

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 238 of 2020

[Arising out of Order dated December 13, 2019, passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in CP (IB) No. 254/KB/2019]

IN THE MATTER OF:

**Vidyasagar Prasad
Plot No.9, Dronacharya Nagar
Near Trimurti Nagar
Nagpur – 440022**

Appellant

Versus

- 1. UCO Bank,
Having its Head Office
10, Biplabi Trailakya Maharaj Sarani,
Kolkata – 700001**

**Having its Flagship Corporate
Centre Branch at:
Mafatlal Centre, 1st Floor
Nariman Point,
Mumbai – 400021
Email: hosp.cscell@ucobank.co.in
Phone No. 033-44557854/03344557970**

Respondent No.1

- 2. Kaizen Power Limited
Through Interim Resolution Professional
Shri Santanu T Ray
1343 Level 13, Platinum Techno Park
Plot No.17 & 18, Sector 30 A,
Vashi, Mumbai – 400705
Email: santanutray@aaainsolvency.com**

**Registration No.:
IBBI/PA-002/IP-N00360/2017-18/11055**

**Registered office
FE-83, Sector-III, Salt Lake City
Ground Floor, Kolkata – 700106
West Bengal**

Respondent No.2

Present:

For Appellant : Mr Abhijeet Sinha, Mr Sandeep Bajaj and Mr Devansh Jain, Advocates
For Respondent : Mr Partha Sil and Mr Tavish Bhushan Prasad, Advocates for Respondent No. 1
Mr Prateek Kushwaha and Mr Kanishk Khetan, Advocates for Respondent No. 2.

Glossary

KPL	Kaizen Power Limited.
CD	Corporate Debtor/Appellant
IBC	Insolvency and Bankruptcy Code, 2016
FC	Financial Creditor / UCO Bank
IRP	Interim Resolution Professional
RP	Resolution Professional
AA	Adjudicating Authority/NCLT
SARFAESI ACT, 2002	Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002
DRT	Debt Recovery Tribunal
NPA	Non-Performing Assets

J U D G M E N T

[Per; V. P. Singh, Member (T)]

1. The present Appeal has been filed by the Appellant/(suspended) Director of Corporate Debtor 'Kaizen Power Limited' under Section 61 of the Insolvency & Bankruptcy Code, 2016 (for brevity "IBC") against the impugned Order dated 13.12.2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata (in short "NCLT") in CP No.254/KB/2019, whereby the petition filed under Section 7 of the Code was admitted.

2. The original status of the Parties in the Company Petition represents them in this Appeal for the sake of convenience.

Brief Facts

3. Brief facts of the case are that the 2nd Respondent/Corporate Debtor 'Kaizen Power Limited' availed credit facilities from the Financial Creditor/1st Respondent in the shape of Term Loan, Foreign Letter of credit with bank guarantee facilities in the year 2010. After executing various documents to secure the debt, the Corporate Debtor also availed the other Term Loan Facilities from the Financial Creditor in 2012. However, the Corporate Debtor could not maintain financial discipline in payment of interest and principal amount as agreed. Therefore, the account of Corporate Debtor was classified as Non-Performing Assets on 05.11.2014. As a result, the Financial Creditor issued a notice of recall on 19.11.2014 under Section 13(2) of the SARFAESI Act, 2002, directing the Corporate Debtor and its guarantor to repay the entire loan. After that, the Financial Creditor filed an Original Application being OA No.458/2016 to recover its dues before the Debts Recovery Tribunal (DRT) Mumbai. But no material orders have been passed in the said proceedings. However, during the pendency of the proceeding of SARFAESI Act, 2002 Respondent No.1 UCO Bank filed an Application under Section 7 of the Insolvency & Bankruptcy Code, 2016, which was admitted by the Impugned Order, which is under challenge in this Appeal.

4. Grounds of Appeal

4.1 The Appeal is filed mainly on the ground that impugned Order is erroneous and is liable to be set aside as the same fails to appreciate the facts

that the Application under Section 7 of the Code was hopelessly time-barred, having been filed after more than 4.5 years from the date on which the alleged default occurred. It is submitted that the account of Corporate Debtor was declared by Respondent No.1 as irregular w.e.f. from 15.08.2014, that is three months before the date of NPA. The Application filed under Section 7 of the I. B. Code, 2016, was filed in 2019, barred by limitation.

4.2 The Adjudicating Authority considering the acknowledgement of debt in the balance sheet of the Corporate Debtor has passed the impugned Order. Accordingly, it is submitted that the name of Respondent No.1 did not find mentioned in the balance sheet of the Corporate Debtor, neither in the notes to it nor the Auditors report. As such, there was no admission of liability towards Respondent No.1, which would amount to an acknowledgement of debt as envisaged under Section 18 of the Limitation Act, 1963.

4.3 The Adjudicating Authority fails to appreciate that the balance sheet of the Corporate Debtor dated March 31 2017, under the caption Note 3, "Secured Loan",-there is no statement to show that the loan was obtained from Respondent No.1. Therefore, in the absence of disclosure, there cannot be any effective finding that there is an admission of any loan as alleged to have been made over by Respondent No.1. As such, there cannot be any extension of the period of limitation in so far as Respondent No.1 relies upon under Section 18 of the Limitation Act, 1963.

4.4 The Adjudicating Authority fails to notice that Application under Section 7 of the Code contains an account statement showing the first default date committed by the Corporate Debtor, i.e. on or before March 30 2013. The period was of more than three years before the balance sheet dated March 31 2017. As per Section 18 of the Limitation Act, 1963, the acknowledgement of debt has to be made before the expiry of the prescribed period of limitation that in the present matter was available up to March 30 2016, being the date on which the period of limitation for the default occurring on March 30, 2013, had expired.

4.5 The Adjudicating Authority further fails to notice that the effect of acknowledgement in writing has to be specific, thereby contemplating a clear and definite admission against a specific entity and in the absence thereof, no amnesty under Section 18 of the Limitation Act, 1963 can be pleaded.

