**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 690 of 2020**

[Arising out of Order dated 27th May, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in C.P. (IB) No. 5/NCLT/AHM/2018]

**IN THE MATTER OF:**

**Phoenix ARC Pvt. Ltd.**
Acting in its capacity as a
trustee of Phoenix Trust FY-14-9
having its Registered office at
Dani Corporate Park, 5th Floor, 158,
C.S.T Road, Kalina, Santacruz (E),
Mumbai – 400098, India **...Appellant**

**Versus**

**Nagaur Water Supply Company Pvt. Ltd.**
Having its Registered Office at:
Building No. 9, Sigma Corporate,
Behind Rajpath Club, Off S.G. Road,
Bodakdev, Ahmedabad,
Ahmedabad GJ 380054 IN
Also At:
Building No. 12 A (House No. 13),
Sigma Corporate, Behind Rajpath Club,
Off S.G. Road, Bodakdevd, Ahmedabad
Ahmedabad GJ 380054 IN **...Respondent**

**Present:**

**For Appellant:** **Shri Amit Singh Chadha, Sr. Advocate with Shri Suresh Dutt Dobhal and Shri Nirmal Goenka, Advocates.**

**For Respondent:** **Shri Pradhuman Gohil Ranu, Ms. Tanya Srivastava and Ms. Jasleen Bindra, Advocates.**

**J U D G M E N T**
**(01st April, 2021)**

**A.I.S. Cheema, J.**

**Adjudicating Authority dismissed Section 7 IBC application. Hence Appeal**

**1.** This Appeal has been filed by the Appellant against the Impugned Order dated 27th May, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, (Ahmadabad Bench) in C.P. (IB) No. 5/NCLT/AHM/2018. By the said Impugned Order, the Adjudicating Authority dismissed the Application filed by the Appellant under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC in short) holding that the same was barred by Limitation.

**Winding up Petition in Limitation/Section 7 also filed-Running Parallel**

**2.** The Appeal claims and it is argued on behalf of the Appellant that the Adjudicating Authority failed to appreciate that much before IBC came into force, the Appellant had duly filed a winding up petition before Hon'ble High Court of Gujarat at Ahmadabad Bench on 07th April, 2015 against default committed by the Respondent of the Financial Debt which became Non-Performing Assets (NPA in short) on 30th November, 2013. During the pendency of the winding up proceedings, the present Application under Section 7 of IBC was filed and subsequently the winding up petition came to be disposed of as withdrawn on 19th August, 2019. According to the Appellant at the High Court after hearing both parties, the Winding up Petition was withdrawn and that the Hon'ble High Court gave liberty to raise the contentions before the Adjudicating Authority. According to the Appellant, the winding up petition was filed within time and Application under Section 7 of IBC was well within Limitation Period

and the Adjudicating Authority ignored this fact and dismissed the Petition. The Adjudicating Authority failed to consider that time and again the Corporate Debtor admitted and unequivocally acknowledged the debts due to the Appellant in the Balance-Sheets for the year 2014-15, 2015-16 and 2016-17.

**Broadly- The arguments**

**3.** The Learned Counsel for the Appellant painstakingly referred to the developments and it is submitted by him that after the Account of Respondent-Corporate Debtor became NPA on 30th November, 2013, the winding up petition was filed within time on 7th April, 2015 and on 11th June, 2015, the Hon'ble High Court had issued Notice in the winding up petition. The Respondent had appeared in the winding up proceedings. It is submitted by Learned Sr. Counsel that subsequently on 15th November, 2016 the Insolvency and Bankruptcy Code, 2016 (Act No. 31 of 2016) dated 28th May, 2016 read with Notification SO 3453 (E) dated 15th November, 2016 substituted the earlier existing Section 434 of the Companies Act, 2013 (Act-in short). By the amendment, provision was made for transfer of certain proceedings including winding up proceedings from the High Court to the Tribunal. Reference was made to "The Companies (Transfer of Pending Proceedings) Rules 2016 which came into force on 15th December, 2016 and incorporated Rule 5". It provided that Petitions relating to winding-up under Clause-e of Section 434 of the Act on the ground of inability to pay its debts pending before a High Court "and where the Petition has not been served on the Respondents" shall be transferred to the Tribunal. The other Petitions thus stood transferred.

Learned Counsel made reference to Notification Dated 29.06.2017 "Companies (Transfer of Pending Proceedings)" 2nd Amendment Rules 2016 which substituted Rule 5 which gave liberty to transfer proceedings "where Petition has not been served on the Respondent" and set a date of 15th July, 2017 by which time required information under Section 7, 8 or 9 was to be submitted, or in default, the Petition shall stand abated. Learned Sr. Counsel stressed on the 2nd Proviso of Rule 5 to state that the said Proviso provides that any Party or Parties to the Petitions shall after 15 July, 2017 be eligible to file fresh Application under Section 7, 8 or 9 of the Code as the case may be. It is argued that the law thus provided option for Parties whose Winding Up Proceeding was pending to file fresh Petition under Section 7. Thus the limitation existed at that point of time. Thus, it is argued that the Appellant has right to maintain the Application which was filed under Section 7 of IBC on 15th December, 2017. According to the Appellant, the Respondent raised objections in the Petition under Section 7 of IBC that winding up petition which is pending before the High Court, the Application under Section 7 was not maintainable as there were parallel proceedings. Learned Sr. Counsel submits that in view of such objections raised, the matter was taken up in the High Court and the Hon'ble High Court disposed the winding up proceedings as withdrawn with liberty to pursue the remedy of Application under Section 7 of IBC which was already filed. Thus the Appellant claims that the Adjudicating Authority erred in dismissing the Application as time-barred.

**4.** Against this, Learned Counsel for the Respondent relied on Judgment in the matter of **"***B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta Associates [(2018) SCC ONLINE SC 1921]"* to submit that Hon'ble Supreme Court has held that under the Article 137 of the Limitation Act, the Application under IBC is required to be filed within three years of the date of default or else the same would be held as time-barred. Learned Counsel further submitted that in the present matter the Account of Respondent had become NPA on 30th November, 2013 and the Application under Section 7 was filed on 15th December, 2017 and thus the Application was time-barred. Learned Counsel further referred to Judgments in the matter of "*Gaurav Hargovind Bhai Dave Vs. Asset Reconstruction Company (I) Ltd and Anr." (Civil Appeal No. 4952 of 2019) and "Babulal Vadharji Gurjar Vs. Veer Gurjar Aluminum Industries Pvt. Ltd." (Civil Appeal No. 6347 of 2019)* to submit that the Hon'ble Supreme Court has held that the intention of the Court could not have been to give a new lease of life to debts which are already time-barred. It is also argued that so-called cheques dated 16th April, 2015 and 30th April, 2015 relied on by the Appellant cannot be treated as acknowledgment of the debt under Section 18 and 19 of the Limitation Act, 1963. The Learned Counsel for the Respondent argued that the Cheques were given as part of proposal of One-Time Settlement which never materialized. Referring to the Balance-Sheets, the Learned Counsel submits that in Judgment in the matter of *"V. Padmakumar Vs. Stressed Assets Stabilisation Fund & Anr."* [(2020) SCC ONLINE NCLAT 417] larger Bench of

this Tribunal has observed that if Balance-Sheet of the Company is considered to be acknowledgment of debt then in effect there would be no Limitation.

