at times, the Advocates are appearing and mark their presence and when the matter is actually called out, at times advocate is unable to reach. If the Authority proceeds further and records the

Order that none appeared in spite of repeated calls, we would not give weight to the signature or appearance marked, (which could be even before or after recording of the order) even if the same had not been scored out.

The Adjudicating Authority considered all issues raised in Reply and which are still being raised and answered them. Thus, no prejudice was caused. Even after hearing Appellants, for reasons this Judgment will show, Corporate Debtor has had no substantial defence.

8|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 We do not find that Principles of Natural Justice were violated.

Did unauthorized Person file the Application?

11. Coming to the question of authorization, the Application under Section 7 (Annexure A6 page 93 at page 101) shows that the Application under Section 7 was filed under the signature of Chief Manager of the Union Bank of India, Nanpura Branch, Surat, namely Sh. Praveen Kumar Gupta. The document objected to by the Learned Counsel for the Appellant has been filed with Annexure A7 of the Appeal Paper Book. Annexure A7 (Colly) is Reply which the Corporate Debtor filed before the Adjudicating Authority. The Document at Page 123-127 is the General Power of Attorney given by the Bank to said Sh. Praveen Kumar Gupta. Clause 12 of the said General Power of Attorney in general terms, inter alia, has given powers to the said Sh. Praveen Kumar Gupta to commence, prosecute, endorse, defend, answer and/ or oppose any suit or "other legal proceedings" including any Civil or Criminal Proceedings in any Courts or Tribunals and any demand touching any matters in which the Bank may or may hereafter be interested or concerned and also, if the said Attorney shall think fit, compromise, etc. It is all comprehensive paragraph which has conferred powers to this Chief Manager. We do not find any substance in the argument that as such General Power of Attorney was executed before coming into force of Insolvency and Bankruptcy Code hence, the said Chief Manager did not

9|Page Company Appeal (AT) (Insolvency) No. 621 of 2020 have authority. In our view, it is General Power of Attorney and not confined to any particular Act or Acts. We do not find any defect on this account with the Application under Section 7 of IBC.

Although the Learned Counsel for Appellants did not turn up to make submissions at the final stage, still the Adjudicating Authority does appear to have considered the objections raised by the Appellants and in Paragraph 12 of the Impugned Order looked into this issue and did not find any substance in the objections raised that the Power of Attorney was not competent to file the Application.

Limitation

12. Now the issue regarding the Limitation needs to be looked into. Appellants have filed copy of the Form. We have seen the Form submitted. Annexure A6 (Page 93) Part IV of the Format is as follows:

"Part - IV PARTICULARS OF FINANCIAL DEBT

1. TOTAL AMOUNT OF DEBT 1) Date of Sanction GRANTED 2) Sanction letter No. DATE(S) OF DISBURSEMENT 3) Nature of Limit

4) Limit Sanctioned (Rs.)

1) 06.03.2013

2) ROS/ADV/1044/13

3) Working Capital

4) 3,50,00,000 06.03.2013

2) ROS/ADV/1044/13

3) Letter of Credit

4) 50,00,000 10 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 06.03.2013

2) ROS/ADV/1044/13

3) Bank Guarantee

4) 2,00,00,000

1) 06.03.2013

2) ROS/ADV/1044/13

3) Term Loans

4) 14,26,50,000 Total Rs. 20,26,50,000/-

2. AMOUNT CLAIMED TO BE IN Rs. 24,62,98,391/- as on DEFAULT AND THE DATE ON 31.03.2019 WHICH THE DEFAULT TABULAR FORM GIVEN OCCURRED (ATTACH THE HEREUNDER WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM) Account No. Nature of Loan Ledger Unpaid Other Date of Total Total & Amount Balance [RS.] Interest + Expenses Default Days amount Penalty of claimed to Default be in Default as on 31.03.2019 364105060000101 WC 35000000 25179169 NIL 30-09- 1644 60179169 364106110000707 TL - 1 19387527 15605305 NIL 30-09- 1644 34992832 364106110000708 TL - 2 47973034 31915702 NIL 30-09- 1644 79888736 364106710000002 TL - 3 NIL 7311126 NIL 30-09-

