Deepak Vegpro Pvt.Ltd vs Shree Hari Agro Industries Ltd on 11 October, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1085 of 2019

In the matter of:

Deepak Vegpro Pvt. Ltd.
Having registered office at
Old Industrial Area, Itarana Road,
Alwar-301001. Rajasthan. ... Appellant

Versus

Shree Hari Agro Industries Ltd.
Having registered office at
28/1, Shakespeare Sarani,
Ganga Jamuna Apartment,
Flat No. 17 & 18,
Kolkata-700017. ... Respondent

Present

For Applicant : Mr. Narendra M Sharma, Ms. Anindita Saha, Mr. Ankur Sood, Ms. Bheeni Goyal, Mr. Utkarsh Sharma, Advocates

For Respondent: Mr. Ratnanko Banerji, Sr. Adv. with Mr. Pradeep Jwerajka, Ms. Swarlipi Deb Roy, Mr. R.K. Gupta and Ms. Pooja Jwerajka, Advocates

JUDGMENT

(Date: 11.10.2022) [Per.: Dr. Alok Srivastava, Member (Technical)] This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by Deepak Vegpro Pvt. Ltd. who is aggrieved by the order dated 5.9.2019 Company Appeal (AT) (Insolvency) No. 1085 of 2019 passed by the Adjudicating Authority (NCLT, Kolkata) while dismissing CP(IB) No. 265/KB/2018 (hereinafter called 'Impugned Order').

2. Deepak Vegpro Pvt. Ltd., as financial creditor, filed an application under section 7 of the IBC against the corporate debtor Shree Hari Agro Industries Ltd., claiming that a debt and interest thereon amounting to total of Rs.412.52 crores is due and payable to it by the corporate debtor. The facts of the case are that the Appellant obtained a term loan of Rs.4,50,00,000.00 from the

Industrial Development Bank of India (in short 'IDBI') on 11.7.1996, which was to be repaid in 20 quarterly instalments with interest @ 21% p.a. and the said loan agreement and deed of hypothecation of immovable property and mortgage of movable assets were signed on 11.7.1996. As per terms of the said loan agreement, the first instalment fell due and payable on 1.4.1998, and when the Respondent defaulted in repayment of the debt, IDBI issued a formal notice to recall the entire loan amount on 26.4.2000 and initiated proceedings against the Respondent on 22.9.2000 for recovery of the outstanding debt before the Debt Recovery Tribunal, Jaipur. The Appellant has further stated that the Respondent made a reference to the Board for Industrial and Company Appeal (AT) (Insolvency) No. 1085 of 2019 Financial Reconstruction (in short 'BIFR') and it was declared a Sick Industrial Unit on 13.6.2001.

3. During the pendency of proceedings before BIFR, the IDBI assigned the said loan to Stressed Asset Stabilisation Fund (in short 'SASF'), which in turn assigned the entire loan with interest and security interests in favour of Appellant vide the Assignment Agreement dated 17.1.2007, whereby the Appellant stepped into the shoes of SASF and became a secured financial creditor of the Respondent. It is further stated by the Appellant that the said Assignment Deed was signed after the Respondent gave no objection dated 9.1.2007 for assignment of the said loan in favour of the Appellant, which was done for consideration of Rs. 2,50,00,000/- and consequently the security charge relating to the loan was modified and registered in favour of the Appellant with the Registrar of Companies, who issued the Certificate of Registration of Charge on 26.3.2007, and thus the Appellant became the first charge holder of the related movable and immovable assets of the Respondent. The Appellant has also stated that a fresh unsecured loan amount to Rs.2,85,00,000/- was disbursed by the Appellant to the Respondent during 25.05.2007 to 29.08.2007.

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4. The Appellant has further stated that the Respondent unilaterally and without the consent of the Appellant, falsely claimed that the Applicant agreed to waive the entire interest and 70% of the principal amount of the secured loan and 80% of the principal amount of the unsecured loan while submitting the Draft Rehabilitation Scheme, which was not approved by the BIFR, and BIFR's decision was upheld in appeal by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the Hon'ble Delhi High Court. He has further claimed that the Respondent Corporate Debtor has admitted the liability of the loan in its balance/sheets since the year 1998 till the date of filing section 7 application of 2.2.2018. He has stated that the section 7 application was dismissed vide the Impugned Order, and he has filed this appeal aggrieved by the impugned order.