4.6 Respondent No.1 placed reliance on the balance sheet dated March 31 2017, where under the heading "Long Term Borrowings", there is nothing in respect of Long Term Borrowings against the heading of secured loan. As such, there is no admission on the part of the Corporate Debtor that any alleged secured loan was pending clearance against Respondent No.1. In the present case, respondent No.1 has alleged that credit facilities are like term loans.

4.7 Appellant further contends that the impugned Order is erroneous because the Adjudicating Authority has failed to appreciate the facts that

Application under Section 7 of the Code had not been signed, verified or instituted by a duly authorised and competent person. Consequently, the Letter dated February 05 2019, does not constitute a valid authorisation in favour of Mr B. Mondal as the same is nothing but an internal communication of Respondent No.1.

4.8 Adjudicating Authority further fails to appreciate the facts that the alleged Financial debt is yet to be ascertained, and proceedings in that regard are already pending before the Debt Recovery Tribunal, Mumbai (for brevity 'DRT').

4.9 The Adjudicating Authority further fails to appreciate that Section 7 of the Application is liable to be dismissed for suppression and concealment of the material facts.

4.10 The Adjudicating Authority further fails to consider that the said project was jeopardised due to the fault of consortium lenders, including Respondent No.1. The Promoters of the Corporate Debtor had invested considerable sums in the project. It is only on account of laches and lacuna on behalf of Respondent No.1, being a consortium arrangement, the project of the Corporate Debtor failed.

5. **Appellant Contentions**

5.1 The present Appeal arises from the Order dated 13.12.2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata ("AA"), whereby the Application filed under Section 7 of the Insolvency and *Company Appeal (AT) (Insolvency) No.238 of 2020*

6 of 45

Bankruptcy Code ("IBC") by UCO Bank ("FC") was admitted and CIRP was initiated against Kaizen Power Ltd. ("CD").

5.2 The undisputed facts in the present case are as below:

- (a) The only date of default mentioned in Form-1 was 05.11.2014.
- (b) The Section 7 Application was filed by the Financial Creditor on 13.02.2019.
- (c) No pleading or factual foundation for the extension of the limitation period has been set out in Form-1.
- (d) No amendment of Form-1 has been sought by the Financial Creditor at any stage.
- (e) The Adjudicating Authority has relied on the balance sheets of the Corporate Debtor for the year 31.03.2017) (signed on 05.06.2017) to hold that the Application was not barred by limitation.

5.3 In view of the law laid down by this Hon'ble Tribunal and the Hon'ble Supreme Court, it is clear that, in the facts of the present case, the Application filed by the Financial Creditor is barred by limitation.

5.4 **NO FOUNDATION LAID IN FORM - 1**

It is now well settled that a party seeking exemption under Section 4 to 20 Limitation Act, 1963 must provide a factual foundation. In the case of

Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium¹, the Hon'ble Supreme Court held that in the absence of factual foundation of acknowledgement under Section 18 of the Limitation Act in the Form-1, an application made more than three years from the date of default would be barred by limitation.

5.5 The importance of necessary foundation for the Application of exemptions under the Limitation Act has been reiterated by the Hon'ble Supreme Court in the recent cases of:

- (a) Dena Bank (now Bank of Baroda) versus C. Shivakumar Reddy and Anr ²
- (b) Reliance Asset Reconstruction Company v Hotel Poonja International Pvt. Ltd.³
- (c) Asset Reconstruction Company (India) Limited v Bishal Jaiswal.⁴

5.6 It is submitted that the judgment passed in the matter of ARCIL Vs. Biswal Jaiswal (supra) is only the Authority for the proposition that the Limitation Act, particularly Section 18, will apply to proceedings under the Code. However, the manner in which it has to be applied is a question of fact that has to be looked into on a case to case basis.

5.7 In fact, in the appeals heard along with Asset Reconstruction Company (India) Limited v Bishal Jaiswal (Supra), the Hon'ble Supreme Court directed

¹ 2020 (15) SCC 1

² 2021 SCC Online 543

³ 2021 SCC Online SC 289

⁴ 2021 (6) SCC 366

the Financial Creditors to carry out necessary amendment to the Form-1. Therefore, it is clear that neither the Adjudicating Authority nor this Hon'ble Tribunal can consider the extension of the period of limitation in the absence of the necessary pleadings.

5.8 In the matter of Shanti Conductors Pvt. Ltd. Vs. Assam State Electricity Board & Ors.⁵, the Hon'ble Supreme Court, after appreciating the provisions of Order VII Rule 6 of the Code of Civil Procedure, 1908, has categorically held that under Section 3 of the Limitation Act, the Court by mandate of law is obliged to dismiss a case which is filed beyond the period of limitation even though no pleadings or arguments are raised to that effect and that Section 4 to Section 20 of the Limitation Act are exceptions. However, in order to bring its case under the exception, the Plaintiff must show the ground upon which exemption from such law is claimed.

5.9 In the present matter, no pleadings have been forthcoming from the side of the Financial Creditor in the Form-1. The Balance Sheet of the Corporate Debtor had merely been included in the Application index under Section 7 of the Code filed before the Adjudicating Authority, which does not amount to pleadings or laying down any foundation for exemption under the Limitation Act.

5.10 It would not be out of place to note that during arguments before this Hon'ble Tribunal, the Counsel for the Financial Creditor fairly conceded that

⁵ (2020) 2 SCC 677
Company Appeal (AT) (Insolvency) No.238 of 2020

there is no reference to any acknowledgement in the Form-1 filed before the Adjudicating Authority. However, the Counsel the FC sought to explain the "context" in which the Balance Sheet of the CD was filed. It is submitted that such an approach is contrary to Section 18 of the Limitation Act and the law laid down by the Hon'ble Supreme Court. An acknowledgement must be unambiguous, and no evidence beyond the words in writing in the form of pleadings have to be looked into. In the present matter, there is nothing in writing or in Form -1 of pleadings.

5.11 Therefore, in the absence of anything in writing or in pleadings or any other factual foundation for exemption under the Limitation Act, as in the present case, an application filed more than 3 years after the date of default ought to be rejected as being barred by limitation.

5.12 No unequivocal acknowledgement and entries in the balance sheet with caveats:

Assuming that the Adjudicating Authority could have looked into the Balance Sheet of the CD in the absence of necessary pleadings, even then, the Balance Sheet of the CD for the year ending 31.03.2017 would not extend the period of limitation.