1644 7311126 364106710000003 TL - 4 36860439 27066089 NIL 30-09- 1644 63926528 Total
20,23,22,200/ 13,92,21,000/ 10,70,77,391/ 24,62,98,3 91/-

Statements of accounts (account wise) enclosed from page no.....to.....(Ann. A/(Colly.) "

13. Part V of the Form contains Particulars of Financial Debt (Documents, Records and Evidence of Default) Particulars refer to various documents linking them to Annexures. Para 6 of Part V of the Form relates to Record Of Default As Available With Any Credit Information Company. In this reference is made to:-

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1.) CIBIL Report dated 28.12.2018 and

2.) Recall Notice dated 01st October, 2014.

14. In Paragraph 7 of Part V of the Form there is reference to Statements of Loan Account, annexed. Paragraph 8 refers to List of Other Documents Attached to the Application to prove existence of Financial Debt, The Amount and Date of default. There is long list. (Annexure A6, filed by the Appellants as copy has blanks where Annexure Numbers and Page Numbers were to be filled. It is probably copy as they received. It is however no bodies case that Annexure Numbers and Page Numbers are not filled in Original before Adjudicating Authority). The Adjudicating Authority in Paragraph 5 of the Impugned Order has recorded that the Applicant (i.e. the Bank) has submitted copies of the following documents in support of their claim. The same reads as under:

"5. The Applicant has submitted copy of the following documents in support of their claim:-

| Sl. No. | Particulars | Page Nos. |
|---------|---|--------------|
| 1 | Application by financial creditor for initiation of corporate insolvency against respondent company under Section 7 of IBC and general affidavit of authorised signatory of the applicant | 1-9 |
| 2 | Power of attorney of authorised signatory of the applicant | 10-14 |
| 3 | Form No. 2 - written communication by proposed interim resolution professional | 15-17 |
| 4 | Applicant's sanction advice dated 11.05.2009 | 18-19 |
| 5 | Applicant's renewal of limit and sanction of fresh term loan dated 06.03.2010 | 12 P a g e |
| 6 | Company Appeal (AT) (Insolvency) No. 621 of 2020 | 6 |
| 7 | Applicant's sanction advice dated 12.10.2011 | 26-29 |
| 8 | Applicant's sanction letter dated 06.03.2013 for Rs. 30,26,50,000/- | 40-41 |
| 9 | Corporate debtor's Board resolution dated 09.02.2009 for availing credit facilities from the applicant | 42 |
| 10 | Corporate debtor's Board resolution dated 26.03.2011 | 43-44 |
| 11 | Corporate debtor's board resolution dated 06.03.2013 | 45-48 |

terms and conditions of sanction 11 D.P. Note dated 15.5.2009 for Rs. 50.00 lacs 49 12 D.P. Note dated 19.03.2010 for Rs. 4.50 crores 50 13 D.P. Note dated 30.03.2011 for Rs. 50.00 lacs 51 14 D.P. Note dated 19.01.2012 for Rs. 1.5 crores 52 15 D.P. Note dated 19.01.2012 for Rs.3.72 crores 53 16 D.P. Note dated 07.03.2013 for Rs. 2.50 crores 54 17 D.P. Note dated 07.03.2013 for Rs. 3.50 crores 55 18 D.P. Note dated 07.03.2013 for Rs. 3.50 crores 56 19 Composite hypothecation deed executed on 19.03.2010 to 57-68 the extent of Rs. 4.50 crores 20 Composite hypothecation deed executed on 19.01.2012 to 69-80 the extent of Rs. 3.72 crores 21 Composite hypothecation deed executed on 07.03.2013 to 81-94 the extent of Rs. 5.00 crores 22 Certificate of charge registration dated 29.04.2011 issued 95 by ROC, Gujarat 23 Certificate of charge registration dated 01.04.2013 issued 96-103 by ROC, Gujarat 24 Personal guarantee for Rs. 3,72,00,000/- dated 19.01.2012 104-