5. The Appellant has claimed in the appeal that his section 7 application was rejected on the grounds that:

(i) The debt is time barred;

(ii) There is discrepancy in the debt amount which is payable and claimed in section 7 application and the debt amount that is mentioned in the balance sheets cited by the appellant;

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(iii) There is pending litigation due to family dispute between two groups of the Data Family and after division in the family assets, the issue of this loan is being used to settle scores; and

(iv) No demand notice was issued by the Appellant after assignment of the loan in 2007 till 2018.

6. We heard the arguments of the Learned Counsels for both the parties and perused the record.

7. The Learned Counsel for Appellant has submitted that the term loan taken by the Respondent of Rs. 4.50 crores from IDBI with compound interest @ 21% p.a. with repayment in quarterly instalments secured by hypothecation of moveable property and mortgage of immovable property of the corporate debtor. Since the loan was not repaid in time, IDBI recalled the loan in 1998. He has further submitted that IDBI initiated proceedings before the DRT, and IDBI assigned the loan along with associated securities to SASF on 30.9.2014, which was further assigned by SASF to the Appellant on 17.1.2007 through an Assignment Agreement after obtaining consent of the corporate debtor for a consideration of Rs. 2.50 crores. He has claimed that thus the appellant has stepped into the shoes of IDBI along with all the rights and responsibilities that were available to IDBI.

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8. Regarding discrepancy in the debt amount appearing in the balance sheets of the corporate debtor and that appearing in section 7 application, the Learned Counsel for Appellant has submitted that from the Financial Year (FY) 2006-07 till FY 2007- 08, the balance sheets of the corporate debtor show a secured debt amount of Rs. 4.50 crores, and thereafter in the balance sheets from FY 2008-09 continuing up to FY 2015-16, the liability owed to the Appellant by the corporate debtor is shown as Rs. 1.35 crores. These debt appearing in the successive balance sheets from FY 2006-07 till 2015-16 provide acknowledgement of the secured loan by the corporate debtor. He has argued that the balance sheets only show the principal amount due and payable but there is additional accrued interest in terms of the original loan agreement entered into between IDBI and the corporate debtor, which is also due and payable to the Appellant, and this amount is shown in Part IV of section 7 application.

9. The Learned Counsel of Appellant has submitted that in the light of judgment of Hon'ble Supreme Court in the matter of Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal (2021 SCC Online SC 321), the acknowledgement given by the corporate debtor in balance sheets provides acknowledgement of the debt as required in section 18 of the Limitation Act, and successive Company Appeal (AT) (Insolvency) No. 1085 of 2019 acknowledgements in the balance sheets of the corporate debtor starting from FY 2006-07 until FY 2015-16, the section 7 application is within limitation, as it was filed on 10.4.2018, which is within 3 years from 31.3.2016 from the last acknowledgment in the balance sheet for FY 2015-16. He has added that the Respondent has through its various balance sheets admitted a liability of Rs. 1.35 crore, and this amount, being greater than the threshold limit of Rs. 1 lakh, is sufficient for the purpose of admission of section 7 application. He has clarified that the claim of total amount of Rs. 412.52 crores which appears in

section 7 application, is the actual amount due and payable by the Respondent. He has claimed that the finding in the Impugned Order, that since there is discrepancy in the amount claimed by the Appellant in his section 7 application and the amount of debt acknowledged as liability in the corporate debtor's balance sheets is erroneous as the Adjudicating Authority has to merely see whether the acknowledgement is of an amount greater than the threshold value of Rs.1 lakh and not go into the precise amount of the alleged debt.

10. The Learned Counsel for Appellant has also cited the judgment of Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. vs. ICICI Bank (2018 1 SCC 407) in support of Company Appeal (AT) (Insolvency) No. 1085 of 2019 his contention that once the Appellant's status as a financial creditor is established and the admitted debt liability is more than Rs. 1 lakh, which is the threshold monetary limit for consideration of section 7 application, the application is liable to be admitted.

11. On the point that the Appellant's section 7 application was dismissed due to alleged family settlement and related dispute between two groups of the same family, the Learned Counsel for Appellant has submitted that the family settlement documents do not include any reference to the corporate debtor, and therefore, it is separate from the businesses included in the family settlement, and in no way affected by the family settlement and any litigation that may be going on between the family members.

