

# **Pegasus Asset Reconstruction Pvt. Ltd vs Yashomati Hospitals Pvt. Ltd on 24 November, 2020**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
NEW DELHI

Company Appeal (AT) (Ins) No.1337 of 2019

[Arising out of Order dated 10th October, 2019 passed by National Company Law Tribunal, Bengaluru Bench in I.A. No.69 of 2019 in CP(IB)No.144/BB/2017]

IN THE MATTER OF:	Before NCLT	Before NCLAT
Pegasus Assets Reconstruction Private Limited, (Pegasus ARC) 507, Dalamal House, Nariman Point, Mumbai - 400021	Financial Creditor (Original Applicant- Respondent in I.A.)	Appellant

Vs.

Yashomati Hospitals Private Limited, No.2371/3, HAL Airport, Varthur Main Road, Munnekolalal, Marathahalli, Bangalore 560 037	Corporate Debtor (Original Respondent/ Applicant of I.A)	Respondent
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For Appellant: Mr. Dinkar Singh & Ms. Priyanka Narang,  
Advocates

For Respondent: Mr. Ajesh Kumar Shankar & Ms. Saranya  
Devi, Advocates

2

JUDGEMENT

(24th November 2020) A.I.S. Cheema, J. :

1. The Appellant - M/s. Pegasus Assets Reconstruction Pvt.

Ltd., Financial Creditor has filed this Appeal against Impugned Order dated 10th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench). The Appellant is assignee of South Indian Bank (SIB - in short) and had filed CP(IB)No.144/BB/2017 under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC - in short) before the Adjudicating Authority. In the Application filed under IBC, the Respondent - Corporate Debtor filed I.A. 69 of 2019 under Rule 11, read with Rule 51 of National Company Law Tribunal Rules, 2016 (Rules - in short), to dismiss the Company Petition. The Adjudicating Authority has allowed I.A. 69 of 2019 and dismissed the Company Petition CP(IB)No.144/BB/2017 reserving liberty to the Appellant - Financial Creditor to file fresh Company Petition in accordance with law after High Court of Karnataka decides the issues pending before the High Court. Thus, the present Appeal.

2. The Appellant filed the Application on 23.11.2017 under Section 7 of IBC on assigning of the debt as per registered deed of Company Appeal (AT) (Ins) No.1337 of 2019 assignment (Annexure A-11) dated 30.03.2016 by which deed South Indian Bank assigned its debt to the Appellant.

We will refer to the South Indian Bank as "SIB" or, unless context is otherwise - as "Appellant" for sake of convenience.

3. The case of the Appellant, in short, is that the Corporate Debtor (CD - in short) earlier filed Statement of Objections (Annexure A-17) opposing Section 7 Application, on 11.06.2018. Later Corporate Debtor filed I.A. 69 of 2019 on 30th January, 2019 vide Annexure A-18 (Page - 321) and challenged maintainability of Section 7 Application. Initially, the said I.A. was dismissed by Adjudicating Authority on 21st February, 2019 vide Order (Annexure A-19 - Page 327) on the ground that the grounds raised can be taken up at the time of hearing for admission of the Petition under Section 7. Corporate Debtor, however, filed Writ Petition 14107/2019 (Annexure A-20 - Page 329) and the Hon'ble High Court of Karnataka by Order dated 25th April, 2019 (Annexure A-21

- Page 350) set aside the Order dated 21st February, 2019 and directed the Adjudicating Authority to decide the I.A. 69 of 2019 by Speaking Order and decide the objections regarding maintainability. Subsequently, the Adjudicating Authority on hearing the parties has allowed the I.A. 69 of 2019, and dismissed the Application under Section 7 of IBC, with liberty as mentioned.

Company Appeal (AT) (Ins) No.1337 of 2019

4. The Appeal has referred to the facts of the case (in para - 7) and the documents filed with the Appeal. We have considered the Appeal as well as the statement of objections filed by the Corporate Debtor (Diary No.18701) and Rejoinder (Diary No.18953). The Appeal as well as Impugned Order has referred to the developments. It would be appropriate to have the chronology of events in Telegraphic language to have a birds eye view, clarity and reference.

5. To introduce, it may be mentioned that State Bank of India (SBI - in short) and South Indian Bank (SIB) had a Consortium Lending Agreement (Annexure A-3) in 2009 and Annexure A4 -

Supplementary Agreement dated 29.01.2011 with the Corporate Debtor. The State Bank of India initiated actions earlier as consortium leader and later chose to take actions for itself. The Financial Creditor (SIB) granted term loan of Rs.15 Crore as part of Consortium arrangement with SBI as per Sanction Order dated 26th February, 2009 and subsequently, in 2011, had also granted separate overdraft facility to the extent of Rs.1.35 Crores (see Annexure A-5 - Page 121 @ 128). The Application under Section 7 of IBC (Annexure A-16 - Page 307) was filed on 23rd November, 2017 on the basis of amounts lent under both these arrangements and the debt on the basis of both these arrangements was claimed to be in default.

Company Appeal (AT) (Ins) No.1337 of 2019

6. Now, keeping this broad outline before us, we are referring to the Chart of chronology of events in telegraphic language as appearing from the record. The same is as under:-

Chart Sl. Date/ From Record Chronology of relevant Events No. Annexure/ in  
Telegraphic Language Page

1. 25.03.2009 SBI & South Indian Bank (SIB) entered into Annexure - A3 Term Loan Consortium Lending Agreement Page - 60 dated 25.03.2009 and sanctioned and granted financial facility to CD of Rs.20 Crores and Rs.15 Crores respectively.

