

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 373 of 2022

(Arising out of Order dated 25th February, 2022 passed by National Company Law Tribunal, Court III, Mumbai Bench, in C.P. (IB) No.- 4108/MB/2018).

IN THE MATTER OF:

**Mr. Ishrat Ali,
A Member of the Suspended Board
of Director of Mirco Dynamics Pvt. Ltd.,
R/o at 121, Carina Tarrace,
52, Lulla Nagar,
Pune – 411040, Maharashtra.**

...Appellant

Versus

**1.The Cosmos Cooperative Bank Ltd.,
A Company within the meaning of the
Companies Act, 2013.
R/o at Cosmos Tower,
Plot No.6, University Road,
ICS Colony, Ganesh Khind,
Pune - 411007.**

...Respondent No. 1

**2. Ms. Anagha Anasingaraju,
The Interim Resolution Professional of
Mirco Dynamics Pvt. Ltd.
Having her Registration No. IBBI/IPA-002/IP-
N00247/2017-18/10732.
R/o at 1-2, Aishwarya Sankul,
S. No. 17, Joshi Railway Museum,
Near Sangam Press,
Shri G.A. Kulkarni Marg,
Kothrud, Pune – 411038.
Email: rp.anagha@kanjcs.com**

...Respondent No. 2

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 491 of 2022

(Arising out of Order dated 25th February, 2022 passed by National Company Law Tribunal, Mumbai Bench, Court III, in I.A. 2417/2021 in C.P. (IB) No.- 4108/2018).

IN THE MATTER OF:

**Mr. Ishrat Ali,
A Member of the (allegedly Suspended) Board
of Directors of Mirco Dynamics Pvt. Ltd.,
R/o at 12, Carina Tarrace,
52, Lulla Nagar,**

Pune – 411040, Maharashtra

...Appellant

Versus

**1. The Cosmos Cooperative Bank Ltd.,
A Company within the meaning of the
Companies Act, 2013.**

**R/o at Cosmos Tower,
Plot No.6, University Road,
ICS Colony, Ganesh Khind
Pune 411007.**

...Respondent No. 1

**2. Ms. Anagha Anasingaraju,
The Interim Resolution Professional of
Mirco Dynamics Pvt. Ltd.
Having her Registration No. IBBI/IPA-002/IP-
N00247/2017-18/10732.**

**R/o at 1-2, Aishwarya Sankul,
S. No. 17, Joshi Railway Museum,
Near Sangam Press,
Shri G.A. Kulkarni Marg,
Kothrud, Pune – 411038.
Email: rp.anagha@kanjcs.com**

...Respondent No. 2

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 492 of 2022

(Arising out of Order dated 25th February, 2022 passed by National Company Law
Tribunal, Mumbai Bench, Court III, in M.A. 2420/2019 in C.P. (IB) No.-
4108/2018).

IN THE MATTER OF:

**Mr. Ishrat Ali,
A Share Holder & Promotor & Member of the
(allegedly Suspended) Board of Director of
Mirco Dynamics Pvt. Ltd.,
R/o at 12, Carina Tarrace,
52, Lulla Nagar,
Pune – 411040, Maharashtra**

...Appellant

Versus

**1.The Cosmos Cooperative Bank Ltd.,
R/o at Cosmos Tower,
University Road, Ganeshkhind,
Shivajinagar,**

Pune 411007.

...Respondent No. 1

**2. Ms. Anagha Anasingaraju,
The Interim Resolution Professional of
Mirco Dynamics Pvt. Ltd.
Having her Registration No. IBBI/IPA-002/IP-
N00247/2017-18/10732.
R/o at 1-2, Aishwarya Sankul,
S. No. 17, Joshi Railway Museum,
Near Sangam Press,
Shri G.A. Kulkarni Marg,
Kothrud, Pune – 411038.
Email: rp.anagha@kanjcs.com**

...Respondent No. 2

**WITH
COMPANY APPEAL (AT) (INSOLVENCY) No. 493 of 2022**

(Arising out of Order dated 25th February, 2022 passed by National Company Law
Tribunal, Mumbai Bench, Court III, in M.A. 472/2019 & M.A. 479/2019 in
C.P. (IB) No.- 4108/2018).