12. The Learned Counsel for Appellant has also argued that the contention of the Respondent that he (Appellant) did not raise any demand since the year 1998 for repayment of the loan is also not correct, since he has been continuously raising the claim for recovery before DRT, BIFR, AAIFR and Hon'ble High Court of Delhi. Expanding on this argument, he has referred to the BIFR order dated 28.6.2010, wherein the name of the Corporate Debtor Shree Hari Agro Industries Ltd. is very clearly mentioned in paragraph 3 of the said order and further, the findings in the BIFR order were upheld by AAIFR vide its order dated 29.5.2012 and Company Appeal (AT) (Insolvency) No. 1085 of 2019 also by the Hon'ble High Court of Delhi, which dismissed the appeal of Respondent with costs vide order dated 1.10.2012, whereafter a review petition filed by the respondent challenging Delhi High Court's orders dated 1.10.2012 was also dismissed by order dated 23.1.2012. He has, thus, claimed that the Appellant has been continuously making efforts for recovering the amount due and payable to him on account of loan including the principal amount, interest and liquidated damages from the corporate debtor. The Learned Counsel for the Appellant has, thus, strongly argued that in view of the alleged debt being a financial debt that is in default of repayment, and since the application under section 7 of IBC is within limitation and all the ingredients laid down in section 7 are fulfilled, it ought to have been admitted by the Adjudicating Authority.

13. In reply, the Learned Senior Counsel for Respondent has argued that after the default committed by the corporate debtor in repayment of IDBI loan, the IDBI obtained right to recover from the BIFR. He has further argued that in the year 2004 and later, the Appellant started action for taking over the corporate debtor, and contributed Rs.2.50 crores to the corporate debtor. Later, through the Assignment Agreement dated 17.01.2007, the Appellant Deepak Vegpro Pvt. Ltd. was assigned the loan originally taken Company Appeal (AT) (Insolvency) No. 1085 of 2019 from IDBI as the

corporate debtor came in the hands of Babu Lal Data Group of the family as a result of family settlement. He has submitted that in the background of family settlement with an amount of Rs. 2.50 crores paid by the corporate debtor in purchasing the loan from SASF, the balance sheets of the corporate debtor show a reduced secured debt amount of Rs.1.35 crores. He has further argued that the amount of secured debt shown in the balance sheets should be read with the notes in the balance sheets, and in particular the note in the balance sheet for the FY 2008-09 shows that no repayment schedule is attached to the said loan. He has also stated that there is no interest amount shown as liability in the balance sheet which also goes to show that the amount of Rs. 1.35 crores is not a loan but a financial contribution of Deepak Vegpro Pvt. Ltd. to the corpus of the corporate debtor and not a loan and it has been placed in the section of secured credit in the balance sheets for ease of accounting. In such a situation, he has argued, the amount appearing in the balance sheets is not a loan and hence is not covered in the definition of 'financial debt'.

14. The Learned Senior Counsel of Respondent has insisted that even if the debt is taken to be a financial debt, the balance sheet documents placed on record by the appellant do not show that it is Company Appeal (AT) (Insolvency) No. 1085 of 2019 the same debt amount which is in default, and therefore the entries in the balance sheets cannot to be taken to provide acknowledgement of the original debt of IDBI and so the application under section 7 is not within limitation. Thus, he has surmised that none of the ingredients of section 7 of IBC are fulfilled and, therefore, in view of the fact that the Adjudicating Authority has discretion in admission of the section 7 application, it has been correctly rejected.

15. The Learned Senior Counsel for Respondent has argued that the original loan of Rs.4.5 crores given by IDBI was reduced to Rs. 1.35 crores from FY 2008-09 onwards, which is the figure shown in the balance sheet of the corporate debtor and it has not been explained by the Appellant as to how the original amount got reduced to Rs. 1.35 crores. He has claimed that the default amount of Rs.412.52 crores was neither owed to the Appellant nor demanded by him at any time after the loan was assigned to the Appellant and therefore, in the absence of any repayment schedule after assignment for the alleged loan as mentioned in the notes included in the balance sheet of FY 2008-09, there is no default regarding the same. Moreover, in the absence of any repayment schedule provided for the loan of Rs.1.35 crores, default in repayment of loan is not established.

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16. The Learned Senior Counsel for Respondent has cited the judgment of J.C. Budhiraja vs. Chairman, Orissa Mining Corporation Ltd. & Anr. [(2008) 2 SCC 444] wherein it is held that "it is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and conscious affirmation of an intention of continuing such relationship in regard to an existing liability" and further that "any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages."