- Annexure A4 - Later Supplementary Agreement dated 29.01.2011 entered into.

2. 30.01.2014 As per Appeal there was Default - CD classified as NPA by Appellant/SIB.

3. 10.01.2014 SBI filed OS 88/14 in DRT Bengaluru under Section 19 of RDDB&FI Act, 2002 against CD for Rs.19,96,71,133. (Appeal Para - 7.4)

4. 15.07.2014 SIB filed OA 932/14 in DRT under Section 19 of Annexure - A5 RDDB&FI Act, 1993 for Rs.11,18,21,775.83 Page - 121 towards Term Loan in Consortium arrangement and Rs.71,93,509.00 towards Overdraft facility outside Consortium as on 04.04.2014, as there was default in debt of SIB also.

5. 27.10.2014 SBI as consortium leader issued Demand Notice Annexure A/6 to CD under Section 13(2) SARFAESI Act, 2002 Page 142 for Rs.33,69,18,099 as on 07.10.2014 (which included Rs.11,89,08,577 as dues of SIB under Consortium).

6. 28.11.2014 CD made repayment of Rs.3,47,00,000/- to SIB Annexure A-7 as seen from Statement of Account of CD. Page - 148 Another Rs.53 Lakhs repaid on 03.12.2014.

7. 29.11.2014 CD sent Reply to Annexure - 6 Demand Notice dated 27.10.2014 which was sent by SBI.

(Appeal Para 7.8) Company Appeal (AT) (Ins) No.1337 of 2019

8. 05.08.2015 SBI issued Possession Notice to CD - under Rule 8(1) of Security Interest (Enforcement) Rules, 2002. (Appeal Para - 7.9)

9. 10.08.2015 - CD moved DRT under Section 17 of SARFAESI Act.

- DRT passed Order dated 10.08.2015 restraining Bank from further proceeding under SARFAESI (Appeal Para - 7.10)

10. 14.09.2015 SBI withdrew Demand Notice dated 27.10.2014, which had been sent for Consortium. (Appeal Para - 7.11)

11. 17.10.2015 SBI issued fresh Demand Notice for Consortium Annexure A-8 to CD for Rs.26,35,26,643 as on 15.10.2015. CD Page - 149 informed by SBI that account of CD was classified NPA by Consortium Banks on 30.01.2014. Demand Notice dated 27.10.2014 and recovery measures therein were withdrawn.

12. 04.12.2015 - CD filed W.P. 52886-52887/2015 in HC at Annexure A-9 Bengaluru challenging Notice dated 17.10.2015 The W.P. against Respondent No.1 - Authorised Officer of Page - 156 SBI and Respondent No.2 - SBI.

- Respondent - SBI restrained from further proceeding other than what has been impugned before DRT, by High Court Order dated 04.12.2015 (Annexure R-4 - Page 22 of Statement of Objections Diary No.18701)

13. 22.03.2016 DRT allowed OA 88/14 of SBI. Issued Recovery Annexure A-10 Certificate in favour of SBI, against CD, for Page 172 Rs.19,96,71,133.

14. 30.03.2016 SIB assigned its debt to Appellant vide Annexure A-11 Registered Deed of Assignment. Page - 187

15. 14.02.2017 SBI withdrew its Annexure A-8 Notice dated Annexure A-12 17.10.2015 and recovery actions initiated under Page - 285 Section 13(2) of SARFAESI Act reserving right to initiate legal proceedings deemed necessary under law.

Company Appeal (AT) (Ins) No.1337 of 2019

16. 09.03.2017 SBI, in individual capacity (and not as Annexure A-13 Consortium) issued fresh Notice and demanded Page - 289 Rs.20,05,05,013 to CD, under Section 13(2) of SARFAESI Act. The Notice limited itself to liabilities of SBI only.

19.08.2017 SBI issued Possession Notice under SARFAESI

17. Annexure A-14 Act read with Rule 8(1) of The Security Interest Page - 296 (Enforcement) Rules, 2002 in individual capacity pursuant to Demand Notice (Annexure A-13) dated 09.03.2017.

18. 12.10.2017 - CD filed IA 1/17 in WP 52886- 52887 of 2015 -

Annexure A-15 challenging Notices dated 09.03.2017 and Page - 300 19.08.2017. Respondent No.1 is Authorised Officer of SBI and Respondent No.2 is SBI.

Prayer made was to direct the Bank not to take further proceeding under SARFAESI Act and Security Interest Rules as per Notice dated 19.08.2017.

- HC passed Order dated 12.10.2017 directing SBI not to precipitate further till Main Petition is decided.

(Appeal Page 306/306A)

19. 23rd November, Appellant/SIB filed IBC Section 7 Application 2017 before Adjudicating Authority at Bengaluru - Annexure A-16 CP/IB/144/BB/2017.

Page - 307 19A. (W.e.f. (Section 238 A inserted in IBC - applying 06.06.2018) provisions of the Limitation Act, 1963, as far as may be made applicable to proceedings.)

20. 11.06.2018 CD filed Statement of Objections, to Annexure A-

Annexure A-17 16.

Page - 313

21. 30.01.2019 CD filed IA 69/2019 under Rule 11 read with Annexure A-18 Rule 51 of NCLT Rules, 2016 challenging Page - 321 maintainability of Section 7 Application, when DRT proceeding was pending and High Court had stayed the proceeding. Dismissal was sought.