5.13 In *ARCIL Vs. Bishal Jaiswal* (Supra), the Hon'ble Supreme Court, has discussed the cases in which the issue of acknowledgement in a balance sheet had previously been considered. The same is as under.

- (a) Bengal Silk Mills Co, v. Ismail Golam Hossain Arif⁶
- (b) Re: Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd⁷
- (c) In Re Pandam Tea Co. Ltd.⁸
- (d) Re: The Coliseum (Burrow) Ltd.⁹
- (e) Jones v. Bellgrove Properties Ltd.¹⁰
- (f) Kashinath Sankarappa v. New Akol Cotton Ginning & Pressing Co. Ltd.¹¹

5.14 From a perusal of the above judgments, as discussed in ARCIL Vs. Bishal Jaiswal (Supra), the following points are clear:

- (a) Necessary pleading for acknowledgement must be made by the Financial Creditor seeking exemption under Section 18 of the Limitation Act.**
- (b) Unless the Financial Creditor makes necessary amendments to Form-1, the arguments about the extension of limitation cannot be considered.**
- (c) Every entry in the Balance Sheet of a company does not amount to an acknowledgement.**
- (d) Whether an entry amounts to an acknowledgement depends on the facts of each case.**

⁶ 1961 SCC online Cal 128

⁷ 1928 Ch. 836

⁸ 1973 SCC online Calcutta 93

⁹ (1930) 2 Ch 44

¹⁰ , (1949) 2 KB 700

¹¹ 1949 SCC online MP 123

- (e) **The acknowledgement has to be an acknowledgement of liability and not just an acknowledgement of disbursement.**
- (f) **The acknowledgement has to be unqualified and unequivocal.**
- (g) **The acknowledgment has to be made to the person to whom the debt is owed and who is claiming benefit thereof.**
- (h) **Balance Sheets have to be read with the Director's Report and / or Auditor's Report to determine if an entry made in a Balance Sheet qua any particular creditor is unequivocal or not.**
- (i) **The Balance Sheets, like other documents, have to be read as a whole to determine whether there was an acknowledgement qua a specific creditor.**

5.15 Furthermore, from a perusal of the cases relied upon in the Reference Order in the case of Bishal Jaiswal Vs. ARCIL, it is clear that the acknowledgement relied upon was distinct and unequivocal in each of those cases. Furthermore, none of those refers to any acknowledgement by assumption. The same is reflected as under:

- a. In Mahabir Cold Storage v. CIT,¹² the names of the creditors were reflected in the Company's books of account.
- b. In the matter of A.V. Murthy v B. S. Nagabasavanna¹³, the Hon'ble Supreme Court, refused to express any final opinion on the aspect

¹² (1991) 188 ITR 91

¹³ (2002) 2 SCC 642

of an acknowledgement as the Hon'ble Court was of the view that the same were matters to be agitated before the Ld Trial Court.

- c. In the matter of Usha Rectifier Corporation (I) Ltd CCE¹⁴, it was not the case of an acknowledgement of debt in the balance sheet of the Company but one where the Company in its balance sheet had explicitly stated to have made an addition to plant and machinery in the Company by capitalisation or the expenditure and the same Form a basis for the demand for excise duty by the Central Excise Commissioner.
- d. In the matter of S. Natarajan v. Sama Dharman¹⁵, once again by placing reliance upon the judgment rendered in the matter of AV Murthy. BS Nagabasavanina (Supra), the Hon'ble Supreme Court held that whether the debt was time-barred or not can be decided only after the evidence is adduced, it being a mixed question of law and fact and no final opinion about the acknowledgement of debt in the balance sheet of the Company was expressed.

5.16 In the present case, the only acknowledgement relied upon by the Financial Creditor was one allegedly in the Balance Sheet of the Corporate Debtor have for the year ending 31.03.2017. However, the said Balance Sheet would not extend the Limitation period because there is no explicit, unequivocal acknowledgement. Furthermore, the Balance Sheet relied upon

¹⁴ (2011) 11 SCC 571

¹⁵ 2014 SCC online SC 1812, Para 8 and 9

by the Financial Creditor does not even mention the name of the Financial Creditor, let alone any details of any amount payable to the Financial Creditor.

5.17 The Financial Creditor has also relied on the Balance Sheets of the CD for the year ending 31.03.2019. The said document has been filed for the first time in reply to the present Appeal. This Hon'ble Tribunal ought not to consider the said Balance Sheet as it is well settled that a party cannot introduce new documents in an appeal to fill the lacuna in its case. Even if the said document is considered, it will not amount to an acknowledgement for the same reason as given about the Balance Sheet for the year ending 31.03.2017.

5.18 There is a gap of more than three years between the date of first default and the balance sheet relied upon by Respondent No.1 .

Without prejudice to the above, it is further submitted that along with the Application under Section 7 of the Code filed before the AA; the FC had filed a copy of the Balance Sheet of the CD as of 31.03.2017. Furthermore, the FC had also filed a copy of the detailed account statement of the CD as maintained in the books of the FC.

5.19 It is submitted that from a perusal of the said Statement of Accounts, filed before this Hon'ble Tribunal, it is evident that the FC had been charging "Penal Interest" from the CD from 30.03.2013 onwards, thereby implying that the first default on the part of the CD had occurred on or before 30.03.2013. Furthermore, such Penal Interest is also reflected in the entries dated

30.04.2013, 31.05.2013, 29.06.2013, 31.07.2013, 31.08.2013, 30.09.2013, 31.10.2013, 03.12.2013 etc., thereby implying that the CD had been in continuous default.

5.20 It is submitted that an acknowledgement to extend the Limitation period as contemplated under Section 18 of the Limitation Act, 1963 must be made within three years from the date the cause of action accrued. However, from a perusal of the above facts, it is evident that there was a gap of more than three years between the date on which the first default on the part of the CD had occurred, and the date of the aforesaid Balance Sheet relied upon by the FC. Therefore, such Balance Sheets cannot amount to an acknowledgement as contemplated under Section 18 of the Limitation Act. Accordingly, they cannot extend the period of limitation, and the Application filed before the Adjudicating Authority was barred by limitation.