17. The Learned Senior Counsel for Respondent has also cited the judgment of the Hon'ble Supreme Court in the matter of Tilak Ram and Others vs. Nathu and Others (AIR 1967 SC 935), wherein it is

held that "the right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence Company Appeal (AT) (Insolvency) No. 1085 of 2019 an intention to admit cannot be imposed on its maker by an involved or a farfetched process of reasoning."

18. The Learned Counsel for Respondent has also cited the judgment of the Hon'ble Supreme Court in the matter of Reliance Assets Reconstruction Company Limited vs. Hotel Poonja International Private Limited [(2021) 7 SCC 352], wherein it is held that, "19. It is well settled by a catena of decisions of this Court, that Article 137 of the Limitation Act gets attracted to applications filed under Sections 7 and 9 of the IBC. The right to sue accrues when a default occurs, and if that default has occurred over three years prior to the date of filing of an application under Section 7 of the IBC, the application would be barred under Article 137 of the Limitation Act. At the highest, the limitation started ticking on 27th March 2003, when a Recovery Certificate was issued by the DRT. The appellant has not disclosed any material in its application under Section 7 of the IBC to demonstrate that the application is not barred by limitation."

19. In connection with the amounts shown in section 7 application and that in the balance sheets, the Learned Senior Counsel for Respondent has argued that the acknowledgment should be of the liability and the liability shown in section 7 application is Rs.412.52 crores, whereas no such liability is acknowledged through the balance sheets placed on record. Moreover, no demand notice has been given regarding the amount of Rs. 412.52 crores. He has pointed out to the letter dated Company Appeal (AT) (Insolvency) No. 1085 of 2019 27.2.2008 to claim that the reason for the amount Rs.1.35 crores is shown in the balance sheet is because of the exchange of shares in the corporate debtor. He has further argued that section 65 of the IBC is relevant in the present case because the insolvency process of the corporate debtor/respondent is claimed due to malicious intent and not for any insolvency resolution of the corporate debtor (attached at pg. 857 of the appeal paper book, Vol. V) to show that the appellant has never made any attempt to recover the alleged amount and it is only because of a certain family dispute that it has filed section 7 application for initiating Corporate Insolvency Resolution Process (CIRP) of the corporate debtor.

20. The main issue involved in this appeal is whether the section 7 application is within limitation. Therefore, we will deal with this issue first. The Impugned Order in paragraph 41 held as follows: -

> "41. The financial statements referred to for proving acknowledgment also would not be helpful to the applicant to provide that the filing of this application was within 3 years before the commencement of I&B, code. The amount of interest claimed and as shown in annexure A-21 of the application, is never at all acknowledged by the Corporate Debtor either by way of confirmation or in its books of account. The Applicant company did not issue any loan recall notice of the amount claimed on the respective due date when it fell due for payment as contained in the application. The amount under claim by the applicant has been a subject matter of dispute before

> BIFR and before the hon'ble Delhi High Court and at present at NCLT. The amount allegedly due to the applicant as per the Financial Statement of the Company Appeal (AT) (Insolvency) No. 1085 of 2019 Applicant for the Financial Year ending 2009 was rs.1,35,00,000/-. The financial year ending 31.03.2016 referred to on the side of the applicant discloses an amount of Rs. 1,35,00,000/- as the amount payable to Deepak Vegpro (P) Ltd., and as per the terms and condition given in the note read as "There is no pre-defined/specified repayment schedule for this loan". On the other hand the present application has been filed claiming Rs.40044.15 lacs. The amount evidently acknowledged as per the financial statement for the year ending 31.3.2016 cannot be taken as an acknowledgment of debt as claimed by the applicant.

Accordingly, we are of the considered view that the claim, if any, is barred by law of limitation."