22. 21.02.2019 Order dated 21.02.2019 passed by Adjudicating Annexure A-19 Authority/A.A. - Dismissed IA 69/2019, on the Page - 327 ground that the grounds raised can be taken up Company Appeal (AT) (Ins) No.1337 of 2019 at the time of hearing for admission of Petition under Section 7.

23. 26.03.2019 CD filed WP 14107/19 against Appellant Annexure A-20 challenging Annexure A-19 Order dated Page - 329 21.02.2019, in High Court of Karnataka at Bangalore, referring to restrain Order dated 04.12.2015 and 12.10.2017 against SBI (Para 11, 12 of Writ Petition 52886 - 52887/2015 and OA 932/2014 by SIB in DRT.

24. 25.04.2019 High Court Order dated 25.04.2019 which set Annexure A-21 aside Order dated 21.02.2019 of Adjudicating Page - 350 Authority and directed A.A. to decide IA 69/2019 by speaking Order with regard to the objections regarding maintainability.

25. 10.10.2019 Adjudicating Authority passed Impugned Order.

Annexure A-1 IA 69/2019 allowed and CP IB/144/BB/17 Page - 44 dismissed.

7. Referring to the events as appearing from the above, it has been argued by the learned Counsel for Appellant that when the Adjudicating Authority passed Orders (Annexure A-19) dated 21st February, 2019, the Corporate Debtor instead of filing Appeal to this Tribunal, filed Writ Petition. It is argued that the Hon'ble High Court of Karnataka at Bengaluru allowed the Petition and set aside the Order dated 21st February, 2019 directing the Adjudicating Authority to decide the Interim Application on maintainability. Subsequently, the Adjudicating Authority has by cryptic Order allowed the I.A. 69 of 2019 on the basis that the Hon'ble High Court has in a proceeding which was basically against the State Bank of India, restrained further proceeding (Annexure R-4 Diary No.18701) Company Appeal (AT) (Ins) No.1337 of 2019 and by another Order dated 12th October, 2017 (Page - 306) directed the State Bank of India not to precipitate further. The learned Counsel has argued that although State Bank of India initially invoked actions under SARFAESI acting in consortium against which Writ Petition 52886 - 52887 of 2015 was filed by Corporate Debtor, the Notice dated 27th October, 2014 (Annexure A/6) which had been issued by State Bank of India as consortium leader, was withdrawn by State Bank of India on 14.09.2015 and S.B.I. issued fresh Demand Notice (Annexure A-8) on 17.10.2015. This led Corporate Debtor to file Writ Petition 52886-52887 of 2015 in High Court of Karnataka and Order dated 04.12.2015 was passed against SBI. That, even this Notice was withdrawn on 14th February, 2017 vide Annexure A-12. The Counsel submitted that Writ Petition 52886 - 52887 of 2015 filed by Corporate Debtor became infructuous when the said Notice dated 17.10.2015 was withdrawn by State Bank of India and the Writ Petition would no more survive. The learned Counsel submitted that subsequently on 9th March, 2017 by Annexure A-13 (Page 289), State Bank of India in individual capacity and not as a consortium leader demanded dues from Corporate Debtor and issued Possession Notice (Annexure A-14) dated 19th August, 2017 due to which the Corporate Debtor filed I.A. 1 of 2017 in WP 52886 - 52887 of 2015 challenging Notices dated 09.03.2017 and 19.08.2017 and High Court passed Order dated 12th October 2017, copy of which is at Company Appeal (AT) (Ins) No.1337 of 2019 Page - 306. Argument is that SIB is not party to the said Writ Petition. It is argued that the Notice issued by SBI as Consortium Leader was already withdrawn and subsequent individual action of State Bank of India and Order passed in view of that action under SARFAESI cannot be reason for Adjudicating Authority to dismiss the Application under Section 7 as not maintainable. Argument is that action under Section 7 of IBC is not adversarial but to save the Corporate Debtor by bringing about resolution so that the debts can be fairly paid.

8. It is argued that the Application under Section 7 was also within limitation as SIB had classified default with regard to the amounts lent by SIB as NPA on 30th January, 2014 and Corporate Debtor made repayment of Rs.3,47,00,000/- to SIB on 28th November, 2014 as can be seen from Statement of Account (Annexure A-7 - Page 148). Learned Counsel referred to Reply filed by the Corporate Debtor (Diary No.18701) where in Para - 34, it is claimed that the Corporate Debtor was denying that subsequent to repayment of Rs.3,47,00,000 to the Appellant on 28.11.2014, the Corporate Debtor did not pay a single penny. The learned Counsel referred to the Statement of Account (Annexure A-7) to submit that yet another amount of Rs.53 Lakhs was repaid on 3rd December, 2014. It is argued that it is quite clear that under Section 19 of the Limitation Act, fresh period of limitation would run from the date of Company Appeal (AT) (Ins) No.1337 of 2019 these

repayments on 28th November, 2014 and 3rd December, 2014. The argument is that the Section 7 Application filed on 23.11.2017 was thus within limitation. Counsel submitted that apart from this, the Corporate Debtor had in the High Court in Writ Proceeding filed Certificate (Annexure R A/2 - Rejoinder Diary No.18953) which clearly acknowledged outstanding dues of South Indian Bank to the tune of Rs.8.60 Crores as on 15th November, 2015. Thus, it is argued that there is also acknowledgement of debt even from the date of NPA dated 30th January, 2014. Counsel argued that Section 18 of the Limitation Act applies to Suit as well as Application and under Section 7, it being an Application, the limitation is clearly saved.