**Is Appellant Financial Creditor/Assignee?**

**5.** Learned Counsel for Respondent further argued that the Application filed under Section 7 is by "*Phoenix ARC Pvt. Ltd.*" purportedly acting in capacity of *"Trustee of Phoenix Trust Fy-14-9".* The Assignment Agreement by which original Financial Creditor M/s. L&T Infrastructure Finance Pvt. Ltd. assigned debt is to Phoenix Trust Fy-14-9. Thus, it is claimed that the Application is not filed by entity which is Financial Creditor. For such reasons, the Learned Counsel submitted that the Adjudicating Authority rightly rejected the Application. It is further argued referring to the "Transfer of Pending Proceedings Rules" that there is no material to show that the Appellant sought "transfer" of pending proceedings and thus, it is argued that benefit of those provisions cannot be taken and the Application before the Adjudicating Authority must be held to be time-barred.

**6.** We have gone through the rival submissions put up by the parties. It would be appropriate to make brief reference to record depicting facts and developments, before considering the law on the subject.

**Broadly - The facts & Developments**

**7.** Respondent-Nagaur Water Supply Company Pvt. Ltd. availed financial facilities from lenders M/s. L & T Infrastructure Finance Pvt. Ltd. vide agreement dated 14th June, 2011 for an amount of Rs. 40 Crores which was to be repaid in 10 years by way of 120 structured monthly installments with

interest of 13% per annum for the purpose of securitization of project receivables of Desalination and Water Supply Project implemented by Respondent- NWSCPL at Rajasthan. The outstanding due was Rs. 74,22,55,644/- on 30th November, 2017. The Appellant acquired the Financial Debt from M/s. L&T Infrastructure Finance Company Ltd. vide assignment agreement dated 30th December, 2013 (Annexure A10-Page 158). The Appellant gave winding up notice (Annexure A13-Page 200) on 09th January, 2015 to the Respondent under Section 434 (e) and Section 434 of the Companies Act, 1956 (Old Companies Act- in short) claiming Rs. 40,42,00,020/-. Subsequently, on 07th April, 2015 winding up petition C.P. No. 127 of 2015 (Annexure A 14-Page 203) was filed before the Hon'ble High Court of Gujarat. Appeal claims, the Corporate Debtor then filed Annual Report and Balance-Sheet of 2014-15 with Registrar of Companies on 16th September, 2015 (Annexure A 15-Page 227) and acknowledged debt of Rs. 35,53,33,333/- as on 31st March, 2015. Learned Counsel for the Appellant has referred to Page 248 to show that the secured debt of the Appellant M/s. L&T Infrastructure Finance Company Ltd. (the assignor of Appellant) was recognized as due. Reference is also made to the directors concerned signing the Annual Report. Appellant then filed O.A. No. 127 of 2016 before DRT Ahmedabad on 04th February, 2016 (Annexure A16 – Page 254). Subsequent to that, there is Directors' Report under MGT9 EXTRACT (Annexure A 17-Page 274 @ 308) in which part of Balance-Sheet is there at Page 308 showing similar acknowledgment, but now for the amount of Rs. 35,28,33,333/- as on 31st March, 2016. The Appellant has put on record

that even after IBC came into force there was similar Directors' Report (Annexure A19 –Page 316) in the part of Balance-Sheet of 2016-17 showing acknowledgment of Rs. 35,28,33,333 as on 31st March, 2017. The Learned Counsel for the Appellant pointed out Page 350 of the Appeal Paper Book in this regard. Thereafter, the Application under Section 7 (Annexure A20 Page 355) was filed on 15th September, 2017.

**8.** Learned Counsel for the Appellant has, relying on such record claimed that even without looking at Transfer of Pending Proceedings Rules, there are sufficient Acknowledgments of Debt under Section 18 of the Limitation Act. The Appellant has further shown from the record that the Respondent filed Reply before the Adjudicating Authority on 22nd February, 2018 (Annexure A21-Page 365) and in the said Reply in Paragraph 17 raised objection that as winding up petition is pending the Application could not be maintained. Rejoinder of the Appellant was filed before the Adjudicating Authority (Annexure A22-Page 381) on 12th March, 2018 and the Appellant also filed Application (Annexure A23 – Page 394) submitting additional documents. In terms of permission of Adjudicating Authority's Order the Appellant put on record copies of audited account and copy of cheque dated 16th April, 2015 making part payments of Rs. 25 lakhs along with Bank-Statement showing Corporate Debtor paying the Appellant. Appellant relies on Section 19 of Limitation Act also. Reference was also made to the Balance-Sheet put on record to show that the dispute was within Limitation.

**The Order of Withdrawal in High Court Dated 19.08.2019**

The Appellant refers to subsequent order passed by the Hon'ble High Court of Gujarat disposing the winding up petition. Copy of the Order dated 19.08.2019 is at (Annexure A24-Page 398). The Order reads as under:

> *"According to learned advocate for the petitioner, the petitioner has already approached NCLT in a petition being NCLT No. [(P.(I.B.)]/5/2018 for the relief which is sought in this petition and also for other reliefs and therefore, it no longer desires to continue this petition.*
>
> *Upon instructions, thus Mr. Anip A. Gandhi, learned advocate for the petitioner seeks permission to withdraw this petition.*
>
> *Permission, as prayed for, is granted. This petition stands disposed of as withdrawn, without entering into the merits of the matter. This Court has not adjudicated this petition and both the sides are open to raise all factual and legal contentions raised in this petition. Withdrawal of this petition shall not come in the way of the petitioner. No order as to cost."*

**9.** According to the Appellant, thereafter arguments took place before the Adjudicating Authority on 30th September, 2019 and the Adjudicating Authority reserved orders (Annexure A26-Page 443). Parties had filed Written-Submissions. The Appellant refers to (Annexure A27) Page 444 of the Written-Submissions filed by the Appellant to submit that all the necessary documents were before the Ld. Adjudicating Authority however the Adjudicating Authority did not pass Impugned Order for another eight (8) months and subsequently without going into the complete facts, and without looking into the facts of

pendency of the winding up petition and the effect of the same, Adjudicating Authority wrongly concluded that the Application was time-barred.

**Appellant is Financial Creditor/Assignee**

**10.** Before entering into other discussions, we are disposing one issue raised by the Respondent where it is claimed that the Appellant is not the Financial Creditor. It is claimed that M/s. L& T Infrastructure Finance Company Ltd. assigned the debt to "Phoenix Trust Fy-14-9" and Appellant filed Petition in capacity of Trustee of Phoenix Fy-14-9 and so is not a Financial Creditor.

Copy of the assignment deed dated 30th December, 2013 (Annexure A10-Page 158) shows (See Page 166) that the "Assignor" was "M/s. L&T Infrastructure Finance Company Ltd". and the "Assignee" is "Phoenix ARC Private Limited which is described as acting in its capacity as trustee of Phoenix Trust Fy-14-9. Considering the description of the Assignor and Assignee in the assignment agreement, we do not find any defect in the Application filed by the Appellant under Section 7 of IBC describing itself similarly. Appellant is Assignee of Financial Creditor and thus Financial Creditor. There is no substance in this contention raised by the Respondent.

**Limitation**

**11.** Coming to the question of Limitation, the Learned Counsel for the Appellant has taken us through the concerned amendments made to Section 434 of the Companies Act, 2013 and how Rule 5 in the Companies (Transfer of Pending Proceedings) Rules 2016 was earlier framed and then substituted.