21. In the light of the contention of both the Learned Counsels and reliance placed on the balance sheets placed on record regarding acknowledgement or otherwise of the alleged financial debt, we look at the financial statements referred to by the Appellant, which include balance sheets FY 2006-07 going continuously up to FY 2015-16 to claim that the debt owned by the corporate debtor was acknowledged therein, year after year. A perusal of the balance sheet for FY 2006-07 (attached at pp.421- 436 of the appeal paperbook, vol. III) shows the existence of a secured loan amounting to Rs. 4.50 crores from the Deepak Vegpro Pvt. Ltd. As per record placed in the appeal, this is the first time the alleged loan appears in a balance sheet in the name of Deepak Vegpro Pvt. Ltd. Again, in the balance sheet for FY 2007-08 (attached at pp. 437-464 in the appeal paperbook, vol.III), a secured loan of Rs.4.50 crores appears in 'Schedule II-Secured Company Appeal (AT) (Insolvency) No. 1085 of 2019 Loans' in the name of Deepak Vegpro Pvt. Ltd. Then we find that the loan amounting to Rs. 4.50 crores till then, becomes Rs. 1.35 crores in the balance sheet for the FY 2008-09 (attached at pp. 465-481 of the appeal paperbook, vol.III), in the section 'Secured Loan' in Schedule III in the name of Deepak Vegpro Pvt. Ltd. and there is a mention of any interest accrued and due relating to the default from previous years is entered as Rs.7,09,96,285/-. Thereafter, in the balance sheets for the FY 2009-10 running up to FY 2015-16 (attached at pp 482- 620 of the appeal paperbook, vol.III) a loan in the name of Deepak Vegpro Pvt. Ltd. appears for an amount of Rs. 1.35 crores. Significantly in these balance sheets relating to FY 2009-10 upto FY 2015-16, there is no mention of any interest amount liable to be paid. Another point worth noting is that in the balance sheet for the FY 2008-09, the following is mentioned in the 'Notes to the Accounts' (attached at pp. 478-479 of the appeal paperbook, vol.III): -

> "
>
> xxx xxx xxx
>
> 2. The Company entered into settlement with its secured creditors namely Industrial Investment Bank of India (IIBI) and M/s. Deepak Vegpro Pvt. Ltd. (Assignee of loan of IIBI) as evident from the relevant documents produced before us for verification. Consequent to the said settlements, the aggregate amount of waiver made by the secured creditors aggregating to Rs. 480 lacs has been credited to the Capital Reserve

Account.

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3. The company entered into one time settlements with its unsecured creditors namely, M/s. Kedar Nath Ravindra Kumar HUF, Smt. Anita Agarwal, M/s. Shree Hari Industries, M/s. Versa Trading Company and M/s. Deepak Vegpro Private Limited, accordingly an outstanding principal amount aggregating to Rs. 335.82 lacs settled at 20% whereas balance 80% of principal i.e. Rs.268.65 lacs and all other moneys towards simple interest, compound interest, penal interest, liquidated damages or any other claims agreed for waiver in full. The waived amount aggregating to rs.268.65 lacs was accordingly written back and cr4edited to Capital Reserve Account out of which an amount aggregating to Rs.40.65 lacs outstanding to M/s. Kedar Nath Ravindra Kumar HUF, Smt. Anita Agarwal, M/s. Shree Hari Industries, M/s. versa Trading company are subject to verification with proper relevant document or pending consent of these parties in this regard.

4. Interest accrued and due to financial Institutions amount to Rs. 709.96 lacs as at 31.3.2008 towards interest including simple interest, compound interest, penal interest, liquidated damages etc. has also been written back in the books of accounts of the Company in terms of one time settlement agreed and settled with them accordingly written back and credited to Capital Reserve Account to that extent.

xx xx xx xx"

22. From a close perusal of balance sheets and the alleged loan amount that appears in the name of Deepak Vegpro Pvt. Ltd. and the 'Notes to the Accounts', it is quite clear that the original loan amount of Rs. 4.50 crores became Rs. 1.35 crores in the balance sheet for the FY 2008-09 and thereafter continued as such in the balance sheets of the following years. Notably in the balance sheet for the FY 2008-09, when the loan amount of Rs. 4.50 crores became Rs. 1.35 crores, the 'Notes to Accounts' (supra) clearly Company Appeal (AT) (Insolvency) No. 1085 of 2019 indicate that the company entered into settlements with its secured creditors, namely, Industrial Investment Bank of India (in short 'IIBI') and Deepak Vegpro Pvt. Ltd., and after the said settlements, the aggregate amount of waiver made by the secured creditors aggregating to Rs. 480 lacs have been credited to the Capital Reserve Account. Moreover, with regard to unsecured creditors and one-time settlement entered into by the corporate debtor with the unsecured creditors, the Notes to the Accounts show that the outstanding principal amount due to all unsecured creditors were settled at 20%, whereas 80% of the principal amount i.e. Rs. 268.65 lakhs and other monies towards simple interest, compound interest, penal interest, liquidated damages or any other claims agreed for waiver in full and the waived amount aggregating to Rs.268.65 lacs was accordingly returned back and credited to Capital Reserve Account. Similarly, there is a waiver of Rs. 709.96 lacs of the interest amount accrued

and due to Financial Institutions. These notes show that there was a settlement entered into by the corporate debtor with its secured and unsecured creditor/s.