5.21 Section 25(3) Contract Act not applicable:

FC has argued that even if Section 18 of the Limitation Act were not to apply, the Balance Sheet would extend the period of limitation under the provisions of Section 25(3) of the Contract Act, 1872 ("Contract Act").

5.22 This stand of the FC is also unsustainable for the following reasons:

(a) The FC laid no pleading or foundation in the Section 7 Application about Section 25(3) of the Contract Act.

(b) The Supreme Court considered the applicability of Section 25 of the Contract Act in *B. K. Educational Services (P) Ltd. v. Parag*

Gupta & Associates¹⁶ . The Court held that the limitation of applications under the Code would be governed by Article 137 of the Limitation Act. Therefore, the only delay that could be condoned would be in terms of the Limitation Act.

- (c) The provisions of the Contract Act do not apply to the Code; applications under the Code are not recovery proceedings. Therefore, the provisions of the Contract Act cannot be applied to proceedings under the Code, let alone to extend the period of limitation. Moreover, Section 238 of the Code expressly states that the provisions of the Code would have an overriding effect on any other law.

5.23 In the facts of the present case, the Application under Section 7 of the Code was filed more than three years after the date of default. FC has not pleaded and/or laid down the foundation for the extension of limitation on account of alleged acknowledgements in its Section 7 Application or Form-1 filed before the AA.

5.24 The Supreme Court and this Hon'ble Tribunal have repeatedly held that Financial Creditors cannot be permitted to revive time-barred claims under Section 7 of the Code. Therefore, this Appeal ought to be allowed, and the CD should be freed from the rigours of CIRP.

¹⁶ (2019)11 SCC 633

6. **Respondent No.1 UCO Bank's Contentions**

6.1 The Corporate Debtor had availed various credit facilities from time to time from UCO Bank/Respondent No.1. The Corporate Debtor executed various documents to avail/secure such credit facilities. As of September 14 2011, a principal sum of Rs.170.20 crores and the accrued Interest of Rs.350.50 crores was due as of January 31 2019. The account of the Corporate Debtor was classified as NPA on November 05 2014. Subsequently, action under the SARFAESI Act, 2002 was undertaken before the DRT Mumbai for recovery of dues of Respondent No.1. The Application under Section 7 was filed under the IBC, 2016 before Adjudicating Authority/NCLT Calcutta on or before 2019.

6.2 The Appellant had challenged the admission order mainly on the ground that the petition is barred by limitation as the date of default was November 05 2014, when the account was declared as NPA. Respondent No.1 has annexed the Balance Sheet of the Corporate Debtor for the Financial Year ending March 31 2017 (page 90, Vol. I, Appeal Paper Book), which shows the balance under respective heads, as shown in the previous Balance Sheet for the year ending March 31 2016 (page 123, Vol. I, Appeal Paper Book). The relevant part of the Balance-Sheet is extracted below for ready reference;

<i>Non- current liabilities</i>	<i>Rupees in Lakhs</i>	
<i>Long-Term Borrowings</i>	<i>15,715.43</i>	<i>17,670.96</i>
<i>Note 3</i>		
<i>Secured Loan</i>	<i>Rupees in Lakhs</i>	
<i>From Banks</i>	<i>19,496.22</i>	<i>19,496.02</i>

<u>less;</u>
<u>Current maturities to other current liabilities:</u>
<u>3999.06 15,585.16 1955.53 17,540.69</u>
<u>3.4 The Company made certain defaults in repayment of term loans and Interest. The continuing default as of March 31 2017 is as below;</u>
<u>Interest on Term Loans; 9681.51 (amount in lakhs)</u>

6.3 Respondent No.1 contends that such Balance Sheet was prepared within three years from the date of default, i.e., prescribed period of limitation, which would clearly show that the Corporate Debtor admitted and acknowledged its outstanding against the credit facilities extended by the UCO Bank/Respondent No.1—further contended that there was neither any Qualification nor any Exception Note in such Balance Sheet as on March 31, 2017, of the Corporate Debtor.

6.4 In the balance sheet, for the year ending March 31 2019 (Annexure B page 14 of Reply Affidavit of UCO Bank, at page 21), in the column Note (viii), it is clearly stated that the Company has defaulted in payment of interest and repayment of the principal amount along with the retirement of acceptance. Accordingly, the Account of the Company is classified as Non Performing Assets by Banks.

<u>Further, in the said Balance-Sheet @ pg. 25:</u>		
Long Term Borrowings	Rs.12,699.60	14,542 (amount in Lacs)
Long Term Loan and Advances	Rs.56.67	1,140.09 22,498,46

Further, in the said Balance-Sheet @ pg. 28:		
Secured Loan	Rs. in Lacs	
Rupee Term Loans		
From Banks	19,496.22	19,496.22

6.5 The Company has made certain defaults in repayment of Term Loans and Interest. The continuing default as of March 31 2019, is as below:

'Interest on Term Loans Rs. 16,352.65' (amount in Lacs)

6.6 However, surprisingly at Note 3.5 Annexure B @pg. 29 of Reply Affidavit of UCO Bank, the Company has made Exception/Qualification Note, which was not in the Balance Sheet as on 31.03.2016 & 31.03.2017.

6.7 Even in the Provisional Balance Sheet (Annexure C @pg. 39 of Reply Affidavit of UCO Bank), similar Exception Note at Cl. 3.5 has been made with similar mala fide intention (Annexure C @pg. 44 of Reply Affidavit of UCO Bank).

6.8 Even the extract Register of Charges of ROC evidence that the charges were registered in favour of UCO Bank, which is subsisting to date (Annexure D of Reply Affidavit of UCO Bank).

6.9 LEGAL SUBMISSIONS

EXTENSION OF PERIOD OF LIMITATION AS PER SECTION 18 OF THE LIMITATION ACT, 1963

Based on the above, it is submitted that the aforesaid documents fulfil the criteria of acknowledgement laid under Section 18 of Limitation Act, 1963,

to extend the period of limitation for filing Application under Section 7 of IBC, 2016. Further, by the following authorities, it is well settled that an Acknowledgement in Books of Account is admissible in law to extend the period of Limitation under Section 18 of the Limitation Act, 1963 (previously Section 19 of the Limitation Act, 1877).