In this context, we would rather refer to the landmark Judgment of the Hon'ble Supreme Court in the matter of *"Forech India Ltd vs. Edelwiesis Assets Reconstruction Comopany Ltd." reported in 2019 SCC ONLINE SC 87*. Hon'ble Supreme Court observed in Paragraphs 7 to 12 of the Judgment as under:

> *"7. At this stage, it is important to advert to some of the provisions contained in the Code. Section 255 of the Code reads as under:*
>
> > *"255.* ***Amendments of Act 18 of 2013.****- The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."*
>
> *8. In pursuance of this Section, the Eleventh Schedule to the Code made various amendments to the Companies Act, 2013 on 15.11.2016 with effect from 01.12.2016. Section 434 of the Companies Act, 2013 was substituted as follows:-*
>
> > *"****434. Transfer of certain pending proceedings.****- (1) On such date as may be notified by the Central Government in this behalf,—*
> >
> > *(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of Section 10-E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;*
> >
> > *(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the*

*Company Law Board to him on any question of law arising out of such order:*

*Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and*

*(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:*

*Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.*

*(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section."*

*9. On and from 17.08.2018, Section 434 was substituted again. This time, the provision reads as follows:-*

***"434. Transfer of certain pending proceedings.**- (1) On such date as may be notified by the Central Government in this behalf,—*

*(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of Section 10-E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;*

*(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:*

*Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and*

*(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:*

*Provided that only such proceedings relating to the winding up of companies shall be transferred to the*

*Tribunal that are at a stage as may be prescribed by the Central Government:*

*Provided further that only such proceedings relating to cases other than winding up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:*

*Provided also that—*

*(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or*

*(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;*

*shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:]*

*Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of Section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:*

*Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the*

*commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

*(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section."*

*(Emphasis supplied.)*

*10. When the Code was enacted with effect from 01.12.2016, two Notifications both dated 07.12.2015 were made. The first Notification, which was titled as the Companies (Transfer of Pending Proceedings) Rules, 2016 laid down in Rule 5 as follows:*

***"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.**- (1) All petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and [where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959] shall be transferred to the Bench of the Tribunal established under sub-Section (4) of Section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of*

*the Code, as the case may be, and dealt with in accordance with Part II of the code:*

*Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate."*

*11. Simultaneously, on the same date, by the Companies (Removal of Difficulties) Fourth Order, 2016, it was made clear in sub-Clause 2 of the said Order as follows:-*

*"(2) In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely:-*

*"Provided further that – xxx xxx xxx*

*(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;*

*shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959""*

*12. By a Notification dated 29.06.2017, titled the Companies (Transfer of Pending Proceedings) Second Amendment, Rules, 2017, Rule 5 was substituted as follows:-*

*"(5) Transfer of pending proceedings of Winding up on the ground of inability to pay debts.--(1) All petitions relating to winding up of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending*

*before a High Court, and, [where the petition has not been served on the respondent under Rule 26 of the Companies (Court) Rules, 1959,] shall be transferred to the Bench of the Tribunal established under sub-Section (4) of Section 419 of the Companies Act, 2013, exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:*

*Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:*

*Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under Sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*

*Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of Section 433 of the Act for winding up against the same company pending as on 15th December, 2016 such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."*

**12.** The Hon'ble Supreme Court in the above Judgment in the matter of Forech India thereafter referred to Rules 26 and 27 of the Companies (Court) Rules, 1959 and Form No. 6 which prescribed under Rules, to observe in

Paragraph 16 of the Judgment that Rules 26 and 27 clearly referred to Pre-Admission Scenario and that the expression "was admitted" in Form No. 6 only meant that the Notice has been issued in the Winding-up Petition which is then "fixed for hearing before the Judge". In Forech India, the Hon'ble Supreme Court then observed in Paragraph 17 as under:

> *"17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code."*

**13.** What appears is that when Section 434 was amended and sub-clause c of Clause 1 provided that ALL proceedings under the Companies Act, 1956 inter alia including proceedings relating to winding-up of a company which

were pending shall stand transferred to the Tribunal, the Provisos were introduced for keeping back certain proceedings in High Court. The earlier Rule 5 and then substituted Rule 5 came into being in this context. After the Companies "Transfer of Pending Proceedings" 2nd Amendment Rules 2017 vide notification dated 29th June, 2017 substituted earlier Rule 5 with effect from 16th June, 2017. Now Rule 5 inter alia stated that: "Provided further that any party or parties to the petitions shall after 15th July, 2017, be eligible to file fresh applications under Section 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:" The Learned Counsel for the Appellant is relying on this Second Proviso of Rule 5 to state that the parties to such winding-up petitions are given right to file fresh Applications under Section 7 or 8 or 9 of the Code. Reading Rule 5 as a whole, in present matter we are not entering into the issue of such standalone right claimed (with no outer limit as to in how much time it should be exercised after abatement as stated). Here it is sufficient to hold that considering the law and Section 434 read with Rule 5 legislature did not treat rights of applicants to file application under Section 7 of IBC as time barred whose within limitation Petition for Winding up was Pending giving them option to seek transfer if they desired.

**14.** What is material is that the Section 434 as substituted on 17th August, 2018, which is referred supra has now removed the condition which was existing earlier. Any party or parties to the proceedings can apply for transfer of such petitions to NCLT to deal with them as an application for initiation of

CIRP under IBC, without being tied down with the condition "where the Petition has not been served on the Respondent"

**15.** What appears to be clear to us from Section 434 of the Companies Act as is now appearing is that the Legislature did not intend to treat the claims of Applicants whose Winding-up Petitions were pending to be hit by Limitation and thus made Provisions for transfer of the claims. Hon'ble Supreme Court of India in the matter of B.K. Educational Services (See infra) referred to Report of the Insolvency Law Committee of March, 2018. Said Report, recorded that "debts in Winding up Proceedings cannot be time barred".

**16.** In the present matter, the Learned Counsel for Appellant instead of requesting Hon'ble High Court to transfer the winding-up proceedings, (which were in Limitation) to the Adjudicating Authority withdrew the Petition. We have already reproduced the Order of the Hon'ble High Court above which shows that the intention of the Appellant was to continue with the Lis before the Adjudicating Authority. Thus, the Learned Counsel for the Appellant made statement that the Appellant has already approached the Adjudicating Authority for relief vide C.P. No. 5/2018 (the present matter) and thus did not desire to continue with the Petition in High Court and sought permission to withdraw the Application. The permission, as prayed for, was granted. The Hon'ble High Court recorded that it was open to both-sides to raise all factual and legal contentions and that the withdrawal will not come in the way of the Appellant. The Respondent is trying to take advantage of such development where instead of "transfer", the Appellant "withdrew" the winding-up petition

which was filed within Limitation and which was pending when Application under Section 7 was filed. Question is whether it would be justice if the Appellant is punished for not seeking "transfer" (for which Rules had been made) and only seeking "withdrawal" on the basis that already Application under Section 7 of IBC is pending. This Tribunal is guided by Section 424 of the Companies Act, 2013 that it has to follow "Principles of Natural Justice". This Tribunal is empowered also under Rule 11 of the NCLAT Rules, 2016 vide which we can exercise inherent powers to make such Orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal. In the backdrop of such provisions and such powers existing of ours, we have option to dispose the Appeal giving liberty to the Appellant to approach Hon'ble High Court to seek modification of the Orders passed by the Hon'ble High Court on 19th August, 2019 from "withdrawal" to one of transfer. However, considering the facts, and provisions and interest of justice, and also the intent of the High Court Order dated 19th August, 2019, the same can be read as an Order which permitted, in effect the lis to be transferred for decision and adjudication to the Adjudicating Authority. This is clear from Paragraph 1 & 2 of the Order, read with wording in third paragraph which recorded that "Permission as prayed for is granted". The third paragraph kept alive "factual and legal contentions raised in the petition and also directed that "withdrawal of this petition shall not come in the way of Petitioner". However, in the present matter, it is not necessary for us to resort to even this, in order to do justice.

This is because, there is material available on record which shows that the claim filed by the Appellant even otherwise cannot be treated as time-barred. If the debt was not time barred during pendency of Winding up Proceeding and in the parallel Section 7 IBC application which was filed and pending (which was permissible) Section 7 application later cannot be rejected only because of Winding up Petition being withdrawn instead of transferring and merging with Section 7 application already pending.