Rs. 1,50,00,000/- dated 19.01.2012, Rs. 2,50,00,000/- dated 07.03.2013, Rs. 5,00,00,000/- dated 07.03.2013, Rs. 123 3,50,00,000/- dated 07.03.2013 25 Memorandum of extension of deposit of title deeds 124-136 registered with sub-registrar dated 22.05.2009 26 Memorandum of extension of deposit of title deeds 137-162 registered with sub-registrar, Surat City dated 19.03.2010 13 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 27 Memorandum of extension of deposit of title deeds 163-192 registered with sub-registrar, Surat City dated 17.01.2012 28 Instrument of extension of deposit of the title deeds dated 193-225 06.03.2013 29 Valuation report obtained in 2017 226-333 30 CIBIL Report dated 28.12.2018 obtained by applicant 334-360 31 Recall notice dated 01.10.2014 issued by the applicant 361-362 32 Statement of accounts in respect of loan account 363-637 33 Company's master data of corporate debtor 638 34 Corporate debtor's letter dated 09.12.2011 showing change 639-652 of name 35 Account-wise simple debit balance confirmation dated 653-657 07.04.2016 signed by the corporate debtor "

15. The Adjudicating Authority noticed that the Bank had claimed as Financial Creditor that it has to recover Rs. 24,62,98,391/- which includes the principal amount of Loans sanctioned under different schemes, accrued interest and penal interest as per the calculation in tabular Form annexed to the Application at Page 3. It appears from the Application under Section 7 of IBC that the Corporate Debtor had been extended facility of Loan for working capital, letters of credit as well as Term-Loan.

16. The Learned Counsel for the Appellant referred to the Chart which is part of "Part IV of the Form" to say that for all these nature of loans, the dates of default were shown by the Bank as 30th September, 2014 which is the date of NPA and thus it is argued that as per Article 137 of 14 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 the Limitation Act all these amounts were time-barred. The Learned Counsel also referred to Recall Notice dated 01ST October, 2014 (Annexure A3) which is referred in Paragraph 6 of Part V of the Form.

According to the Learned Counsel the date of default has to be calculated from date of NPA and that the date of NPA does not shift.

17. The Learned Counsel for Respondent No. 2/Bank referred to the reasonings recorded by the Adjudicating Authority in Paragraph 11 of the Impugned Order which reads as under:

"11. On perusal of the records it is found that the first and foremost objection raised by the respondent is that the application is barred by limitation. On perusal of the records it is found that the applicant bank has placed on record simple debit balance confirmation letter dated 07.04.2016 (Annexure A/34 of Petition at page No. 653-657) issued by the respondent and addressed to the applicant acknowledging the debt. Moreover, the account statements show that there are regular credit entries after 7th April, 2016 till May, 2018. The corporate debtor by its letter dated 17.11.2018 has also given the details of amount repaid till 30.09.2018 and also acknowledged the amount outstanding in the respective account as on 30.09.2018. Moreover, the corporate debtor in para 29 (a) of its reply, has admitted that it has paid Rs. 16.17 lacs during the financial year 2019-20. Further, the records reveal that from time to time the 15 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 respondent has executed/entered into various documents acknowledging the debt. This itself shows that the respondent company has acknowledged the debt in the financial year 2019-20. Since the application is filed on 29.04.2019, it is well within time." (Emphasis Supplied)

18. It is argued by Learned Counsel for Respondent Bank that such observations were made by the Adjudicating Authority on the basis of record and the Format Annexure A6 read along with the various documents which were filed. It is argued that record before Adjudicating Authority showed that the Corporate Debtor had issued simple Debit Balance Confirmation Letter dated 07th April, 2016 and that there were regular credit entries even after 07th April, 2016, till May, 2018. The Learned Counsel also referred to Reply which was filed by the Corporate Debtor copy of which is at Annexure A7.