6.10 During the course of arguments, the Ld. Counsel for the Appellant relied upon the cases of Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572; Jignesh Shah v. Union of India, (2019) 10 SCC 750 and Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158, which have no application in the present case. They only dealt with the limitation period under Article 137 of Limitation Act, 1963 and whether an Application under Section 7 of IBC, 2016 could have been filed and entertained upon expiry of the period of limitation. The Hon'ble Supreme Court has held that, if such Application is filed beyond the period of limitation, same would be time-barred, and Section 7 Application could not have been filed. However, in the case of Jignesh Shah v. Union of India. (supra) the Hon'ble Supreme Court has consciously observed at paragraph 21 as follows:

"...In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is

to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding."

6.11 Therefore, the Hon'ble Supreme Court opined that acknowledgement of liability under Section 18 of Limitation Act, 1963 would extend the period of Limitation under IBC, 2016.

6.12 ACKNOWLEDGEMENT MADE IN LETTER DATED 07.06.2016

It is further submitted that the Letter dated 07.06.2016, Annexure A @pg. 11 of Reply Affidavit of UCO Bank, wherein the Corporate Debtor has given OTS proposal, acknowledges liability. As per the ratio of the judgment in the case of Lakshmirattan Cotton Mills Co. Ltd. v. Aluminium Corpn. of India Ltd., (1971) 1 SCC 67, there is an acknowledgement of subsisting liability of the Corporate Debtor. However, it may not necessarily specify the exact nature of the liability. It indicates that the jural relationship between the Parties and the same can also be derived by implication in any event. Further, the said Letter is not 'Without Prejudice' basis and, therefore, amounts acknowledgement of liability of the Corporate Debtor.

7. Discussion and findings

7.1 Limitation

7.2 The learned Counsel for the Appellant is mainly raised that the petition filed by the Respondent No.1 Bank is not maintainable on the ground of limitation. It is contended that the only date of default, as stated in Form 1, is November 05 2014, whereas the Section 7 Application was filed on February 13 2019. No pleading is, or factual foundation for the extension of limitation

Company Appeal (AT) (Insolvency) No.238 of 2020 ***21 of 45***

has been set out in Form-1. Further, no amendment of Form 1 has been sought by the Financial Creditor at any stage. The Adjudicating Authority has relied on the balance sheet of the Corporate Debtor for the year ending March 31 2017, to hold that the Application was not barred by limitation. In the circumstances, the benefit of section 18 of Limitation Act 1963 is not applicable in the case.

7.3 The learned Senior Counsel for the Appellant submits that based on the judgement of the Hon'ble Supreme Court in the case of Babulal Vardhraj Gurjar v Veer Gurjar Aluminium (2020) 15 SCC 1 held that in the absence of factual foundation of acknowledgement under Section 18 of the Limitation Act in Form 1, and Application made more than three years from the date of default would be barred by limitation.

7.4 The Appellant further placed reliance on the Hon'ble Supreme Court judgement in the case of Dena Bank (now Bank of Baroda) versus C. Shivakumar Reddy and Anr (supra), Reliance Asset Reconstruction Company v Hotel Poonja International Pvt. Ltd. (supra) And Asset Reconstruction Company (India) Limited v Bishal Jaiswal (supra).

7.5 The Appellant further contends that an acknowledgement must be unambiguous, and no evidence beyond the words in writing in the form of pleadings have to be looked into. However, in the present matter, there is nothing in writing or in the form of pleadings.

It is important to mention that the points that are raised by the Appellant were already any issue in the case of Dena bank (supra). In the above-mentioned case Hon'ble Supreme Court has held that;

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

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

75. Section 7(4) of the IBC casts an obligation on the Adjudicating Authority to ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor within fourteen days of the receipt of the Application under Section 7. As per the proviso to Section 7(4) of the IBC, inserted by amendment, by Act 26 of 2019, if the Adjudicating Authority has not ascertained the existence of default and passed an order within the stipulated period of time of fourteen days, it shall record its

reasons for the same in writing. The Application does not lapse for non-compliance of the time schedule. Nor is the Adjudicating Authority obliged to dismiss the Application. On the other hand, the Application cannot be dismissed, without compliance with the requisites of the Proviso to Section 7(5) of the IBC.

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

77. The Corporate Insolvency Resolution Process commences on the date of admission of the Application under sub-section (5) of Section 7 of the IBC. Section 7(7) casts an obligation on the Adjudicating Authority to communicate an order under clause (a) of sub-section (5) of Section 7 to the financial creditor and the corporate debtor and to communicate an order under clause (b) of sub-section (5) of Section 7 to the financial creditor within seven days of admission or rejection of such Application, as the case may be. Sections 8 and 9 of IBC pertain to Insolvency Resolution by an operational creditor and are not

attracted in the facts and circumstances of this case. Section 10 pertains to initiation of Corporate Insolvency Resolution Process by the Corporate Debtor itself, and is also not attracted in the facts and circumstances of the case.

110. *In this case, admittedly there were fresh documents before the Adjudicating Authority (NCLT), including a letter of offer dated 3.03.2017 for one time settlement of the dues of the Corporate Debtor to the Financial Creditor, upon payment of Rs. 5.5 crores. The Appellant Bank has also relied upon financial statements up to March 31, 2018 apart from the final judgment and Order dated March 27, 2017 in O.A. 16/2015 and the subsequent Recovery Certificate No. 2060/2017 dated May 25, 2017 which constituted cause of action for initiation of proceedings under Section 7 of the IBC.*

111. *Babulal Vardharji Gurjar (supra) is not an authority for the proposition that there can be no amendment of pleadings at the fag end of the NCLT proceeding. Moreover, in this case, the amendments were not made at the fag end of the proceedings but within 2/3 months of their initiation, before admission of the petition under Section 7 of the IBC.*

112. *It is not necessary for this Court to examine the relevance of all the documents filed by the Appellant Bank pursuant to its interim applications being I.A. No. 27 of 2019 and I.A. No. 131 of 2019. Suffice it to mention that the documents enclosed with the applications being I.A. No. 27 of 2019 and I.A. No. 131 of 2019 and the pleadings in the supporting affidavits, made out a case for computation of limitation afresh from the dates of the relevant documents. It would also be pertinent to note*

that the reasons for the execution of the documents are irrelevant. It is not the case of the Respondents, that any of those documents were extracted through coercion.