**17.** The Adjudicating Authority referred to the Judgments being relied on by the Learned Counsel for the Respondents to find that the period of Limitation under Article 137 of the Limitation Act is three years from date of default. The Adjudicating Authority relied on Judgment dated 18th December, 2019 of this Tribunal in the matter of *"C Shiva Kumar Reddy Vs. Dena Bank and Anr."* (Company Appeal (AT) (Insolvency) No. 407 of 2019) to hold that balance-sheet of the Corporate Debtor could not be relied on and calculated three years from the date of NPA and after making reference to Article 137 of the Limitation Act, 1963 it is held that the Application was time-barred.

**Ref: Judgment of this Tribunal in "Rajendra Narottamdas Vrs. Chandra Prakash"**

**18.** We have earlier dealt with similar averments being made by the parties in present matter with regard to the Limitation. In our Judgment dated 18th December, 2020 passed in Company Appeal (AT) (Insolvency) No. 621 of 2020 in the matter of *"Sh. Rajendra Narottamdas Sheth & Anr. Vs. Sh. Chandra Prakash Jain & Anr."* we had observed in Paragraphs 22-24 as under:

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

***23.1.** Section 238-A was inserted in the IBC by way of Amendment Act No. 26 of 2018 which was given retrospective effect from 06th June, 2018. Section 238-A reads as under:*

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

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

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

> *"6. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238-A into the Code. This is to be found in the Report of the Insolvency Law Committee of March 2018, as follows:*
>
> ***"28 APPLICATION OF LIMITATION ACT, 1963***
>
> *28.1. The question of applicability of the Limitation Act, 1963 (the Limitation Act) to the Code has been deliberated upon in several judgments of NCLT and NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of "debt" and "claim" in the Code. Further, debts in winding-up proceedings cannot be time-barred, and there appears to be no rationale to exclude the extension of this principle of law to the Code.*
>
> *28.2. Further, non-application of the law on limitation creates the following problems; first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for*

*CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is 'to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches'. Though the Code is not a debt recovery law, the trigger being "default in payment of debt" renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30 (4) of the Code.*

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

*(Emphasis supplied)*

*The Report of the Committee would indicate that it has applied its mind to judgments of NCLT and NCLAT.* ***It has also applied its mind to the aspect that the law is a complete Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred."***

*(Emphasis supplied)*

*In the same Judgment of B.K. Educational Services, in Paragraph 27 it was observed as under:*

*"27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the*

*Limitation Act gets attracted. "**The right to sue", therefore accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing** such application." (Emphasis supplied)*

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

***23.4*** *In subsequent Judgments in the matter of "Gaurav Hargovindbhai Dave" & "Babulal Vardharji Gurjar", it is argued this factum was reiterated that for Section 7 application time begins to run from date of default, i.e. date of NPA and Period of Limitation is three years as prescribed in Article 137 of the Limitation Act.*

***23.5.*** *Limitation Act, 1963 Part I deals with the short title, extent and commencement of the Limitation Act, 1963 and contains the Definitions. Part II deals with Limitation of Suits, Appeals and Applications and contains Sections 3 to 11. Part III deals with "Computation of Period of Limitation" and contains Sections 12 to*

*24. Part IV relates to "Acquisition of Ownership by Possession" and Part V is Miscellaneous.*

*We are concerned with "Limitation of Applications".*

***23.6*** *"The Schedule" prescribes "Periods of Limitation" and is divided into various Divisions. First Division deals with Suits, Second Division deals with Appeals and Third Division deals with "Applications". There is no difficulty that the Applications under Section 7 and 9 of IBC fall under Article 137 of the Limitation Act, 1963.*

***23.7*** *When we go to Sections, Section 2 (j) is relevant which reads as under:*

> *"(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;"*

***23.8*** *Thus, when Article 137, for such Applications "prescribes" "Period of Limitation" as "Three Years" triggered "When the right to apply accrues", Section 2 (j) provides that "prescribed period" means period of limitation computed in accordance with the provisions of this Act.*

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

> *"Bar of Limitation.-(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed*

*period shall be dismissed, although limitation has not been set up as a defence."*

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

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

*" **18: Effect of acknowledgement in writing:***

*(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.*

*(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.*

*Explanation. – For the purposes of this Section,-*

*(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has*

*not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;*

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

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

*19. **Effect of payment on account of debt or of interest on legacy.**-Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly Authorised in this behalf, a fresh period of limitation shall be computed from the time when payment was made:*

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

*Explanation.- For the purposes of this section,-*

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

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

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

**19.** It was further observed by us in Paragraph 26 of our Judgment in "Rajendra Narottamdas" supra as under:

*"**26.** The Learned Counsel for the Appellant referring to Judgment in the matter of Jagdish Prasad Sharda referred (Supra.) of another bench of this Tribunal submitted that in that matter it was interpreted that even if the payments were made after the Account was declared NPA if the Account was not regularized benefit cannot be taken. It may be clarified that limitation issue is decided on facts and law both and it differs from case to case. In the instant case, when Bank declared NPA to recover dues, it moved DRT. If the Corporate Debtor made some payments, as a reasonable prudent person, Bank received the payments. Section 19 of the Limitation Act, 1963 is not subject to any qualification/exception that after Account is declared NPA, if the debtor makes payments on account of debt, the Section would not be applicable. The Adjudicating Authority found that there were not merely repayments but also Acknowledgments."*

**Ref: Judgment of this Tribunal in "A. Balakrishnan Vrs. Kotak Mahindra"**

**20.** In the matter of *"A. Balakrishnan Vs. Kotak Mahindra Bank Limited & Anr."* (Company Appeal (AT) (Insolvency) No. 1406 of 2019) dated 24th November, 2020, we had in paragraph 12 reproduced paragraph 27 of the Judgment in the matter of "*B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates"* reproduced supra and discussed as under:-

> *13. In Judgment dated 18.09.2019 in the matter of* ***Gaurav Hargovind bhai Dave vs Asset Reconstruction Company (I) Ltd. & Anr. (2019) SCC Online SC 1239,*** *the facts of that case show that in that matter of Gaurav Hargovind bhai Dave vs Asset Reconstruction Company (I) Ltd. & Anr. the Respondent No. 2 was declared NPA on 21.07.2011. At that point of time State Bank of India filed two OAs in DRT in 2012 to recover the total debt due in that matter. State Bank of India assigned its debt in 2014 to the Respondent No. 1/Asset Reconstruction Company. DRT by Judgment dated 10th June, 2016 held that the OAs were not maintainable. Against this, Applications were filed before Gujrat High Court. The High Court remanded the matter. The SLP filed in Supreme Court came to be dismissed. Thereafter the Respondent No. 1 on 03rd October, 2017 filed Application under Section 7 of IBC. The date of default was shown as 21.07.2011. NCLT applied Article 62 of Limitation Act relating to mortgage to hold the matter in Limitation. This was challenged before NCLAT and this Tribunal had held that Limitation would run only from 01st December, 2016 when IBC came into force and dismissed the Appeal. With such set of facts, the observations of the Hon'ble Supreme Court in Paragraph 7 of the Judgment were as under:*
>
> *"7. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary article 137. As rightly pointed out by learned counsel*

*appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr. Banerjee's reliance on para 7 of B.K. Educational Services Private Limited (Supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred."*

*It can be seen that in spite of filing of OAs within Limitation, the Hon'ble Supreme Court accepted the submissions that the time of Limitation when it began running on 21.07.2011, the Application under Section 7 filed on 03.10.2017 was time-barred. Thus, it appears to us that the filing of OAs and pendency of the same did not extend the time for the Financial Creditor, in independent proceeding under IBC.*