9. It is argued that in the proceeding which was filed before the Hon'ble High Court of Karnataka, it was relating to only action initiated under SARFAESI and the Appellant was not party to the litigation and had not been restrained from pursuing its statutory remedy under Section 7 of the Code. By the Order dated 12th October, 2017 (Page - 306), the direction was only to the State Bank of India not to precipitate further. The SIB is not party to any such individual actions of State Bank of India and the SIB is not even arrayed as party in the Writ Petition and Adjudicating Authority wrongly expected SIB to get permission from High Court.

Company Appeal (AT) (Ins) No.1337 of 2019 Thus the learned Counsel submitted that the Adjudicating Authority erred in dismissing the Application of the Appellant.

10. Against this, the Corporate Debtor has raised objections (Diary No.18701) and it is argued that the Corporate Debtor had borrowed loan to the tune of Rs.35 Crores, under consortium banking arrangement wherein - from State Bank of India Rs.20 Crores and from South Indian Bank Rs.15 Crores was the amount. The Agreement was dated 25th March, 2009 and supplementary Consortium Agreement was executed on 29th January, 2011. On 30th December, 2010, SBI sanctioned further loan of Rs.5 Crores. The Corporate Debtor has partially repaid State Bank of India and SIB. The Corporate Debtor claims that the Notice under Section 13(2) of the SARFAESI Act was issued by SBI on 27.10.2014 vide Annexure A-6. In the said Notice, the debt was declared NPA as on 30th January, 2014. On 24th November, 2014, the Appellant - SIB filed OA 932 of 2014 (Annexure A-5) before DRT. On 10th January, 2014, SBI filed OA 88 of 2014. Both the OAs were based on Notice dated 27th October, 2014. It is stated that in the interim, Corporate Debtor repaid Rs.11,94,00,000 to consortium banks which was confirmed by SBI vide Annexure R-2 dated 22.01.2015, and it withdrew Notice dated 27.10.2014 vide Annexure R-3 dated 14.09.2015. Respondent claims that in spite of payment to the State Bank of India, it issued subsequent Notice dated 17th Company Appeal (AT) (Ins) No.1337 of 2019 October, 2015 (Annexure A-8) for itself and SIB. The Corporate Debtor challenged the same before High Court of Karnataka vide Writ Petition No.52886 of 2015. [Corporate Debtor in Reply - Diary No.18701, accepts that SBI had later on withdrawn the Demand Notice dated 17th October, 2015 as well as recovery action initiated under Section 13(2)]. Statement of Objections (Diary No.18701) in para - 14 mentioned as under:-

"14. By order dated 04.12.2015, the Hon'ble High court was pleased to restrain SBI from taking any further proceedings. The operative part of the order is extracted hereunder:

"Since the Petitioner alleges action on the part of the respondents which are an over-reach of their authority and the law it would be appropriate for this petition to be entertained notwithstanding the embargo imposed by the Supreme Court and the statute that the proceedings shall not lie before this Court.

Accordingly, the respondents are restrained from taking any further proceedings other than what has been impugned before the Debts Recovery Tribunal.

Emergent notice regarding rule." (emphasis supplied) True copy of the order of Hon'ble High Court of Karnataka in W.P. No.52886/2015 dated 04.12.2015 is annexed herewith as Annexure R-4 (pg 22 to 23)"

[Emphasis supplied] Company Appeal (AT) (Ins) No.1337 of 2019

11. Corporate Debtor states that DRT passed final Order dated 22nd March, 2016 (Annexure A-10) in the Suit filed by State Bank of India and gave directions to pay amounts as mentioned to State Bank of India. It is claimed that said proceedings were not pursued by State Bank of India as per communication dated 14th February, 2017 (Annexure A-12). It is claimed that subsequently, DRT stayed the OA 932 of 2014 which had been filed by the Appellant referring to High Court Order dated 4th December, 2015. Respondent claims that State Bank of India then issued letter dated 9th March, 2017 (Annexure A-13) in its own capacity and not on behalf of SIB demanding certain repayments and the Notice was challenged by filing I.A. 1 of 2017 in WP 52886 of 2015 and State Bank of India was restrained from proceeding further. Para - 18 of the Statement of Objections filed reads as under:-

"18. The Notice dated 09.03.2017 was challenged by the Respondent in I.A. No. 01/2017 in W.P.No.52886/2015. By order dated

12.10.2017, the Hon'ble High Court was pleased to restrain SBI from initiating further proceedings until the main petition is considered in full (pg.306 of Annexure A-15)."

[Emphasis supplied]

12. On such basis, the Corporate Debtor claims that there is stay Order dated 4th December, 2015 which enjoins SBI and SIB from Company Appeal (AT) (Ins) No.1337 of 2019 taking any further proceeding and the said Order dated 12th October, 2017 is another stay Order. Thus, the Corporate Debtor claims that the Impugned Order is required to be maintained. It is further the defence and it is argued that the Application under Section 7 is time barred considering the Judgement of Hon'ble Supreme Court in the matter of "B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates" (MANU/SC/1160/2018) (AIR 2018 SC 5601) and Judgement in the matter of "Gaurav Hargovindbhai Dave Vs Asset Reconstruction Company (India) Ltd & Anr" - Civil Appeal No.4952 of 2019 which laid down that Application under Section 7 of IBC is time barred if it is filed three years from the date on which the debt has fallen due, that is, from date of default. Corporate Debtor claims that Form submitted by Appellant shows the date of default as 30th January, 2014. The



Corporate Debtor wants the Appeal to be dismissed.