19. Reply Annexure A7 which was filed before Adjudicating Authority by Corporate Debtor Paragraph 29 to 31 may be reproduced. The same are as under:

"29. The Respondent states that the Applicant has kept the Hon'ble Tribunal in dark by not informing about the efforts made and steps taken by the respondent after becoming NPA to make the account regular. The Respondent have deposited huge amount with the applicant after becoming the NPA till date.

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(a) Though declared NPA since 03.11.2014, as a gesture of good relationship & committed integrity, the Respondent deposited Rs. 316.53 lacs till date due to the applicant against principle outstanding as under.

(Rs. Lacs) Year Amount Remark 2014-15 25.48 CC-Int. And TL instalment 2015-16 12.39 TL instalment 2016-17 80.26 TL instalment 2017-18 110.12 TL instalment 2018-19 72.11 TL instalment 2019-20 16.17 TL instalment Total 316.53

(b) The Respondent was regularly serving interest and TL repayment up to June 2014. Even after declared NPA, as a gesture of continuing relationship with UBI, The Respondent continued to repay TL instalment, servicing of interest on Term Loan. The Respondents have deposited huge amount of Rs. 776.67 Lacs during the period from 2013-14 to till date. Year wise repayment & deposit of EMI against loan with UBI.

(Rs. Lacs) Year Int. on CC TL-II TL-III TL-VII TL-VIII Total 2013.14 66.33 52.95 44.00 98.57 60.99 322.84 2014.15 32.38 21.80 16.60 52.68 39.33 162.78 17 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 2015-16 00.00 00.00 00.00 12.39 00.00 12.39 2016.17 00.00 80.25 00.00 00.00 00.00 80.25 2017-18 00.00 110.11 00.00 00.00 00.00 110.11 2018.19 00.00 08.89 00.00 63.22 00.00 72.11 2019.20 00.00 00.00 0.00 16.17 00.00 16.17 Total 98.71 274.01 60.60 243.03 100.32 776.67

(c) The entire instalment paid regularly for TL-I and the loan was repaid as per stipulated repayment schedule. TL-I was closed during the month December-2012.

(d) Repayment of TL-II was made regularly till June- 2014. The Respondent continued to repay TL instalment even after declared NPA. Major portion of the amount was paid after 03.11.2014. The Respondent tried all their best efforts and repaid fully Term Loan II which was closed during May-2018 i.e. during the period of NPA.

Statement showing Term Loan wise repayment and balance payable:

| Term | Sanction Amt. | Principle Amount | O/s. | Remark | Loan Date | Rs. Lacs | Paid | Paid | | | | | | | |
|---------|---------------|------------------|--|--------|-----------|----------|---------|---------|--------|----------|------------|---------|--------|--------|---------|
| Total | Before | After | Paid | NPA | NPA | TL-I | 2009.10 | 450.00 | 450.00 | 0.00 | 450.00 | 0.00 | | | |
| Closed | 08.12.12 | TL-II | 2010.11 | 350.00 | 157.46 | 192.54 | 350.00 | 0.00 | Closed | 28.05.18 | | | | | |
| TL-III | 2011.12 | 450.00 | 81.40 | 0.00 | 81.40 | 368.60 | TL-VII | 2012.13 | 372.00 | 86.55 | 107.75 | | | | |
| 194.30 | 177.70 | 18 P a g e | Company Appeal (AT) (Insolvency) No. 621 of 2020 | TL- | 2013.14 | 500.00 | 20.27 | 0.00 | 20.27 | 479.73 | VIII Total | 2122.00 | 795.68 | 300.29 | 1095.97 |
| 1026.03 | | | | | | | | | | | | | | | |

30. As a continuing relationship The Respondent have offered a cut back of approx. 10 % on their receipts & have deposited Rs. 154.67 Lacs with the applicant during the period 12.06.017 to till date under "Cut Back" offer.