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

128. In the instant case, Rs. 111 lakhs had been paid towards outstanding Interest on March 28, 2014 and the offer of One Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery has been issued in favour of Appellant Bank on May 25 2017. The Corporate Debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself gives a fresh cause of action to the Appellant Bank to institute a petition under Section 7 of IBC. The petition under Section 7 IBC was well within three years from March 28 2014.

129. In Jignesh Shah v. Union of India (supra), this Court relied upon a judgment of the Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited²³, the relevant portion whereof is extracted hereinbelow:—

"....In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its Original Side, such institution of the suit and the pendency thereof in that Court cannot enure for the benefit of the present winding-up proceeding. The debt having become time-barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under Section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of the opposite party No. 1, after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of Section 434."

130. *In effect, this Court speaking through Nariman J., approved the proposition that an application under Section 7 or 9 of the IBC may be time barred, even though some other recovery proceedings might have been instituted earlier, well within the period of limitation, in respect of the same debt. However, it would have been a different matter, if the applicant had approached the Adjudicating Authority after obtaining a final order and/or decree in the recovery proceedings, if the decree remained unsatisfied. This Court held that a decree and/or final adjudication would give rise to a fresh period of limitation for initiation of the Corporate Insolvency Resolution Process.*

131. *It is true that the finding of Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited (supra) was rendered in the context of Section 434(1)(b) of the Companies Act 1956, which provided that a company would be deemed to be unable to pay its debts if execution or other process issued on a decree or Order of any Court or Tribunal in favour of a creditor of the Company was returned unsatisfied in whole or in part.*

132. *We see no reason why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.*

133. *It is not in dispute that the Respondent No. 2 is a Corporate Debtor and the Appellant Bank, a Financial Creditor. The question is, whether the petition under Section 7 of the IBC has been instituted within 3 years from the date of default. 'Default' is defined in Section 3(12) to mean "non-payment" of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor".*

134. *It is true that, when the petition under Section 7 of IBC was filed, the date of default was mentioned as September 30 2013 and December 31 2013 was stated to*

be the date of declaration of the Account of the Corporate Debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings.

135. As observed above, the Appellant Bank filed the Petition under Section 7 of the IBC on October 12 2018. Within three months, the Appellant Bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/decree dated 27.3.2017 in O.A. 16/2015 and the Recovery Certificate dated 25.5.2017, enabling the Appellant Bank to recover Rs. 52 crores odd. The judgment and order/decree of the DRT and the Recovery Certificate gave a fresh cause of action to the Appellant Bank to initiate a petition under Section 7 of the IBC.

136. On or about March 05 2019, the Appellant Bank filed another application for permission to place on record additional documents including inter alia financial statements, Annual Report etc. of the period from April 01 2016 to March 31 2017, and again, from April 01 2017 to March 31 2018 and a letter dated March 03 2017 proposing a One Time Settlement. This Application was also allowed on March 06 2021. The Adjudicating Authority, took into consideration the new documents and admitted the petition under Section 7 of the IBC.

137. Even assuming that documents were brought on record at a later stage, as argued by Mr. Shivshankar, the Adjudicating Authority was not precluded from considering the

same. The documents were brought on record before any final decision was taken in the Petition under Section 7 of IBC.

138. *A final judgment and order/decreed is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decreed, upon adjudication, and a certificate of Recovery is also issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decreed and/or the amount specified in the Recovery Certificate.*

139. *The Appellant Bank was thus entitled to initiate proceedings under Section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till May 24, 2020.*

140. *While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.*

141. *Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of*

limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the Application by its Order dated March 21, 2019.

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

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three

years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.

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

113. As per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of

limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired.

114. In *Sesh Nath Singh v. Baidyabati Sheoraphuli Cooperative Bank Ltd.* (supra) this Court, speaking through one of us (Indira Banerjee J.) held that the **IBC does not exclude the Application of Section 14 or 18 or any other provision of the Limitation Act. There is therefore no reason to suppose that Sections 14 or 18 of the Limitation Act do not apply to proceedings under Section 7 or Section 9 of the IBC.**

115. In *Laxmi Pat Surana v. Union Bank of India* (supra) this Court speaking through Khanwilkar J. held that there was no reason to exclude the effect of Section 18 of the Limitation Act to proceedings initiated under the IBC.

116. In *Asset Reconstruction Company (India) Limited. v. Bishal Jaiswal* (supra) where this Court speaking through Nariman J. relied, inter alia, on *Sesh Nath Singh* (supra) and *Laxmi Pat Surana* (supra) and held **that the question of applicability of Section 18 of the Limitation Act to proceedings under the IBC was no longer res integra.**

117. In *Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad Chamaria*¹⁷, this Court held:—

"6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the

liability in respect of the right in question; **it need not be accompanied by a promise to pay either expressly or even by implication.** The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the Court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of **a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning.**

Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter."

118. It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In *Asset Reconstruction Company (India) Limited v. Bishal Jaiswall (supra)* authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*,¹⁸ [*"Bengal Silk Mills"*] and in *Re Pandem Tea Co. Ltd.*¹⁹, the judgment of the Delhi High Court in *South Asia Industries (P) Ltd. v. General Krishna Shamsheer Jung Bahadur Rana*²⁰ and the judgment of Karnataka High Court in *Hegde Golay Ltd. v. State Bank of India*²¹ and held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt."