IN THE MATTER OF:

**Mr. Ishrat Ali,
A Share Holder & Promotor & Member of the
(allegedly Suspended) Board of Director of
Mirco Dynamics Pvt. Ltd.,
R/o at 12, Carina Tarrace,
52, Lulla Nagar,
Pune – 411040, Maharashtra**

...Appellant

Versus

**1.The Cosmos Cooperative Bank Ltd.,
A Company within the meaning of the
Companies Act, 2013.
R/o at Cosmos Tower,
Plot No. 6, University Road,
ICS Colony, Ganesh Khind,
Pune 411007.**

...Respondent No. 1

**2. Ms. Anagha Anasingaraju,
The Interim Resolution Professional of
Mirco Dynamics Pvt. Ltd.
Having her Registration No. IBBI/IPA-002/IP-
N00247/2017-18/10732.
R/o at 1-2, Aishwarya Sankul,
S. No. 17, Joshi Railway Museum,**

Near Sangam Press,
Shri G.A. Kulkarni Marg,
Kothrud, Pune – 411038.
Email: rp.anagha@kanjcs.com

...Respondent No. 2

For Appellants: Mr. Abhijeet Sinha, Mr. Ashish Choudhury, Mr. Dhruv Surana and Mr. Aditya Shukla, Advocates.

For Respondent No.1: Mr. Ninad Laud, Mr. Ivo D'Costa, Ms. Ananyaa Mazumdar and Mr. Avinash Mathews, Advocates for R-1.

For Respondent No. 2: Mr. Avinash Rajan Khanolkar, Advocate for R-2.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

Company Appeal (AT) (Insolvency) No. 373 of 2022

1. This Appeal, filed under Section 61 of the Insolvency & Bankruptcy Code (hereinafter referred to as 'The Code') is against the Impugned Order dated 25.02.2022 passed by the National Company Law Tribunal, Court III, Mumbai Bench, Mumbai in CP (IB) 4108/MB/2018 wherein the Adjudicating Authority has admitted the Application filed under Section 7 of the Code, filed by the 'Financial Creditor'/The Cosmos Cooperative Bank Ltd. against Mirco Dynamics Pvt Ltd (hereinafter referred to as the 'Corporate Debtor').

2. Brief Facts of the Case:

- In the first round of Litigation, the Adjudicating Authority had admitted the Section 7 Application filed by M/s. Cosmos Co-Operative Bank Limited'- ('Financial Creditor') vide Order dated 23/09/2019 holding that the Petition was within limitation.
- The Appellant challenged the Admission Order before this Tribunal on the ground that the Section 7 Application was 'barred by Limitation'. A

three Member Bench of this Tribunal doubted the correctness of its earlier Judgment in '*Sesh Nath Singh Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd and Ors.*' and thus referred the Appeal to a larger Bench of five Judges to decide the issue.

- A Larger Bench of this Tribunal departed from the view taken by the three Judge Bench and held that action taken by a financial institution under Section 13(4) of the SARFAESI Act is not a proceeding before a Court of law or a Tribunal. Therefore, such proceeding shall not be taken into consideration for excluding the time period under Section 14(2) of the Limitation Act.
- This Tribunal relied upon the case of '*Jignesh Shah and Anr. Vs. Union of India and Anr.*' to 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.
- The Judgment dated 12.03.2020 of this Tribunal was then appealed before the Hon'ble Supreme Court which has allowed the Appeal holding that having answered the question regarding the maintainability of the Application, NCLAT ought to have allowed the Appellants to proceed before the Adjudicating Authority on the ground that the issue required reconsideration in light of the recent decisions of the Hon'ble Apex Court. The Hon'ble Supreme Court set aside the Judgment of this Tribunal and restored the Application to the file of Adjudicating Authority to its original number for being considered afresh on merits.

3. Submissions of the Learned Counsel Mr. Abhijeet Singh, appearing for the Appellant/ the Suspended Board of Director:

- The Learned Counsel strenuously contended that the Section 7 Application was filed by a person who was not authorized to do so; that Annexure 'A' in Form 1 is a letter from the Managing Director of a Multi-State Cooperative Society who is an appointee of the Board of Directors; that there is nothing on record to show that he is also the Chief Executive Officer (CEO); that a Notification by the Ministry of Corporate Affairs, "S.O. 1091(E) dated 27.02.2019 has clearly specified the persons who are authorised to initiate CIRP; that the Corporate Debtor had raised this issue regarding the lack of authorisation in IA No.2420/2019, that only a person duly authorised by the Board of Directors of a Company is eligible to file an Application under Section 7 of the Code, the Adjudicating Authority vide Order dated 11.03.2019 in the first round of proceedings gave an opportunity to the Financial Creditor to correct the Application, which was not done, but the Adjudicating Authority has concluded that the Managing Director of the Cooperative Society, is also the CEO whose function is to appoint a person to 'sue' or to be 'sued' and, therefore, is authorised to file the Application. It is submitted that as on the date of the Interim Order i.e., 11.03.2019, notification of the MCA S.O.1091(E) was in existence and was applicable. Therefore, the correction ought to have effected as per the requirement of the said Notification. It is further submitted that if there is an inconsistency (regarding the issue of authorization), between two legislations, the provisions of the IBC 2016 would certainly override

the provisions of MSCS Act, 2002 and hence the Application was not maintainable having been filed without proper authorization.