31. The respondent also state that in addition to the huge amount deposited after NPA, they also have cleared LC limit of Rs. 125.00 Lacs after NPA."

(Emphasis Supplied)

20. The Learned Counsel for Bank stated that the factor of Corporate Debtor making such payments is also reflected in the accounts maintained by the Bank and when even after declaration of NPA and parties proceeding to DRT the Corporate Debtor made payments on account of debt and interest, Section 19 of Limitation Act is attracted.

21. The Learned Counsel for the Appellant referred to above Para 30 of the Reply which was filed by Corporate Debtor before the Adjudicating Authority to submit that the amounts shown as payment of instalments is in an arrangement of "cut back" which the Appellants agreed even after NPA was declared. It is argued that the Corporate Debtor to maintain good relations accepted that the Bank may deduct particular amount as cut back. Learned Counsel for the parties at the time of arguments submitted that "Cut Back" is an arrangement whereby the Corporate 19 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 Debtor agreed that from the payments the Corporate Debtor receives from its customers, the Bank could directly deduct particular percentage towards its dues. Learned Counsel for Appellant argued that in this arrangement Bank directly deducts 10 % from Receipts against its dues and this may not be taken as deposit by Corporate Debtor.

22. The Learned Counsel for the Appellant has relied on Judgment in the matter of Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (Civil Appeal No. 4952/2019) (2019 SCC OnLine 1239) to argue that the residuary Article 137 of the Limitation Act shall be applicable to Application under Section 7 of the Code and the time begins to run from the date of default i.e. date of NPA. It is argued that the date of NPA does not shift. Relying on the Judgment in the matter of Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company it is stated that the Hon'ble Supreme Court referred to its Judgment in the matter of B.K. Educational Services Pvt. Ltd. (2018) SCC Online SC 1921 to observe that the Report of Insolvency Law Committee itself stated that the intention of Code could not have been to give new lease of life to debts which are time-barred. Reference was also made to Judgment in the matter of Babulal Vardharji Gurjar Vs. Veer Gurjar (Civil Appeal No. 6347 of 2019) dated 14.08.2020 (2020 SCC OnLine SC 747) where also Supreme Court of India has held that under Section 7 the period of limitation starts running from Date of Default and the same is considered to be the date of NPA.

20 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 23.1. Section 238-A was inserted in the IBC by way of Amendment Act No. 26 of 2018 which was given retrospective effect from 06th June, 2018. Section 238-A reads as under:

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

(Emphasis Supplied) It is clear from the above Section that the provisions of Limitation Act, 1963 shall apply "as far as may be" to the proceedings or Appeals before the Adjudicating Authority or this Tribunal. Thus it is necessary to look into the Limitation Act to consider how far Limitation Act may be, or could be applied.

23.2. Validity of Section 238-A were examined by the Hon'ble Supreme Court of India in Judgment dated 11.10.2018 in the matter of B.K. Educational Services Vs. Parag Gupta - MANU/SC/1160/2018 where reference was made to the Report of Insolvency Law Committee and Paragraph 6 read as under:

"6. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238-A into the Code. This is to be found in the Report of the Insolvency Law Committee of March 2018, as follows:

21 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 "28 APPLICATION OF LIMITATION ACT, 1963 28.1. The question of applicability of the Limitation Act, 1963 (the Limitation Act) to the Code has been deliberated upon in several judgments of NCLT and NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-

barred. This requires being read with the definition of "debt" and "claim" in the Code. Further, debts in winding-up proceedings cannot be time-barred, and there appears to be no rationale to exclude the extension of this principle of law to the Code. 28.2. Further, non-application of the law on limitation creates the following problems; first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is 'to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches'. Though the Code is not a debt recovery law, the trigger being "default in payment of debt" renders the exclusion of the law 22 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30 (4) of the Code.