(emphasis supplied)

8. Based on the above case law, it is clear that an Application filed under Section 7 of the IBC would not be barred by limitation on the ground that it had been filed beyond a period of three years from the date of classification of a loan account of the Corporate Debtor as NPA if there were an acknowledgement of the debt by the Corporate Debtor before the expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

9. Learned Counsel for the Appellant submits that given the judgment of the Hon'ble Supreme Court in case of ARCIL Vs. Bishal Jaiswal (supra) it is clear that necessary pleadings for acknowledgement must be made by the Financial Creditor seeking exemption under Section 18 of the Limitation Act. The balance sheet has to be read with the Director's report and Auditors report to determine if any entry made in the balance sheet qua any particular creditor is unequivocal or not. The balance sheet, like other documents, have to be read as a whole to determine whether there was an acknowledgement qua a specific creditor. It is further argued that unless the Financial Creditor makes necessary amendments in Form-1, the argument about the extension of limitation cannot be considered. It is further argued that whether an entry amounts to an acknowledgement depends on the facts of each case.

10. It is important to mention that the Hon'ble Supreme Court, in a recent judgement in the case of Rajendra Narottamdas Sheth & Anr.¹⁷ has held that;

"15. Section 7(1) of the Code enables a financial creditor to file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating Authority when a default has occurred. Sub-section (2) thereof provides that the Application shall be in the Form and manner as prescribed. Sub-section (3) obligates the financial creditor to furnish the record of default recorded with the information utility or such other record or evidence of default as may be specified, along with the Application. On the basis of records of

¹⁷ Civil Appeal No.4222 of 2020

Rajendra Narottamdas Sheth & Anr. Vs. Chandra Prakash Jain & Anr.

Date of judgment: 30.09.2021.

Company Appeal (AT) (Insolvency) No.238 of 2020

an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3), the Adjudicating Authority within a period of 14 days shall ascertain the existence of a default, as stipulated under sub-section (4). According to sub-section (5), the Adjudicating Authority may admit the Application filed under sub-section (2), where the Adjudicating Authority is satisfied that a default has occurred, the Application filed is complete and no disciplinary proceedings are pending against the proposed resolution professional. As per sub-section (6), the corporate insolvency resolution process shall commence from the date of admission of the Application.

16. Rule 4 of the 2016 Rules prescribes that the Application under 7 of the Code shall be filed in form 1, accompanied by documents and records required therein and as specified in the Insolvency and bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 2-A of the said Regulations permits the financial creditor to furnish, as evidence of default, (a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891, and (b) an order of a court or Tribunal that has adjudicated upon the non-payment of a debt, where the period of Appeal against such Order has expired. Form 1 is in a printed format and in five parts, wherein the financial creditor shall give his particulars, the particulars of the corporate debtor, the proposed interim resolution professional and the financial debt. The date on which the default has occurred shall be provided by the financial creditor as required in Part IV. In Part V of Form 1, the financial creditor is required to furnish documents as listed therein as well as other documents that may be relevant

to prove the existence of financial debt, the amount and the date of default.

17. ***The date of default in the Babulal Vardharji Gurjar case (supra) was 08.07.2011, being the date of the NPA. The particulars of financial debt with documents and evidence on record as required in Part V of the Application were not furnished by the financial creditor. As no foundation was laid in the Application suggesting any acknowledgment or any other date of default, the financial creditor was not permitted to make submissions at a later stage to the effect that the Application filed was within the limitation period. In the said fact situation, this Court in Babulal Bardharji Gurjar (supra) held that Section 18 of the Limitation Act and the principles thereof were not applicable. In Dena Bank v. C. Shivkumar Reddy & Anr., this Court had occasion to deal with the pleadings and the documents required to be filed at the time of making of an application under Section 7 of the Code. It was observed therein that the financial creditor can only fill in the particulars as mentioned in Form 1 and there is no scope for elaborate pleadings. This Court was of the view that an application under Section 7 cannot be compared with a plain in a suit. It was further held in the said judgment that there is no bar for filing of documents as required under Section 7, until a final order either admitting or dismissing the Application has been passed. While concluding, this Court had opined that in case of inordinate delay, the Adjudicating Authority, at its discretion, may allow or decline the request of the***

applicant to file additional pleadings and/or documents before passing the final Order.

18. While examining the question of maintainability of an application filed under Section 7 of the Code in the absence of a plea regarding the acknowledgment of liability, this Court in *Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & Anr.*, gave an opportunity to the financial creditor to amend its pleadings before the NCLAT on payment of costs of Rs.1 lakh. In the said case, the corporate debtor's account was declared as NPA from 2010. The NCLT admitted the Application under Section 7 on the ground that there was a continuing cause of action. The NCLAT dismissed the Appeal of the corporate debtor on the ground that limitation would commence from the date on which the Code came into force, i.e., 01.12.2016. This Court remanded the matter back to the NCLAT to re-examine the question of limitation. After remand, the NCLAT allowed the Appeal filed by the corporate debtor on the ground that the three years' period from the date of the corporate debtor's account being classified as NPA, prescribed under Section 137 of the Limitation Act, had expired on 30.12.2017. In the Appeal filed against the Order passed by the NCLAT before this Court, the financial creditor argued that there was acknowledgment on the part of the corporate debtor. On the other hand, the corporate debtor contended that there was no pleading either before the NCLT or the NCLAT regarding the acknowledgment of liability extending limitation. An application was filed by the financial creditor before this Court to amend the pleadings, arguing that such amendment could be permitted by this Court. **Noting that the financial creditor had been remiss in pleading acknowledgement of liability but given the staggering amounts allegedly**

due, the financial creditor was given an opportunity to amend its pleadings before the NCLAT in support of its contention that there was acknowledgment of liability, subject to payment of costs.