13. We have heard the parties and perused the record. The Impugned Order referred to the averments made in I.A. 69 of 2019 by the Corporate Debtor and the Statement of Objections filed to the I.A. by the Financial Creditor and in para - 9 of the Impugned Order, referring to the Assignment Agreement in favour of the Appellant, observed that the Assignment Agreement dated 30 th March, 2016 was filed in DRT only in October, 2016 for substitution and observed that unless proper Application is filed for Company Appeal (AT) (Ins) No.1337 of 2019 substitution in cases and granted by the Court/Tribunal, it cannot be automatic. We find these observations irrelevant for what Adjudicating Authority had to decide.

Adjudicating Authority then referred to the Assignment Agreement where reference is made to pending cases. Impugned Order then observed in para -11:-

"Apart from the above cases as referred to in the said Assignment Agreement, OA No.932 of 2014 filed by SIB is also pending.

All these cases are in the name of Lead Bank which includes SIB, the Assignor of Financial Creditor herein. Without settling/withdrawing the above cases, the instant case is filed by the Petitioner on the basis of Assignment Agreement in question, by conveniently referring some of the issues involved in the case. Though individual Bank of Consortium Banks can maintain an application/Petition, in normal circumstances, under the extant provisions of the Code, the circumstance as available in the instant case do not justify maintaining an independent application/Petition, without clarifying this issue by the Hon'ble High Court in the issue pending before it. We have granted sufficient time to the Petitioner to get necessary clarification over the matter pending with reference to the instant Petition. However, the Petitioner tried to justify the maintainability on un-tenable grounds.

12. Even though, technically, there is no bar in provisions of Code for the Petitioner/Assignee of SIB to initiate CIRP in respect of Corporate Debtor, the preliminary objections raised by the Corporate Debtor to be considered before taking up the admission of main case.

Company Appeal (AT) (Ins) No.1337 of 2019 Moreover, it is settled provision of law that Original jurisdiction of Hon'ble High Courts as conferred on them Under Articles 226 and 227 of Constitution of India is intact. Admission of the case under the Code pre-suppose imposition of Moratorium apart from appointing IRP etc. The Adjudicating Authority is not empowered to pass any order over jurisdiction of Hon'ble High Court or to clarify over interim orders passed by it. The above facts and circumstances clearly indicate rather suggest that the broad issue of Loans given to Applicant and subsequent defaults are issues to be decided by the Hon'ble High Court of Karnataka in the pending cases. And we are not convinced with the reasons cited by the Petitioner/Financial Creditor that the main Company petition is still

maintainable.

13. On careful perusal of the judgement of Rita Machines (India) Ltd. vs. DRAT and others, relied upon by the learned Senior Counsel for the Respondent/Financial Creditor, we found that the facts and circumstances and issue raised are totally different from the facts and issue involved in the instant case. In this case, broad issues are the validity of Assignment in question and the alleged violation of interim orders passed by Debt Recovery Tribunal.

14. For the aforesaid reasons and circumstances and the law on the issue, we are of the considered view that the instant Application deserves to be allowed by granting liberty to the Petitioner to file an appropriate Petition duly following the extant provisions of Code, after the Hon'ble High Court decides the issues pending before it.

15. In the result, the instant I.A. No.69 of 2019 in CP (IB) No.144/BB/2017 is hereby allowed.

Consequently dismissed main Company Petition bearing C.P. (IB) No.144/BB/2017 by reserving liberty to the Petitioner/Financial Company Appeal (AT) (Ins) No.1337 of 2019 Creditor to file fresh Company Petition, in accordance with law, after the Hon'ble High Court decides the issues pending before it. No order as to costs."

[Emphasis supplied]

14. Thus, these are the reasons recorded by the Adjudicating Authority for allowing the I.A. and dismissing the Application under Section 7. It is apparent that the Adjudicating Authority did not apply itself to the Orders which were being relied on by the Corporate Debtor and simply recorded that it is not empowered to pass any Order over jurisdiction of Hon'ble High Court or to clarify interim orders passed by the Hon'ble High Court. It appears to us that the Adjudicating Authority avoided to decide the issues raised and without going into the Record, it has thrown out the Application under Section 7 without justifiable reasons. Adjudicating Authority accepted individual Bank can maintain application beyond consortium and there is no bar to invoke provisions of Code but without even showing how the Orders in Writ Petition in which SIB was not even party, it should wait.

15. The chronology of events as noted in the above chart as appearing from the record shows that OA 932 of 2014 was filed by SIB before SBI sent Notice dated 27.10.2014, which it withdrew on 14.09.2015. Later SBI issued Notice again for Consortium on 17.10.2015 which led the Corporate Debtor to file Writ Petition Company Appeal (AT) (Ins) No.1337 of 2019 52886 - 52887 of 2015. State Bank of India had issued that Notice for itself and SIB which Demand Notice was under Section 13(2) of SARFAESI on 27th October, 2014 (Annexure A-6). Annexure A9- Copy of the Writ Petition No. 52886-87/2015 shows that, in the Writ Petition, Corporate Debtor made only (1) Authorized Officer of SBI and (2) SBI as Respondents. SIB was not arrayed as Respondent. Interim Prayer was to restrain the Authorized Officer of the Bank from taking further steps pursuant to the

SARFAESI Notice dated 17.10.2015. The Hon'ble High Court of Karnataka passed following Order on 4th December, 2015:-

"Since the petitioner alleges action on the part of the respondents which are an over-reach of their authority and the law, it would be appropriate for this petition to be entertained notwithstanding the embargo imposed by the Supreme Court and the statute that the proceedings shall not lie before this Court.

Accordingly, the respondents are restrained from taking any further proceedings other than what has been impugned before the Debts Recovery Tribunal.