23. We now look at the Part-IV of section 7 application filed by the financial creditor Deepak Vegpro Pvt. Ltd., the amount of financial debt claimed to be default is Rs.412.52 crores, which Company Appeal (AT) (Insolvency) No. 1085 of 2019 according to the Appellant is the amount due to it by way of principal amount, interest, penal interest and liquidated damages.

It is quite clear from a note in the balance sheets for the FY 2008- 09 onwards (supra) that even the principal amount of Rs. 4.50 crores which is the loan taken by the corporate debtor from IDBI is settled by the assignee Deepak Vegpro Pvt. Ltd. and thereafter a loan amount of Rs.1.35 crores is shown in the balance sheets for the successive years but significantly no interest amount pertaining to the debt is shown as being outstanding and liable to the purported financial creditor. Quite obviously the principal amount of loan gets changed due to the settlement entered into by the corporate debtor with its secured creditors including Deepak Vegpro Pvt. Ltd.

24. The Learned Senior Counsel for Respondent has cited the judgment of Hon'ble Supreme Court in the matter of Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal, 2021 SCC Online SC 321 wherein it is held as follows: -

"35. A perusal of the aforesaid sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by section 134 (7). Equally, the auditor's report may also enter caveats with regard to acknowledgments made in the books of accounts including Company Appeal (AT) (Insolvency) No. 1085 of 2019 the balance sheet. A perusal of the aforesaid would show that the statement of law contained in Bengal Silk Mills, that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgment of liability has, in fact, been made thereby extending limitation under Section 18 of the Limitation Act.

(Emphasis supplied)

25. The Hon'ble Supreme Court has ruled in the matter of Reliance Assets Reconstruction Company Limited vs. Hotel Poonja International Private Limited [(2021) 7 SCC 352] regarding the necessity of existence of a jural relationship between the creditor and debtor: -

> "28. In Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad Chamaria, this Court held:
>
> (6)...Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words... Stated generally, courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter.

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29. In the present case, reliance ought not to be placed on the balance sheet dated 16.8.2017 and letter dated 23.4.2019 primarily for two reasons. First, there is no evidence or material to show that the documents were signed before the expiry of the prescribed period of limitation. There is no pleading to the said effect in the application under Section 7 IBC filed by the appellant in the statutory form. In fact, the two documents were never relied upon.

30. Secondly, the two documents cannot be construed as admissions that amount to acknowledgment of the jural relationship and existence of liability. The balance sheet dated 16.8.2017 does not acknowledge or admit any debt."

(Empahsis Supplied)

26. The Learned Senior Counsel for Respondent has also referred to Hon'ble Apex Court's judgment in J.C. Budhiraja vs. Chairman, Orissa Mining Corporation Ltd. & Anr. [(2008) 2 SCC 444] wherein the Hon'ble Supreme Court holds as follows:

> " 21. It is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words .... An acknowledgment made with referenced to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages."

27. Another judgment cited by the Learned Senior Counsel for Respondent relates to the matter of Tilak Ram and Others vs. Company Appeal (AT) (Insolvency) No. 1085 of 2019 Nathu and Others (AIR 1967 SC 935) wherein Hon'ble Supreme Court holds as follows: -

> " 12. The right of redemption no doubt is of the essence of any inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far- fetched process of reasoning."

(Emphasis Supplied)

28. We are of the view that the judgments of Hon'ble Supreme Court cited above by the Respondent's Learned Senior Counsel supports his contention that existence of a jural relationship between the corporate debtor and financial creditor has not been established insofar as the alleged debt appearing in the cited balance sheets and the section 7 application is concerned, and moreover there is no unequivocal admission of the subsisting liability as claimed in the section 7 application and the amount appearing in the balance sheets. We are, therefore, of the view that when there is discrepancy between the amount appearing in the balance sheets itself from one year to another, and in addition, there is a huge discrepancy between the amount claimed in default in section 7 application and the amount appearing as purported Company Appeal (AT) (Insolvency) No. 1085 of 2019 debt, the existence of debt as claimed and the jural relationship are very much doubtful.