19. Any suit, Appeal or Application filed after the prescribed period of limitation shall be dismissed in spite of limitation not being set up as a defence, as per Section 3 of the Limitation Act. Section 238A of the Code makes the provisions of the Limitation Act applicable to the proceedings before the Adjudicating Authority, as far as may be. Therefore, the Adjudicating Authority is duty-bound to scrutinise the Application filed under Section 7 of the Code and come to a conclusion on whether such Application is barred by limitation, even in the absence of any plea with respect to limitation. (See: Noharlal Verma v. District Cooperative Central Bank Limited, Jagdalpur)

*20. There can be no doubt that it is the responsibility of the financial creditor to give all particulars relating to the debt due and the date of default, along with the requisite documents, at the time of filing of an application under Section 7 of the Code. A plain reading of Section 7, Rule 4 of the 2016 Rules and Form 1 makes it clear **that the Adjudicating Authority may admit an application under Section 7 only if he is satisfied that a default has occurred. The definition of 'default' under Section 3(12) of the Code refers to non-payment of debts which are "due and payable" in law, meaning thereby that an application under Section 7 of the Code is maintainable only with respect to debts that are not time-barred. (See: B.K. Educational Services***

Private Limited v. Parag Gupta and Associates) The primary obligation of making out a prima facie case of default is on the financial creditor. There is no necessity for the corporate debtor to provide any information at the stage of admission of the Application under 7 of the Code, as the burden of showing non-payment of a legally recoverable debt, which is not time-barred, is on the financial creditor. At the same time, it is clear from the judgments of this Court in Asset Reconstruction (supra) and Dena Bank (supra) that non-furnishing of information by the financial creditor at the time of filing an application under Section 7 of the Code need not necessarily entail in dismissal of the Application. An opportunity can be provided to the financial creditor to provide additional information required for satisfaction of the Adjudicating Authority with respect to the occurrence of the default."

(emphasis supplied)

11. If we analyse facts of this case in the light of the ratio of the about mention decisions of the Hon'ble Supreme Court, then the following position emerges;

11.1 The Appellant's 1st objection about the acknowledgement of liability is that there is no specific mention of the name of UCO Bank in any liability column of the aforesaid two balance sheets. Consequently, the balance sheets under Note 3 appended do not attract the ingredients of section 18 of the Limitation Act 1963 to extend the limitation period.

11.2 Hon'ble Supreme Court in the case of Dena Bank (supra), while dealing with the pleadings and documents required to be filed at the time of making an Application under Section 7 of the Code, observed that the Financial Creditor could only fill in the particulars as mentioned in Form-1 and there is no scope for elaborate pleadings. An application under Section 7 cannot be compared with a plaint in a suit. Further, there is no bar for filing documents as required under Section 7 until a final order either admitting a dismissing the Application has been passed.

11.3 Non-furnishing of information by the Financial Creditor at the time of filing an Application under Section 7 of the Code need not necessarily entail in dismissal of the Application. Instead, an opportunity can be provided to the Financial Creditor till the admission/rejection of petition to provide additional information required for the satisfaction of the Adjudicating Authority with respect to the occurrence of the default.

11.4 Hon'ble Supreme Court in the case of Rajendra Narottamdas (supra) has further held that the burden of prima facie proving occurrence of default and that the Application filed under Section 7 of the Code is within the period of limitation is entirely on the Financial Creditor. While the decision to admit an application is typically made on the basis of material furnished by the Financial Creditor, the Adjudicating Authority is not barred from examining the material placed on record by the Corporate Debtor to determine that such Application is not beyond the period of limitation. The plea of Section 18 of the Limitation Act not having been raised by the Financial Creditor in the *Company Appeal (AT) (Insolvency) No.238 of 2020*

Application filed under Section 7 cannot come to the rescue of the Appellant's in the facts of the case. It is further observed that if the documents constituting acknowledgement of their debt had not been brought on record, the Application filed under Section 7 of the Code would be liable to be dismissed.

11.5 Therefore, in the instant case, the balance sheet that has been brought on record in the instant case before the Adjudicating Authority shall be taken into consideration while deciding the question of limitation and default on the part of the Corporate Debtor. The said documents cannot be ignored simply on the premise that it is not pleaded in the Application filed in Form-1 for initiation of the Corporate Insolvency Process.

11.6 We find that the balance sheet for the financial year ending on March 31 2017, was part of the record before the learned Adjudicating Authority and was annexed with Section 7 Application, which was also duly admitted by the Appellant during the hearing. Subsequently, the balance sheet for the financial year ending will March 31 2019, was annexed with the reply filed by Respondent No. 1 before this Hon'ble Tribunal on March 02, 2020. However, as the practice and procedure of this Hon'ble Tribunal, the same was not accepted at the filing counter without the specific mention of this Hon'ble Tribunal. Accordingly, a copy of the Application for the additional document is also annexed as Annexure A. Subsequently; this Hon'ble Tribunal permitted such additional documents to be taken on record vide its Order dated July 15 2020.

11.7 The Company's balance sheet is prepared in the statutory format as per Schedule 3rd of the Companies Act 2013, which does not provide for giving the specific name of every secured or unsecured creditor.

11.8 It is further observed that the Corporate Debtor has not denied that there are no outstanding dues to the UCO Bank. A perusal of extract of register of charges submitted with ROC, at Sr. No. 3, shows that a charge of rupees one hundred and seventy-five crores created by the Corporate Debtor has not been satisfied and remains outstanding.

11.9 After the judgement of Hon'ble Supreme Court in case Asset Reconstruction Company (India) Limited v. Bishal Jaiswal (supra), it is settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgement under Section 18

11.10 In the instant case, we also find that the Corporate Debtor issued a letter dated June 07 2016 (Annexure A Page 11 of their reply affidavit of R-1) wherein it has given OTS proposal. Based on the ratio of the judgement of Hon'ble Supreme Court in the case of Lakshmirattan Cotton Mills Co Ltd¹⁸ and further reiterated in Dena Bank's case (supra) that there is an acknowledgement of subsisting liability of the Corporate Debtor. However, it may not necessarily specify the exact nature of the liability. But it indicates the jural relation between the parties, and in any event, the same can also be

¹⁸ Lakshmirattan Cotton Mills Co Ltd v Aluminium Corporation of India Ltd, (1971) 1 SCC 67 (at paragraph 7,8 and 9)

derived by implication. Further, the said Letter is not "without prejudice" basis and, therefore, amounts to an unequivocal acknowledgement of liability of the Corporate Debtor. A reading of the documents above reveals that the Corporate Debtor has acknowledged/subsisting liability to attract the provisions of Section 18 of the Limitation Act, 1963.

11.11 Based on the discussion as above, we think that the present Appeal is liable to be dismissed, and the interim Order dated April 07, 2020, is exposed to vacated.

Order

In fine, Company Appeal (AT) (Insolvency) No. 238 of 2020 is dismissed. Interim Order dated April 07 2020, is vacated. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
4th October 2021

pks