Emergent notice regarding rule."

16. The copy of Writ Petition is at Annexure A-9 in which there are only two Respondents - 1) Authorized Officer of State Bank of India and 2) State Bank of India. The Appellant or SIB are not Respondents in this Writ Petition. Rather in Para - 7 of the Writ Petition, Corporate Debtor claimed that it was mandatory for the consortium to jointly give Notice of Default. The prayer clauses seek Company Appeal (AT) (Ins) No.1337 of 2019 to quash the Notice dated 17th October, 2015. The earlier Notice dated 27th October, 2014 (Annexure A-6) had been withdrawn by State Bank of India on 14.09.2015 and State Bank of India had issued fresh Notice dated 17th October, 2015 (Annexure A-8 Page -

149) and this was challenged in the Writ Petition 52886 - 52887 of 2015 and the prayer sought quashing of this Notice dated 17th October, 2015. It is admitted position that this Notice dated 17th October, 2015 was withdrawn on 14th February, 2017 by SBI vide Annexure A-12, along with recovery action.

17. Subsequently, when State Bank of India issued Demand Notice on 9th March, 2017 (Annexure A-13) it was in individual capacity and Possession Notice dated 19th August, 2017 (Annexure A-14) was pursuant to the Demand Notice dated 9th March, 2017, Corporate Debtor filed I.A. 1 of 2017 in the same Writ Petition 52886 - 52887 of 2015 and challenged these Notices. Annexure A- 15 (Page - 300) is the copy of the I.A. which was filed by the Corporate Debtor. Even in this I.A., only the Authorized Officer of State Bank of India and State Bank of India are the Respondents and not the SIB and the Order which was passed on 12th October, 2017 (Appeal Page - 306) is as under:-

"In view of the statement of objections filed by the respondents, the petition would require consideration.

Company Appeal (AT) (Ins) No.1337 of 2019 In the meantime, since this court through the order dated 04-12-2015 had restrained the respondents from initiating further proceedings, the said order shall enure to the benefit of the petitioner and the matter shall not be precipitated further by the respondent till a consideration is made in this petition.

IA No.1/17 is disposed of accordingly."

18. From the above, it is clear that in the Writ Petition filed against State Bank of India and the I.A. referred above, the Appellant or SIB were not made parties. State Bank of India initially purported to act for the consortium but after filing of the Writ Petition, withdrew the Notice dated 17th October, 2015 which was the basis to file Writ Petition 52886 - 52887 of 2015. The prayers in the Writ Petition were in context of such Notice and that Corporate Debtor should be heard regarding declaration of N.P.A. Subsequently, State Bank of India acted on its own when it raised demand vide Annexure A-13 on 9th March, 2017 and Possession Notice (Annexure A-14) on 19th August, 2017. Directions given were to the Authorized Officer of SBI and State Bank of India which were the Respondents in Writ Petition. Present the Corporate Debtor is aware that both the Orders were against SBI as portions reproduced from its Statement of Objections (Diary No.18701) and highlighted supra show. We find it difficult to accept that there was restraint Order against SIB.

Company Appeal (AT) (Ins) No.1337 of 2019

19. Apart from above, the action initiated by the Appellant - SIB by filing Application under Section 7 was not merely relevant to - 1) term loan facility which was under the Consortium but also, 2) overdraft facility which was separate arrangement between the Corporate Debtor and SIB. In the Application, Form 1 (Annexure A- 16 - Page 307), the Appellant in Para - IV calculated amount of debt granted as Rs.16,35,00,000/- as per sanction dated 26th February, 2009 and the amount claimed to be in default is stated to be Rs.15,43,83,042.73. The date of default is mentioned as 30 th January, 2014. In support of claim of such outstanding debt, Part - V of Form refers to the particulars of financial debt and contents of documents and records in support and that in those documents, there is reference to the Consortium Agreement dated 25th March, 2009 and also Supplementary Agreement dated 29th January, 2011 (Annexure A-4) and it is also mentioned that South Indian Bank also granted separate overdraft facility to a limit of Rs.1.35 Crores and there is reference to the documents executed on 5th April, 2011. The format shows Annexure - I as attaching all documents referred in the Application. If such document is kept in view, it is clear that the Financial Creditor has not merely relied on the amounts due and outstanding based on the Consortium Arrangement but also with regard to the separate overdraft facility granted by it to the Corporate Debtor. Thus even if with regard to the initial effort of State Bank of India to take action for the Company Appeal (AT) (Ins) No.1337 of 2019 consortium, it was to be said that there were Orders passed against SBI with SIB indirectly beneficiary, the right of the Financial Creditor to proceed for dues outstanding based on separate overdraft facility could not be denied. For such reasons also, it appears to us that the Adjudicating Authority erred in not applying itself to the documents and record of the matter.