29. We do not find the argument of the Learned Senior Counsel for Appellant that no demand for outstanding amount was raised by the Appellant from FY 2008-2009 onwards till the year 2018 since he was pursuing case before BIFR and AAIFR convincing, as any creditor, in normal circumstances, will not let go of a large amount of debt, such as the Appellant's that it says was due to it. This fact, coupled with another fact that there was no repayment schedule agreed to between the Appellant and the Respondent adds credence to the argument of Respondent that the amount shown as secured debt in the balance sheets was considered as contribution of the Appellant in the business of the corporate debtor after the exchange of shares. In the absence of any repayment schedule, the Appellant cannot claim any default in repayment of the debt as we are of the view the default should be explicit and direct and not to be inferred in an oblique and vague manner from cases in BIFR/AAIFR. Therefore, even if we assume that the due amount is a financial debt under the IBC, there is no default in repayment of the alleged loan.

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30. In the present case, we find that the amount of loan given by IDBI, which was in default in the year 1998. This loan was taken over by SASF for a total consideration of Rs.2.50 crores by an Assignment Deed executed on 17.1.2007, the alleged loan was assigned by SASF to Deepak Vegpro

Pvt. Ltd., after a no objection by the corporate debtor. The claim of the appellant that the loan was due and payable by the corporate debtor is contested by the Respondent by stating that after the assignee of IDBI/SASF loan to Deepak Vegpro Pvt. Ltd., the remaining amount of Rs. 1.35 crores is considered as an investment and not any loan transaction. In support of his contention, the Respondent has claimed that there was no repayment plan for the remaining amount of Rs. 1.35 crores agreed to between the Appellant and the Respondent and more importantly, between the years 2008 and 2018, and consequently no demand was made for the pending amount. That the said alleged loan appears in the cases before BIFR and AAIFR cannot be taken as making any demand or acknowledgement of the said loan. Moreover, the Appellant has claimed that his loan was acknowledged through the balance sheets and therefore we are considering the balance sheets to examine the acknowledgement, if any, of the said loan and consequently if the loan is within limitation for the purpose of admission of section 7 application.

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31. We find that he judgment of the Hon'ble Supreme Court in the matter of Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal (supra) supports the case of the respondent in that the acknowledgments through the balance sheets should be unequivocal and without any caveat if they are to be considered as providing acknowledgement to the debt for the purpose of extending limitation.

32. It is noted as submitted by the Learned Senior Counsel for the Respondent, that there was a family settlement between the members of two groups of Data Family, which is alluded to in earlier paragraphs of this judgment, whereby the corporate debtor and the financial creditor went to two separate groups being Niranjan Lal Data Group and Babu Lal Data Group. Since Babu Lal Data was a director of the corporate debtor and also a director of the alleged financial creditor until the two groups were separated by family settlement, there were contentious issues between the two-family groups, which resulted in the Niranjan Lal Group which controls the Appellant company to make such exorbitant and unrealistic claim as financial creditor from the corporate debtor which now belongs to Babu Lal Data Group. Company Appeal (AT) (Insolvency) No. 1085 of 2019

33. The section 7 application can be made by a person claiming to be a financial creditor under section 7 of the IBC. Section 5(7) provides the definition of 'financial creditor' and section 5(8) provides the definition of 'financial debt' and they are reproduced below:-

> "5. Definitions - In this Part, unless the context otherwise requires, -
>
> (7) "financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;
>
> (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-
>
> (a) money borrowed against the payment of interest;

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

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

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

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

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

[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section Company Appeal (AT) (Insolvency) No. 1085 of 2019 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

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

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

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;"

34. Further the 'debt' is defined in section 3 (11 of the IBC, which is as follows:-

"3. Definitions - In this Part, unless the context otherwise requires, -

(11) 'debt' means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt."

35. Thus, for an applicant to be a financial creditor, a debt along with interest should be disbursed against the consideration time value of money, whereas in the present case the entries in the balance sheets by which the acknowledgment of debt claimed to be in limitation, do not show any interest accruing on the claimed loan amount, even the Assignment Agreement dated 17.1.2007 executed between SASF and Deepak Vegpro Pvt. Ltd. makes 'the Company Appeal (AT) (Insolvency) No. 1085 of 2019 procedure full and absolute legal owner and the only person legally entitled to financial assets or any part thereof". It does appear that as a result of family settlement and various disputes between the rival groups of Data family, the remaining amount due to Deepak Vegpro Pvt. Ltd. may not have been a loan, since there is no rate of interest either claimed or exhibited by any document or even stated in the balance sheets starting with the FY 2008-09. In such a situation, we are not convinced that the said amount of Rs. 1.35 crores appearing in the balance sheets of the corporate debtor are a financial debt owned by the corporate debtor to the purported financial creditor/Appellant.