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

(Emphasis supplied) The Report of the Committee would indicate that it has applied its mind to judgments of NCLT and NCLAT. It has also applied its mind to the aspect that the law is a complete

Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred."

(Emphasis supplied) 23 | Page Company Appeal (AT) (Insolvency) No. 621 of 2020 In the same Judgment of B.K. Educational Services, in Paragraph 27 it was observed as under:

"27. 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."

(Emphasis supplied) 23.3. From the above it can be seen that there was no intention to give new lease of life to debts which are time-barred. Thus, the consideration is whether a given debt is time-barred. It is also clear from the above that for Applications under Section 7 of IBC the Hon'ble Supreme Court found that residuary Article 137 in the Third Division of Limitation Act dealing with "Applications" was the Article applicable. The Judgment shows that if there is delay in filing of Application one has to go to the Sections where Section 5 would apply. Section 5 would be relevant if an Application which is time-barred and extension of prescribed period is sought showing sufficient cause for not filing the Application within prescribed period.

24 | Page Company Appeal (AT) (Insolvency) No. 621 of 2020 23.4 In subsequent Judgments in the matter of "Gaurav Hargovindbhai Dave" & "Babulal Vardharji Gurjar", it is argued this factum was reiterated that for Section 7 application time begins to run from date of default, i.e. date of NPA and Period of Limitation is three years as prescribed in Article 137 of the Limitation Act. 23.5. Limitation Act, 1963 Part I deals with the short title, extent and commencement of the Limitation Act, 1963 and contains the Definitions. Part II deals with Limitation of Suits, Appeals and Applications and contains Sections 3 to 11. Part III deals with "Computation of Period of Limitation" and contains Sections 12 to 24. Part IV relates to "Acquisition of Ownership by Possession" and Part V is Miscellaneous.

We are concerned with "Limitation of Applications". 23.6 "The Schedule" prescribes "Periods of Limitation" and is divided into various Divisions. First Division deals with Suits, Second Division deals with Appeals and Third Division deals with "Applications". There is no difficulty that the Applications under Section 7 and 9 of IBC fall under Article 137 of the Limitation Act, 1963. 23.7 When we go to Sections, Section 2 (j) is relevant which reads as under:

"(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the 25 | Page Company Appeal (AT) (Insolvency) No. 621 of 2020 Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;"

23.8 Thus, when Article 137, for such Applications "prescribes"

"Period of Limitation" as "Three Years" triggered "When the right to apply accrues", Section 2 (j) provides that "prescribed period" means period of limitation computed in accordance with the provisions of this Act.

23.9 Section 3 deals with "Bar of Limitation" and sub-Section 1 reads as under:

"Bar of Limitation.-(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

Thus to consider, if given debt is or not barred by Limitation Sections 4 to 24 are relevant. In B.K. Educational Services we have already seen that Hon'ble Supreme Court has held that to condone delay Section 5 will have to be applied. We need to see other sections now to consider whether the debt is not barred by Limitation considering the provisions as may be applicable.

23.10 This takes us to sections 4 to 24. Relevant for the present matter are Sections 18 and 19 which read as under:

" 18: Effect of acknowledgement in writing:

26 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 (1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgement 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 acknowledgement was so signed.

(2) Where the writing containing the acknowledgement 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, oral evidence of its contents shall not be received.

Explanation. - For the purposes of this Section,-

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

19. Effect of payment on account of debt or of interest on legacy.-Where payment on account of a debt 27 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly Authorised in this behalf, a fresh period of limitation shall be computed from the time when payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January,1928, an acknowledgment of the payment appears in the hand- writing of, or in a writing signed by, the person making the payment.

Explanation.- For the purposes of this section,-

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) "debt" does not include money payable under a decree or order of a Court."