20. To summarize, it is clear from the above and perusal of the Chart recorded above that before State Bank of India issued first Demand Notice dated 27th October, 2014, SIB had already filed OA 932 of 2014 in DRT for dues based, on not only against Term Loan under Consortium but also against over draft facility which was outside the Consortium. State Bank of India withdrew the Notice dated 27th October, 2014 on 14th September, 2015. Thereafter State Bank of India issued fresh Demand Notice for the Consortium on 17th October, 2015 which led to the Corporate Debtor

filing Writ Petition No.52886 - 52887 of 2015 in High Court of Karnataka and the Hon'ble High Court passed Order dated 4th December, 2015. Corporate Debtor did not array South Indian Bank in that Writ Petition as Respondent. State Bank of India withdrew that Notice dated 17th October, 2015 which was the basis for the Writ Petition, on 14th February, 2017. State Bank also withdrew recovery actions initiated because of the said Notice dated 17th October, 2015. Thereafter, State Bank took actions in individual capacity which led Company Appeal (AT) (Ins) No.1337 of 2019 to the Corporate Debtor filing I.A. 01 of 2017 in the same Writ Petition 52886 - 52887 of 2015. In this I.A. also, South Indian Bank was not party nor concerned with the action of State Bank of India. It is apparent that the Orders were against the State Bank of India and thus, the Adjudicating Authority erred in directing the South Indian Bank to go and get directions from the High Court or to await decision of issues by the High Court when South Indian Bank was not even party in the said Writ Petition. The Adjudicating Authority accepts that there is no bar in IBC for Bank to initiate CIRP proceedings even individually when it is part of Consortium. Still the Adjudicating Authority wrongly insisted that South Indian Bank should go before the High Court when Corporate Debtor itself did not make South Indian Bank a party in the Writ Petition.

21. Apart from above, it is clear that the Application under Section 7 of IBC filed is not confined to debt as arising in the arrangement due to Consortium Lending which was a term loan, but was also towards independent overdraft facility and amounts due in that context. As such, even if one was to stretch the Order of High Court dated 04.12.2015 to say that it affects SIB, still the South Indian Bank was competent to maintain Section 7 Application on the basis of overdraft facility which was provided outside the Consortium. Thus, it appears to us that the Order Company Appeal (AT) (Ins) No.1337 of 2019 passed by the Adjudicating Authority is not at all justified and deserves to be set aside.

22. As regards limitation, the Counsel for Appellant submitted that the Appellant treated the account of Corporate Debtor as NPA on 30th January, 2014 and it is argued that Annexure A-7 shows that on 28th November, 2014, the Corporate Debtor paid Rs.3,47,00,000/- to SIB and another Rs.53 Lakhs on 3rd December, 2014. It is argued that under Section 19 of the Limitation Act, when such repayments were made, fresh limitation would start and thus the Application under Section 7 filed on 23rd November, 2017 was within limitation. The Counsel has further relied on Annexure RA/2 which was issued on 20th November, 2015 and in which it is mentioned that outstanding loan as on 15th November, 2015 of South Indian Bank was Rs.8.60 Crores. It is argued, it is written acknowledgement of debt and thus the Application under Section 7 is within limitation.

23. Against this, the learned Counsel for the Respondent has argued that the letter dated 29th November, 2014 which is at Page - 17 of Statement of Objections (Annexure R-1), was issued without prejudice to the rights of the Corporate Debtor and thus cannot be used against the Corporate Debtor. The Counsel further argued that under IBC, limitation is of three years as per Article 137 of the Limitation Act, 1963. Counsel referred to Judgement in the matter Company Appeal (AT) (Ins) No.1337 of 2019 of "B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates" (referred supra) and submitted that it has been held that the right to sue accrues when default occurs and if default occurred over three years prior to the date of filing the Application, the Application would be barred under Article 137 of the Limitation Act, except, cases where on facts of the case, Section 5 of

Limitation Act may be applied to condone delay. The learned Counsel has then relied on the Judgement in the matter of "Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd." MANU/SC/0589/2020 and Paragraphs - 33 and 33.1 to submit that in the Application under Section 7 filed before the Adjudicating Authority (Annexure A-16 - Page 307) the date of default is mentioned as 30th January, 2014 and thus other arguments to show that the Application is within limitation, cannot be maintained.

24. It would be appropriate to reproduce Paragraphs - 33 and 33.1 from the Judgement (As reported in Manupatra) in the matter of "Babulal Vardharji Gurjar" which read as under:-

"33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they enure to the benefit Company Appeal (AT) (Ins) No.1337 of 2019 of Respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the Respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the Applicant in the said Part-V of the therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

33.1. Therefore, on the admitted fact situation of the present case, where only the date of default as '08.07.2011' has been stated for the purpose of maintaining the application under Section 7 of the Code, and not even a foundation is laid in the application for suggesting any acknowledgement or any other date of default, in our view, the submissions sought to be developed on behalf of the Respondent No. 2 at the later stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. Indisputably, in the present case, the Respondent No. 2 never came out with any pleading other than stating the date of default as '08.07.2011' in the application. That being the position, no case for extension of period of limitation is available to be examined. In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement. In this Company Appeal (AT) (Ins) No.1337 of 2019 view of the matter, reliance on the decision in Mahaveer Cold Storage Pvt. Ltd. does not advance the cause of the Respondent No. 2."