36. We also note the provision in section 7 of the IBC that relates to the admission of the application by a financial creditor. The relevant sub-section 5 of section 7 is reproduced hereunder: -

> "7. Initiation of corporate insolvency resolution process by financial creditor. -
>
> (5) Where the Adjudicating Authority is satisfied that -
>
> (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application: or
>
> (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

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37. A plain reading of the above-stated provision under section 7 and the use of the word 'may' in clause (a) of sub-section (2) of section 7 makes it clear that the Adjudicating Authority has the discretion to either admit it or reject the application, of course depending on the facts of the case and whether such facts and circumstances call for admission of the section 7 application. The language of section 7 can be contrasted with the language of section 9 where no word such as 'may' is used in sub-section (5) of section 9 and an exhaustive list of conditions given in clause (i) of sub-section (5) of section 9 are satisfied.

38. Recently, in the matter of Vidarbha Industries Power Ltd v. Axis Bank Ltd.,2022 SCC OnLine SC 841, decided on 12.07.2022, Hon'ble Supreme held as follows: -

> "The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP. The Adjudicating Authority

> (NCLT) was required to apply its mind to relevant factors including the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control, the impact of MERC's appeal, pending in this Court, order of APTEL referred to above and the overall financial health and viability of the Corporate Debtor under its existing management."

39. Thus the Hon'ble Supreme Court rejected the view of NCLT and NCLAT that once it is found that a debt existed, and a corporate debtor is in default in payment of the debt there would be no Company Appeal (AT) (Insolvency) No. 1085 of 2019 option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC. Going by the scheme of IBC and the legislative intent, the Hon'ble Supreme Court has observed that the Adjudicating Authority would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP, unless there are good reasons not to admit the petition. The Hon'ble Apex Court has observed that if the facts and circumstances warrant exercise of discretion in a particular manner, such discretion would have to be exercised with the condition that such discretionary power cannot be exercised arbitrarily or without any proper reason.

40. We note that IDBI claimed its debt of Rs. 4.5 crores given in 1998 with interest @ 21% p.a., in a recovery suit for such loan which was withdrawn on 16.10.2007. Earlier, a notice for the recovery of IDBI loan was given on 26.4.2000, which was after default in repayment. Thereafter this loan was assigned to SASF and subsequently to Deepak Vegpro Pvt. Ltd. through Assignment Agreement dated 17.1.2007. From the documents submitted in the appeal by both the parties, it is quite clear that IDBI had lost interest in the recovery of the said loan and the assignee SASF and thereafter Deepak Vegpro Pvt. Ltd., also did not make any effort to recover the amount nor made any demand for repayment/recovery Company Appeal (AT) (Insolvency) No. 1085 of 2019 of the pending amount to the corporate debtor. The amount of Rs. 412.52 crores, which is claimed in default in the Part IV of section 7 application, is hugely different from either the original loan of Rs. 4.50 crores or the amount of Rs. 1.35 crores appearing in the balance sheets from FY 2008-09 till FY 2017-18. We thus find that the acknowledgements in the balance sheets which widely differ from the claim made in section 7 application does not provide any extension of limitation to the debt claimed in section 7 application. Therefore, these acknowledgments through the balance sheets, as claimed by the Appellant, do not pertain to the loan amount claimed by the Appellant.

41. We, therefore, come to the fair conclusion that the said loan or its part thereof is not proven to be a financial debt, and the section 7 application is also barred by limitation since the acknowledgements do not provide for unequivocal and unambiguous acknowledgement of the alleged debt as claimed in the section 7 application. We are, therefore, of the view that the Impugned Order does not suffer from any error in holding that section 7 application does not deserve to be admitted. In the result, we find that the appeal is devoid of merit and is accordingly dismissed.

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42. The appeal is disposed of with no order as to costs.

[Justice Rakesh Kumar Jain] Member (Judicial) [Mr. Kanthi Narahari] Member (Technical) [Dr. Alok Srivastava] Member (Technical) New Delhi 11th October, 2022 /aks/ Company Appeal (AT) (Insolvency) No. 1085 of 2019