*14. Then, there is Judgment in the matter of* ***Jignesh Shah. Vs. Union of India*** *(2019) SCC Online SC 1254. In Paragraph 4 of the Judgment, the Hon'ble Supreme Court of India initially referred to the controversy as was arising in the Writ Petition No. 455 of 2019.*

*14.1. Briefly the facts may be referred from the Judgment. What appears is that on 20th August, 2009 a Share Purchase Agreement was executed between Multi Commodity Exchange India Ltd. (MCX), Multi Commodity Stock Exchange Ltd. (MCX-SX) and IL&FS whereby IL&FS had agreed to purchase 442 lakh equity shares of MCX Stock Exchange Ltd. from MCX. Pursuant to the Agreement La-Fin Group Company of MCX issued "Letter of Undertaking" on 20th August, 2009 stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX Stock Exchange after a period of one year but before a period of three years, from date of investment. Hon'ble Supreme Court of India observed that on facts, this period of three years would expire in August, 2012.*

*14.2. It was noticed that IL&FS by Letter dated 03rd August, 2012 exercised the option to sell its entire holding of shares to MCX Stock Exchange and called upon La-Fin to purchase the shares as per the "Letter of Undertaking". On 16th August, 2012 La-Fin replied that it was under no legal or contractual obligation to buy the said shares.*

*14.3. Subsequent to this, on 19th June, 2013 IL&FS filed suit before Bombay High Court showing cause of action as dated 16.08.2012. On 3rd November, 2015 Statutory Notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS to La-Fin and on 21st October, 2016 a Winding up Petition came to be filed under Section 433 (e) of the Companies Act, 1956.*

*14.4. IBC came into force on 01st December, 2016 and as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the Winding up Petition was transferred to NCLT as a Section 7 Application indicating the date of default as on 19th August, 2012. The Application came to be admitted and the Appeal to this Tribunal was dismissed holding that bar of limitation would not be attracted as Winding up Petition was filed within three years of the date on which the Code came into force. Against such Judgment of this Tribunal matter was carried to the Hon'ble Supreme Court.*

*14.5. In this matter of Jignesh shah. Vs. Union of India the Learned Sr. Advocate Dr. Abhishek Manu Singhvi raised issue of the statutory bar of Limitation. The Hon'ble Supreme Court has recorded submissions of the Counsel in Paragraph 5 of the Judgment. Part of the submissions may be reproduced for context. The same are as under:*

*".....Inasmuch as the Winding up Petition that has been transferred to the NCLT was filed on 21st October,2016, i.e. beyond the period of three years prescribed (as the cause of action had arisen in August, 2012), it is clear that a time-barred Winding*

*up Petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the Code filed within time, by virtue of the transfer of such petition……"*

*14.6. After referring to arguments of Advocates for IL&FS the Hon'ble Supreme Court first adverted to the decision in the matter of B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates in which Section 238 A of the Code relating to the Limitation was considered. The Hon'ble Supreme Court in Paragraph 8 to 11 of the Judgment in the matter of Jignesh Shah Vs. Union of India reproduced portion from Judgment in the matter of B.K. Educational Services Pvt. Ltd. and after referring to the said Judgment observed in Paragraph 12 and 13 as under:*

*"12. This Judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238 A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up Petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238 A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL&FS, default in repayment had occurred, it is barred by time.*

*13. Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. <u>These judgments have held that the existence of such suit cannot be construed as having either revived a period of Limitation or having extended it, insofar as the winding up proceeding was concerned."</u>*

*(Emphasis Supplied)*

*14.7. The Hon'ble Supreme Court in Paragraphs 13 to 20 of the Judgment in the matter of Jignesh Shah Vs. Union of India*

*made brief reference to those Judgments in context as underlined above and Paragraph 21 observed as under:*

*"21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within Limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. 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."*

*(Emphasis Supplied)*

*14.8. It was then observed and held in Paragraph 27 of the Judgment as follows:*

*"27. It is clear that IL&FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL&FS, in repayment of which default has taken place."*

*For such and other reasons, the Hon'ble Supreme Court allowed the Appeal which was filed before it and held that Winding up Petition filed on 21st October, 2016 being beyond the period of three years mentioned in Article 137 of the Limitation Act was time-barred and cannot be proceeded with any further.*

*15. It is quite clear from the above that although the suit was filed in time the Winding up Petition was beyond three years of the default and when such Winding up Petition was transferred in view of the Rules to the NCLT to convert the same into a proceeding under Section 7 of IBC, it was found that as the*

*Winding up Petition itself was time-barred from the date of default, the same could not be proceeded further as Application under Section 7."*

**21.** Further, we had discussed in our Judgment in the matter of "A. Balakrishnan" supra paragraphs 19 to 21 as under:

*"19. It has already been held by the Hon'ble Supreme Court that when there is default and the Account is classified as NPA the time would start running. When this is so, if filing of the suit or filing of OAs did not extend the time, the question is whether consequential issuing of Recovery Certificate would trigger a fresh cause of action for filing Application under Section 7 of IBC. Clearly this is not so keeping in view above Judgments. The Learned Counsel for the Respondent No. 1 appears to be not properly reading the Judgment in the matter of Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr. To complete the narration it would be appropriate to reproduce the Judgment as it is, as the same is not very long. The Judgment in the matter of* ***Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.*** *reads as under:*

> *"1. In the facts of the present case, at the relevant time, a default of Rs. 6.7 Crores was found as against the Respondent No. 2. The Respondent No. 2 had been declared a NPA by Abhyudaya Co-operative Bank Limited on 23.12.1999. Ultimately, a Recovery Certificate dated 24.12.2001 was issued for this amount. A Section 7 petition was filed by the Respondent No. 1 on 21.07.2017 before the NCLT claiming that this amount together with interest, which kept ticking from 1998, was payable to the respondent as the loan granted to Respondent No. 2 had originally been assigned, and, thanks to a merger with another Cooperative Bank in 2006, the respondent became a Financial Creditor to whom these moneys were owed. A petition under Section 7 was admitted on 05.03.2018 by the NCLT, stating that as the default continued, no period of Limitation would attach and the petition would, therefore, have to be admitted".*

*2. An appeal filed to the NCLAT resulted in a dismissal on 05.09.2018, stating that since the cause of action in the present case was continuing no Limitation period would attach. It was further held that the Recovery Certificate of 2001 plainly shows that there is a default and that there is no statable defence.*

*3. Having heard learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in "B.K. Educational Services Private Limited vs. Parag Gupta and Associates", 2018 (14) Scale 482, para 27 of which reads as follows: -*

> *"27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."*

*4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which Limitation would be saved in the present case. This contention is effectively answered by a judgment of three learned Judges of this Court in "Balkrishna Savalram Pujari and Others vs. Shree Dnyaneshwar Maharaj Sansthan& Others", [1959] supp. (2) S.C.R. 476. In this case, this Court held as follows:*

> *"… … . In dealing with this argument it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary*

*to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterized as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the trustees, act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued…."*
*(At page 496)*

*Following this judgment, it is clear that when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the appellant's rights as a result of which Limitation would have begun ticking.*
*5. This being the case, and the claim in the present suit being time barred, there is no debt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. There will be no order as to costs."*
*(Emphasis supplied)*

*20. The Learned Counsel for Financial Creditor appears to us to be trying to misread the last part of the paragraph 4 of the above Judgment to submit that right to sue is triggered when Recovery Certificate is issued and non-payment of debt after issuance of the Recovery Certificate would not be regarded as a continuing wrong to give rise to continuing cause of action. We are unable to read the last part as saying that right to sue is triggered when recovery certificate is issued. It is rather speaking of cessation of right, rather than trigger. Perusal of the Judgment in the matter of Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr. shows that in that matter the Respondent No. 2 had been declared NPA by the Co-operative Bank on 23rd December, 1999. Recovery Certificate dated 24th December, 2001 was issued for such amount. Section 7*