24. Section 18 applies to not merely suits but also applications and where before expiry of the prescribed period for an Application an acknowledgment is made, the Section provides for computing fresh period of Limitation from the time when acknowledgment was so signed. Perusal of Section 19 shows that where payment is made on account of a debt or interest before expiration of the prescribed period by the person liable to pay, a fresh period of Limitation shall be computed from the time when the payment was made. The date of NPA will not shift. It will remain the foundational date and Period of Limitation gets triggered from that date. But when prescribed period is computed in accordance with the Limitation Act and facts of this matter, Section 18 and 19 do appear to be attracted.

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25. We have noticed that the Form 1 submitted contains necessary "Particulars" and reading the same with documents, the Financial Creditor laid foundation for Adjudicating Authority to decide question of Limitation. We have read Paragraph 11 of the Impugned Order which is reproduced above. The Learned Counsel for the Appellant has not shown anything from record that the observations of the Adjudicating Authority that the Corporate Debtor had issued Balance Confirmation Letter dated 07th April, 2016 and acknowledged the debt is not correct. The Adjudicating Authority further referred to the account statements showing regular credit entries after 7th April, 2016 till May, 2018. Reference is made to letter dated 17.11.2018 of Corporate Debtor giving details of amounts repaid till 30.09.2018 and acknowledging amount outstanding, in

respective accounts as on 30.09.2018. The Appellants have not shown that these findings are incorrect or that they are not borne from Record. Rather the Reply filed by the Appellants before the Adjudicating Authority (Annexure A7) portions of which we have reproduced above in Paragraphs 29 to 31 clearly show that various repayments were indeed made by the Corporate Debtor even after the Bank declared their Accounts as NPA. The Account was declared NPA on 30th September, 2014. There was Balance Confirmation on 07th April, 2016 and the Reply of the Corporate Debtor Paragraph 30 reproduced above claimed that the Appellants offered cut back approximately 10 % on the receipts and deposited Rs. 154.67 lakhs with the Bank during the period 12th June, 2017 till date. We are not impressed with the arguments of the Learned Counsel for the Appellant that in the arrangement of cut back the 29 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 Bank was itself deducting 10 % on the receipts and so it can not be said to be payment of instalments by the Corporate Debtor. It is only an arrangement to make the payment by Corporate Debtor. When it is with the approval of the Corporate Debtor it is a payment on account of the debt, made by the Corporate Debtor. The Corporate Debtor claimed before the Adjudicating Authority that it had deposited Rs. 154.67 lakhs in the period 12th June, 2017 till date. Even if one was to take a different view of the cut back arrangement, the same Reply mentioned that the Corporate Debtor deposited huge amount of Rs. 776.67 lakhs during the period from 2013-14 till date and has given a table from 2013-14 till 2019-20. Even if we reduce Rs. 154.67 lakhs, there are other payments also, admittedly made.

26. The Learned Counsel for the Appellant referring to Judgment in the matter of Jagdish Prasad Sharda referred (Supra.) of another bench of this Tribunal submitted that in that matter it was interpreted that even if the payments were made after the Account was declared NPA if the Account was not regularized benefit can not be taken. It may be clarified that limitation issue is decided on facts and law both and it differs from case to case. In the instant case, when Bank declared NPA to recover dues, it moved DRT. If the Corporate Debtor made some payments, as a reasonable prudent person, Bank received the payments. Section 19 of the Limitation Act, 1963 is not subject to any qualification/exception that after Account is declared NPA, if the debtor makes payments on account of debt, the Section would not be 30 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020 applicable. The Adjudicating Authority found that there were not merely repayments but also Acknowledgments.

27. For the above reasons, we do not find that the Adjudicating Authority erred in its observations as recorded in Paragraph 11 of the Impugned Order to hold that the Application was within Limitation.

ORDER We do not find any substance in the Appeal. The Appeal is dismissed. No orders as to costs.

[Justice A.I.S. Cheema] Member (Judicial) [V.P. Singh] Member (Technical) New Delhi Basant B. 31 | P a g e Company Appeal (AT) (Insolvency) No. 621 of 2020