25. We have gone through the Judgement in the matter of "Babulal Vardharji Gurjar" (supra). In that matter of "Babulal Vardharji Gurjar", para - 2 of the Judgement shows that the Adjudicating Authority had admitted the Application under Section 7 in that matter which Order was challenged before this Appellate Tribunal and the Appeal was summarily dismissed. However, the Hon'ble Supreme Court (in the first round of litigation, when matter went to the Hon'ble Supreme Court in Civil Appeal No.10710 of 2018) found that the issue relating to limitation though raised in Appeal was not decided by the Appellate Tribunal. The matter was thus remanded for this Tribunal to specifically deal with the issue of limitation. This Appellate Tribunal had, in that matter, thereafter passed Order dated 14th May, 2019 and again dismissed the Appeal holding that the Application was within limitation. This was again challenged before Hon'ble Supreme Court and the above Judgement dated 14th August, 2020 has been passed. The above Judgement of "Babulal Vardharji Gurjar" shows that the Hon'ble Supreme Court in para - 6.3 looked into not only the contents recorded as Point No.2 of Part - IV of the Application but also looked into the requirement as in Point No.5 of Part - V where the Applicant was required to attach the latest and complete copy of the financial Company Appeal (AT) (Ins) No.1337 of 2019 contract reflecting all amendments and waivers to date. Hon'ble Supreme Court also referred to point No.8 of Part - V which required to give List of other documents "in order to prove the existence of financial debt, the amount and date of default". The Hon'ble Supreme Court reproduced portions from the format which was filed in that matter and thereafter, Hon'ble Supreme Court analysed the relevant provisions of the Code of the Limitation Act and relevant basics of IBC and looked into the various Judgements passed by the Hon'ble Supreme Court and examined the operation of law of limitation over IBC proceedings. After noticing relevant and material observations and enunciations in the case of "Jignesh Shah vs. Union of India" 2019 SCC Online SC 1254, and other Judgements observations as seen in the Paragraphs - 33 and 33.1 as reproduced above were recorded.

Keeping the above in view, we have looked into Annexure A- 16, the Format copy of which is filed and contents of Part IV and V and documents referred in Part - V of the format. In the matter of "Babulal Vardharji Gurjar", question of limitation was not an issue when matter was before the Adjudicating Authority. The issue appears to have been raised when matter was in Appeal and as it was not dealt with by this Tribunal, Hon'ble Supreme Court had remanded the matter back to this Appellate Tribunal. After Judgment was again passed by this Tribunal it was again challenged. When the matter was again carried to the Hon'ble Company Appeal (AT) (Ins) No.1337 of 2019 Supreme Court, the above observations have been made. In the present matter if facts are considered, the matter was before the Adjudicating Authority and even before the Application under Section 7 of IBC was looked into so as to consider whether or not the same could be admitted, the Corporate Debtor filed I.A. 69 of 2019 challenging maintainability and the Adjudicating Authority, although it initially dismissed the I.A. on 21st February, 2019, was required by the Hon'ble High Court in Writ Petition 14107 of 2019 on 25th April, 2019 to pass Speaking Order with regard to maintainability. The Adjudicating Authority has then passed the Impugned Order. We have already recorded that the reasons recorded by the Adjudicating Authority to hold that the Application under Section 7 of IBC is not maintainable, cannot be sustained. We find the application was maintainable. The Impugned Order shows that the parties did raise question of limitation which Adjudicating Authority referred in the Impugned Order as the averments of the parties but it did not deal with the issue of limitation or decide the same one way or the other.

26. Under the Limitation Act, 1963, as per Section 3, it is the duty of the Court/Authority to consider whether or not the matter brought before it is within limitation. It is the duty of the authority to apply its mind to the question of limitation although limitation has not been taken as the defence. The authority under law as Company Appeal (AT) (Ins) No.1337 of 2019 appearing from Section 3 of Limitation Act, is bound to raise the question of limitation suo moto. Keeping this in view, it would be now appropriate to refer to Section 7 of IBC. Sub-Section 5 of Section 7 reads as under:-

"(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 be, by order, admit such application; or

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

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

Section 3 of the Limitation Act when it is read with Sub-Section 5 of Section 7 of IBC, it must be said that it was duty of the Adjudicating Authority to look into the format submitted and to consider whether prima facie the Form 1 read with Documents disclosed material to show debt due which is payable in law or in fact and if such debt is in default. For this Format's Part IV (2) read with Part V (8) would be relevant to show "existence" of debt. If not satisfied the Adjudicating Authority would be required to call upon Company Appeal (AT) (Ins) No.1337 of 2019 the Applicant to rectify the defect if the Application does not show how the debt is due and within limitation. In the Chart which we have recorded above, Entry - 19A shows that after the Application under Section 7 of IBC was filed in the present matter, Section 238A of IBC extending provisions of the Limitation Act was inserted in IBC with effect from 6th June, 2018. When this is so, in fairness, it would be appropriate to give opportunity to the Financial Creditor to rectify defect in the Application before the Adjudicating Authority. It is necessary for us under Rule 11 of National Company Law Appellate Tribunal Rules, 2016, to exercise inherent powers to do Justice to pass such Orders.

27. For the above reasons, we are not going into the disputes which are being raised with regard to limitation before us. The matter needs to be remanded back to the Adjudicating Authority so that the Appellant is given opportunity to rectify defects in the format, as indicated above. Appellant may amend Format and annex documents to show, how the debt is due and within limitation. The Adjudicating Authority will then take a decision, hearing both sides regarding admission.

28. For the above reasons, we set aside the Impugned Order. The I.A. 69 of 2019 filed by the Respondent is dismissed. The Company Petition CP(IB)No.144/BB/2017 is restored to the file of the



Adjudicating Authority. We hold that the Application is Company Appeal (AT) (Ins) No.1337 of 2019 maintainable. The matter is remitted back to the Adjudicating Authority with a direction to permit the Appellant - Financial Creditor to rectify defect in the format and file documents with regard to limitation as indicated above. The Adjudicating Authority will then hear both the parties and if the Adjudicating Authority finds the Application to be within limitation and if the Application is otherwise complete, the same shall be admitted and further necessary Orders should be passed.

The Appeal is disposed accordingly.

[Justice A.I.S. Cheema] Member (Judicial) [Justice Anant Bijay Singh] Member (Judicial) [Kanthi Narahari] Member (Technical) rs Company Appeal (AT) (Ins) No.1337 of 2019