*Application was filed on 21st July, 2017 claiming that the amount together with the interest which "Kept ticking from 1998" was payable. (Default in that matter appears to have been of 1998). It is these words which have reflected in the final part of the Judgment where it was observed that the Certificate injured effectively and completely the right of Appellant which "would have begun ticking" as a result of the Limitation Act, Rights, as a result of which Limitation "would have begun ticking" were injured effectively and completely when Recovery Certificate was issued. This is what appears to us from reading the Judgment.*

*21. Earlier in the matter of* ***Digamber Bhondwe Vs. JM Financial Asset Reconstruction in Company Appeal (AT) (Ins.) No. 1379 of 2019*** *also the Learned Counsel therein had claimed that the date of NPA was to be ignored and Limitation was to be counted from the date of Recovery Certificate for Section 7 of IBC. We had at that time gone into details and for reasons recorded concluded that we are unable to accept the submissions that date of NPA was to be ignored and Limitation was to be counted from the date of Recovery Certificate. Even now, for reasons recorded by us in the Judgment of Digamber Bhondwe Vs. JM Financial Asset Reconstruction, when we have revisited the Judgment in the matter of Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr. we are unable to agree that the Judgment gives a fresh date to trigger Application under Section 7 of IBC."*

**22.** In this regard, now we have the advantage of Judgment of Hon'ble Supreme Court of India, dated 22.03.2021 in the matter of "*Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr." (Civil Appeal No. 9198 of 2019).* In the said matter, the Account of Corporate Debtor was declared N.P.A. on 31st March, 2013. On 18th January, 2014, Financial Creditor

issued notice to Corporate Debtor under Section 13 (2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, in short) claiming the outstanding liability. Corporate Debtor made representation objecting to the notice. The representation was rejected by the Financial Creditor. Financial Creditor issued notice dated 13th December, 2014 to the Corporate Debtor under Section 13 (4) (a) of SARFAESI Act, 2002, calling upon Corporate Debtor to hand over possession of secured immovable assets. On 19th December, 2014, Corporate Debtor filed Writ Petition in the Calcutta High Court. While the Writ Petition was pending Financial Creditor issued notice dated 24th December, 2014, that authorized officer had taken possession of the secured assets. On 11th May, 2017, District Magistrate Hooghli issued order under SARFAESI Act, 2002 for possession by the Financial Creditor of the assets hypothecated. On 24th July, 2017, High Court passed interim orders restraining Financial Creditor from taking further steps under SARFAESI Act, 2002, until further orders. Financial Creditor on 10th July, 2018 filed Application under Section 7 of IBC. Corporate Debtor opposed the Application but ground of limitation was not there. Adjudicating Authority admitted the said application on 25th April, 2019. In Appeal to NCLAT issue of limitation was raised but the Appeal was dismissed. With such set of facts, when the matter was carried to Hon'ble Supreme Court, and ground of limitation was agitated, the issues considered by Hon'ble Supreme Court are as under:

*"57. The issues involved in this appeal are:-*

*(i) Whether delay beyond three years in filing an application under Section 7 of IBC can be condoned, in the absence of an application for condonation of delay made by the applicant under Section 5 of the Limitation Act, 1963?*

*(ii) Whether Section 14 of the Limitation Act, 1963 applies to applications under Section 7 of the IBC? If so, is the exclusion of time under Section 14 available, only after the proceedings before the wrong forum terminate?*

Hon'ble Supreme Court considered the law on the subject and earlier Judgments of Hon'ble Supreme Court and while dismissing the Appeal in Paragraphs 63, 64, 66, 67, 68, 88 and 92 of the Judgment in the matter of "*Sesh Nath Singh & Anr." (Supra)* observed as under:

*"63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.*

*64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section.*

*Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.*

*…….*

*66. Similarly under Section 18 of the 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 of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.*

*67. As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any*

*other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible.*

*68. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding under Section 7 or Section 9 of the IBC. Of course, Section 18 of the Limitation Act is not attracted in this case, since the impugned order of the NCLAT does not proceed on the basis of any acknowledgment.*

*……*

*88. An Adjudicating Authority under the IBC is not a substitute forum for a collection of debt in the sense it cannot reopen debts which are barred by law, or debts, recovery whereof have become time barred. The Adjudicating Authority does not resolve disputes, in the manner of suits, arbitrations and similar proceedings. However, the ultimate object of an application under Section 7 or 9 of the IBC is the realization of a 'debt' by invocation of the Insolvency Resolution Process. In any case, since the cause of action for initiation of an application, whether under Section 7 or under Section 9 of the IBC, is default on the part of the Corporate Debtor, and the provisions of the Limitation Act 1963, as far as may be, have been applied to proceedings under the IBC, there is no reason why Section 14 or 18 of the Limitation Act would not apply for the purpose of computation of the period of limitation.*

*……*

*92. In other words, the provisions of the Limitation Act would apply mutatis mutandis to proceedings under the IBC in the NCLT/NCLAT. To quote Shah J. in New India Sugar Mill Limited v. Commissioner of Sales Tax, Bihar, "It is a recognised rule of interpretation of statutes that expression used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature"."*

Thus, it is clear that Section 18 of the Limitation Act applies.

**Balance-Sheets-Acknowledgment?**

**23.** With regard to the Balance-Sheets, the Learned Counsel for the Respondent has relied on Judgment of larger Bench in the matter of "V. Padmakumar Vs. Stressed Assets Stabilisation Fund (SASF) & Anr." (Company Appeal (AT) (Insolvency) No. 57 of 2020).

**24.** In this regard, we find that there are various Judgements passed by various Hon'ble High Courts including High Court of Delhi which have dealt with the Balance Sheet/Annual Returns of Companies and where entries in the same have been treated as "acknowledgement of debt" and even accepted the same for the purpose of Section 18 of the Limitation Act, 1963.

**Ref: Judgment of this Tribunal in "Gautam Sinha Vrs. UV Asset"**

**25.** In Judgement in the matter of **"Gautam Sinha Versus UV Asset Reconstruction Company Limited and others"** in Company Appeal (AT) (Ins) No.1382 of 2019 dated 25th February, 2020 passed by this Tribunal we had the occasion to deal with some of the Judgements relating to Balance Sheets/Annual Returns/Entries in books of accounts. we will extract portions

of the analysis of those Judgements which we recorded in that Judgement of ours in "Gautam Sinha" (supra). The said portions are as under:-

> *"7. Before us, the learned Counsel for the Respondent No.1 (Respondent – in short) referred to the Judgements in the matters of* ***"Sheetal Fabrics versus Coir Cushions Ltd."*** *reported as 2005 SCC OnLine DEL 247;* ***"The Commissioner of Income Tax-III v. Shri Vardhman Overseas Ltd."*** *reported as 2011 SCC OnLine DEL 5599 and* ***"M/s Mahabir Cold Storage Versus C.I.T., Patna"*** *reported as 1991 Supp (1) Supreme Court Cases 402. The argument is that acknowledgement of debt in the Balance Sheet also amounts to acknowledgement under Section 18 of the Limitation Act.*
>
> *8. The Judgement in the matter of "**The Commissioner of Income Tax"** (supra) was in the context of provisions of the Income Tax Act. In Para – 17 of the Judgement, it was observed:-*
>
> > *"17. In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance sheet as on 31st March, 2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect of acknowledgement in writing. It says where before the expiration of the prescribed period for a suit in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, a fresh period of limitation shall commence from the time when the acknowledgement was so signed. In an early case, in England, in Jones v. Bellgrove Properties, (1949) 2KB 700, it was held that a statement in a balance sheet of a company presented to a creditor- share holder of the company and duly signed by the directors constitutes an acknowledgement of the debt.* ***In Mahabir Cold***

***Storage v. CIT*** *(1991) 188 ITR 91, the Supreme Court held:*

*"The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to Messrs. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt."*

*In several judgments of this Court, this legal position has been accepted."*

*The Hon'ble High Court then referred to some of the Judgements.*

*9. In the Judgement in the matter of "Sheetal Fabrics" (supra), Hon'ble High Court of Delhi referred to Judgement in the matter of "**In re. Padam Tea Company Ltd."** AIR 1974 Calcutta 170 and referred to the said Judgement as under:-*

*"10. Let me first deal with the case of Padam Tea Co. Ltd. (supra). This case relied upon by learned Counsel for the respondent company in support of his plea that acknowledgement contained in the balance sheet could not be relied upon by the petitioner. However, on going through this judgment, one would clearly notice that it does not lay down the proposition which is sought to be advanced by the learned Counsel. That was a case where balance sheet was not confirmed or passed by the shareholders. The Court observed that such a balance sheet, before it could be relied upon, must be duly passed by the shareholders at the appropriate meeting and must be accompanied by a report, if any, made by the Directors for its validation. The principle of law laid down was that statement in the balance sheet indicating liability is to be read along with the Directors' report to see whether both so read would amount to an acknowledgement. There is no dispute about this proposition of law. However, in that case, the Court refused to accept entry in the balance sheet as acknowledgement of debt because of two reasons:*

*(a) The balance sheet was not passed by the shareholders at the appropriate meeting.*

*(b) The Directors' report, in the balance sheet, contained the following statement:*

*11. Your Directors are of the opinion that the liabilities shown in Schedules 'A' and 'B' of the balance sheet excepting those of United Bank of India, M/s. Goenka and Co. Private Ltd. and Caritt, Moran and Co. Pvt. Ltd. are barred by limitations, hence these liabilities are not confirmed by your Directors.*

*12. These were the two considerations which led the Court to conclude that even the debt shown in the balance sheet in respect of the said petitioning creditor would not amount to an acknowledgement as contemplated under Section 18 of the Limitation Act and following observations in this regard are reported:*

> *"Therefore, in understanding the balance sheets and in explaining the statements in the balance-sheets, the balance-sheets together with the Directors' report must be taken together to find out the true meaning and purport of the statements. Counsel appearing for petitioning creditor contended that under the statute the balance sheet was a separate document and as such if there was unequivocal acknowledgement on the balance-sheet is a statutory document and perhaps is a separate document but the balance sheet not confirmed or passed by the shareholders at the appropriate meeting and in order to do so it must be accompanied by a report, if any, made by the Directors. Therefore, even though the balance sheet may be a separate document these two documents in the facts and circumstances of the case should be read together and should be construed together.*

*13. In the same breath, the High Court also explained as to what would constitute an acknowledgement under Section 18 of the Limitation Act by referring to the judgment of the Supreme Court and this discussion would be found in the following passage:*

> *"It was held by the Supreme Court in the case of **L.C. Mills v. Aluminium Corpn. of India Ltd.**, (1971) 1 SCC 67 : AIR 1971 SC 1482, that it was clear that the statement on which the plea of*

*acknowledgement did not create a new right of action but merely extended the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question must, however, relate to a present subsisting liability and indicate the existence of a jural relationship between the parties such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not, however, be in express terms and could be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course did not mean that where a statement was made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. In order to find out the intention of the document by which acknowledgement was to be construed the document as a whole must be read and the intention of the parties must be found out from the total effect of the document read as a whole."*

*10. Then the High Court after referring to the Judgement in the matter of "Padam Tea Company" examined the case, which was before the Hon'ble High Court, and in the facts of that matter, found that the list of Creditors maintained by the Respondent Company before High Court or in the balance sheet, was without any conditions or any strings attached." [Emphasis supplied]*

**26.** Thereafter, this Tribunal in Judgement in the matter of "Gautam Sinha" discussed facts regarding the Balance Sheet as was relied on in that matter and concluded as under:-

*"14. We have already referred to the Judgements in the matters of "Sheetal Fabrics" and "Padam Tea" which show that the Balance Sheet would be required to be read with*

*Directors' Report. In the Directors Report which is before us, there does not appear to be any acknowledgement of debt. The statement recorded by the Auditor with regard to the pending litigation in the facts of the present matter, we find, cannot be read as an acknowledgement by Company under Section 18 of the Limitation Act."*

**27.** In the above reference to our Judgement in the matter of "Gautam Sinha" while referring the Judgement of the Hon'ble High Court of Delhi in the matter of **"The Commissioner of Income Tax-III v. Shri Vardhman Overseas Ltd."** reported as 2011 SCC OnLine DEL 5599, only part of Para – 17* of that Judgement was reproduced. In Judgement in the matter of **"Commissioner of Income Tax"** (supra), the Hon'ble High Court of Delhi after referring to Judgement of the Hon'ble Supreme Court in "M/s Mahabir Cold Storage Versus C.I.T." (supra) and the legal positon in Para – 17, observed that in several Judgements of the High Court, the legal position has been accepted and added:-

*"In Daya Chand Uttam Prakash Jain vs. Santosh Devi Sharma 67 (1997) DLT 13, S.N. Kapoor J. applied the principle in a case where the primary question was whether a suit under Order 37 CPC could be filed on the basis of an acknowledgement. In Larsen & Tubro Ltd. v. Commercial Electric Works 67 (1997) DLT 387 a Single Judge of this Court observed that it is well settled that a balance sheet of a company, where the defendants had shown a particular amount as due to the plaintiff, would constitute an acknowledgement within the meaning of Section 18 of the Limitation Act. In Rishi Pal Gupta v. S.J. Knitting & Finishing Mills Pvt. Ltd. 73 (1998) DLT 593, the same view was taken. The last two decisions were cited by Geeta Mittal, J. in S.C. Gupta v. Allied Beverages Company Pvt. Ltd. (decided on 30/4/2007) and it was held that the acknowledgement made by a company in its balance sheet has the effect of extending the period of limitation for the purposes of Section*

*18 of the Limitation Act. In Ambika Mills Ltd. Ahmedabad v. CIT Gujarat (1964) 54 ITR 167, it was further held that a debt shown in a balance sheet of a company amounts to an acknowledgement for the purpose of Section 19 of the Limitation Act and in order to be so, the balance sheet in which such acknowledgement is made need not be addressed to the creditors. In light of these authorities, it must be held that in the present case, the disclosure by the assessee company in its balance sheet as on 31st March, 2002 of the accounts of the sundry creditors amounts to an acknowledgement of the debts in their favour for the purposes of Section 18 of the Limitation Act. The assessee's liability to the creditors, thus, subsisted and did not cease nor was it remitted by the creditors. The liability was enforceable in a court of law."*

**28.** Another Bench of this Tribunal has in the matter of **"Mr. Gouri Prasad Goenka Vs. Punjab National Bank and another"** in Company Appeal (AT) (Insolvency) No. 28 of 2019 reported as MANU/NL/0518/2019 held that letter emanating from Corporate Debtor in that matter, addressed to the Financial Creditor where Corporate Debtor agreed to settle all outstanding dues of the Financial Creditor on "One Time Settlement (OTS) basis" amounted to acknowledgment of outstanding debt in writing.

**29.** In Judgement in the matter of **"ITC Limited Vs. Blue Coast Hotels Ltd. and Ors."** dated 19th March, 2018 reported as MANU/SC/0263/2018, Hon'ble Supreme Court was dealing with question whether Sub-Section (3A) of Section 13 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI - in short) was mandatory or directory in nature and in the context, dealt with the matter where the Creditor had not replied to debtors' representation and it was claimed that there was breach of Section 13(3A). In that context, Hon'ble

Supreme Court dealt with attendant circumstances and the Notices which were issued by the Creditor and the different proposals debtor made including a "Letter of Undertaking" dated 25th November, 2013 and in Para – 35 of that Judgement observed:-

> ***Letter of Undertaking "Without Prejudice"***
>
> *35. Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's case as pointed out by Mr. Harish Salve, "as a Rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure."*
>
> *It was argued in a subsequent case that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:*
>
> > *"But when a statement is used as acknowledgement for the purpose of Section 29 (5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement."*
>
> *Therefore, the without prejudice Rule could have no application.*
>
> *It said:*
>
> > *Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one*

> *in respect of an undisputed debt. Neither an offer of payment nor actual payment.*
>
> *We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up."*
>
> *[Emphasis supplied]*

**30.** Carefully going through "ITC Ltd." Judgement, we are aware that the context there was not Limitation Act but the substance emanating is that even "Letter of Undertaking" issued "without prejudice" clause could contain an "acknowledgement of debt".

**31.** Going through the Judgements of Hon'ble High Courts of Delhi and other High courts, what appears to us is that it is well settled position of law that Annual Returns/Audited Balance Sheets can be referred to and relied on to see if contents therein amount to acknowledgement or not. The above discussion of the Judgements shows that even after referring to the Annual Reports/ Balance Sheets, there are instances where the contents are not relied on to conclude that there is acknowledgement of debt. This is clear from Para – 11 of the Judgement in the matter of "In re. Padam Tea Company Ltd." (referred supra). There the Directors recorded their opinion with regard to the liabilities shown to say that the same are barred by limitations and hence, the liabilities are not being confirmed by the Directors. Thus contents recorded in Balance Sheet/Financial Statements are to be looked into on case to case basis.

**32.** Apart from Judgements of the High Courts, as referred, Judgement in the matter of "Mahabir Cold Storage" (supra) recorded that entries in the books of accounts would amount to an acknowledgement of the liability within the meaning of Section 18 of the Limitation Act, 1963. If books of accounts can be considered, we find it difficult to hold that the audited Balance Sheet prepared on the basis of books of accounts, need to be ignored. Apart from the above, in Judgement in the matter of **"Kashinath Sankarappa Wani Vs. New Akot Cotton Ginning &; Pressing Co., Ltd."** reported as MANU/SC/0007/1958, while dealing with Resolution of Board of Directors and while considering Balance Sheet with regard to question of limitation, Hon'ble Supreme Court examined the Resolution and also the Balance Sheet and in the context of the facts of that matter came to a conclusion that the Resolution or the Balance Sheet did not help the Appellant. It is not that it was held that for the purpose of limitation, Balance Sheet cannot be considered at all.

**33.** In the matter of **"A.V. Murthy Versus B.S. Nagabasavanna"** reported as (2002) 2 SCC 642, while dealing with a complaint under Section 138 of the Negotiable Instruments Act, 1881 when dispute came up whether the cheque drawn was in respect of a debt or liability not legally enforceable, and the Additional Sessions Judge had held that there was error in taking cognizance of the offence, Hon'ble Supreme Court observed in Para – 5 as under:-

> *"Moreover, in the instant case, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31-3-1997 is also produced before us. If the amount borrowed by the respondent is*

> *shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent."*
>
> *[Emphasis supplied]*

**34.** Judgement in the matter of "A.V. Murthy" (supra) was relied on by the Hon'ble Supreme Court in the matter of **"S. Natarajan Vs. Sama Dharman"** reported as MANU/SC/0698/2014. Thus, what appears to us is that even the Hon'ble Supreme Court has observed that if the amount borrowed by the party is shown in the Balance Sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made.

**35**. Thus, we find it is settled law appearing from the Judgements of the High Court of Delhi and other High Courts that Balance Sheets can be looked into to see if there is acknowledgement of debt. Perusing Judgements of Hon'ble Supreme Court we find that even Hon'ble Supreme Court has looked into Balance Sheets and Books of Account to see if there is Acknowledgement of Liability. If the amount borrowed is shown in the Balance Sheet, it may amount to Acknowledgement. We find that the Judgements of Hon'ble Supreme Court of India are binding and Balance Sheets cannot be outright ignored.

**36**. For the above reasons, we are of the opinion that Annual Returns/Audited Balance Sheets, one-time settlement proposals, proposals to restructure loans, by whatever names called, cannot be simply ignored as debarred from consideration and in every given matter, it would be a question

of applying the facts to the law and vice versa, to see whether or not the specific contents, spell out an acknowledgement under the Limitation Act.

**37.** As mentioned there are Judgments especially of the Hon'ble Supreme Court which show that entries in the Balance-sheet may amount to acknowledgment. We are bound by the observations of the Hon'ble Supreme Court.

**38.** Apart from the above, reference needs to be made to Section 29 of the Limitation Act which reads as under:

> *"29 Savings (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).*
>
> *(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.*
>
> *(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.*
>
> *(4) Sections 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to*

*which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend."*

It is clear that Insolvency and Bankruptcy Code is a special law. Section 238 A of IBC states that the provisions of the Limitation Act shall, as far as may apply to the proceedings or Appeals before the Adjudicating Authority and this Tribunal as the case may be. Article 137 of the Limitation Act applies to the applications filed under Section 7 and 9 of IBC has already been held by the Hon'ble Supreme Court. IBC has not excluded Application of Section 4 to 24 while determining Period of Limitation and Section 29 (2) appears to be applicable. This being so, Section 18 and 19 of Limitation Act must be said to be applicable.

**Claim of Appellant is not time-barred**

**39.** We have on record documents at Annexure A15 page 227 with further documents Annexure A17 and A19 containing balance-sheets with reference to 2015-16 and 2016-17 where the acknowledgments of debt by the Corporate Debtor are clearly there. The Respondent has not shown that while preparing the balance-sheets the directors in their reports recorded denial or any reservation with regard to the debts shown by the Chartered Accountant to claim that they were time-barred. If the debt became NPA on 30th November, 2013 and there are acknowledgments in the balance-sheets of 2014-15 to 2016-17 the Application filed under Section 7 of IBC on 15th December, 2017 cannot be said to be time-barred. This is apart from admitted payment by cheque in April of 2015 though it is argued that it was part of proposal of One Time Settlement which never materialized (See Written Submissions of

Respondent – Diary No. 23105). Even if the One Time Settlement did not materialize, the payment made on account of the same debt in April 2015 would attract also Section 19 of Limitation Act. For such reasons, the Appeal deserves to be allowed. Section 7 application was dismissed on ground of limitation. It is not the case that the application was not complete or defective otherwise. The same is required to be admitted. There is no substance in the defence being raised.

**Order**

The Appeal is allowed. The Impugned Order is quashed and set aside. We hold the Application under Section 7 of IBC as filed by the Appellant to be within Limitation. The Application C.P (IB) NO. 5/NCLT/AHM/2018 is restored to the file of the Adjudicating Authority. Unless parties settle earlier, the Adjudicating Authority is directed to admit the application and issue further directions and orders as required under the Provisions of IBC. Parties to appear before Adjudicating Authority on 16th April, 2021.

The Appeal is disposed, accordingly. No costs.

**[Justice A.I.S. Cheema]**
**Member (Judicial)**

**[V.P. Singh]**
**Member (Technical)**

**New Delhi**
Basant B.