- The Learned Counsel argued that the finding of the Adjudicating Authority that the Application was filed on 25.10.2018 and the Notification of the MCA S.O. 1091(E) is dated 27.02.2019 and, therefore, the Notification was not applicable retrospectively only strengthens the case of the Corporate Debtor.
 - The Learned Counsel argued that the Financial Creditor has never stated that in Form I, the authorisation as per provisions of the Act, 2002 was enclosed, but instead has stated under oath that the 'Board Resolution' is enclosed and hence in absence of the 'Board Resolution', the Application being defective ought to have been dismissed. The Corporate Debtor filed MA No.472/2019 dated 25.01.2019 alleging suppression of material facts and also filed MA No.479/2019 for fraudulent initiation of CIRP for a purpose other than 'Resolution'. But these Applications were not decided by the Adjudicating Authority in the first round of proceedings and Section 7 Application was admitted.
 - On an Appeal against the Order dated 23.03.2019, the larger Bench of this Tribunal held that the Section 7 Application was barred by limitation and set aside the Impugned Order. The Judgement dated 12.03.2020 was appealed by the Financial Creditor and the Hon'ble Apex Court vide Order dated 09.08.2021 remitted the matter back to the Adjudicating Authority to be heard afresh and also directed that all the Applications filed in the proceedings stand revived to the original position. During the course of hearing, the Corporate Debtor raised the issue of recovery having already been done by the 'Financial Creditor'
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under SARFAESI Proceedings and in its Rejoinder dated 02.03.2021 filed before the Hon'ble Supreme Court, the 'Financial Creditor' has confirmed the same. The Learned Counsel drew our attention to the statement made by the Financial Creditor in their Affidavit before the Hon'ble Supreme Court which reads as follows:

"Para 14 Page 8-The possession has been taken by the representative of the Appellant Bank under the SARFAESI proceedings and this, in no way hampers the Appellant's recourse to initiate CIRP proceeding under Section of the IBC.

Para 15, Page 8-9: This is in furtherance of the fact that the amount recovered under the SARFAESI proceedings falls short of the amount that is legally owed by the Corporate Debtor (Respondent), which in turn forces the bank to initiate a CIRP proceedings under Section 7 of the IBC."

- It is submitted by the Counsel that SARFAESI Act, 2002 is a complete Act in itself and prescribes the procedure to be followed for recovery of shortfall, if any, but the 'Financial Creditor' without permission of the Debt Recovery Tribunal precluded to initiate another proceeding on the ground that the recovery made is less than the amount demanded and without disclosing the amount recovered, which is a casting obligation upon the Financial Creditor, filed this Application. It is submitted that the Application MA No.479/2019 filed by the Corporate Debtor raising this issue, remained undecided.
- The Learned Counsel vehemently argued that the Application under Section 7 filed on 25.10.2018 is barred by limitation for the following reasons:
 - The Adjudicating Authority has erroneously considered 31/03/2014 as the date of 'NPA' but the Statutory Inspection

Report of RBI read with the account statement for the month of June, 2013 clearly indicates that the Date of Default is 15th June, 2013 based on the following observations:-

- a) 7.3 months EMIs were pending as on 31.03.2014 in the Loan account for March, 2014.
 - b) 5.4 months EMIs were pending as on 1 December 2013 in the Loan Account No.0027521528.
 - c) The account of the Corporate Debtor ought to have been classified as NPA before December, 2013.
 - d) At least 90 days time gap is needed after the Date of Default to make the account liable to be classified as NPA as per the Prudential RBI Norms and Guidelines which means the Date of Default has to be at least 90 days prior to 30th September, 2013.
 - e) Account statement for the month of June, 2013 shows that the 'default' occurred on 15.06.2013 and, therefore, the Statutory Inspection done by the RBI Officers was absolutely right when they made the observation that the account ought to have been treated as NPA at quarter ending 30.09.2013, for the default having occurred on 15.06.2013.
- The Learned Counsel submitted that, therefore the Date of Default to be taken for calculating the Limitation is 15.06.2013, and the period of 3 years from this date ends on 14.06.2016, but the Application under Section 7 was filed on 25.10.2018 and hence is barred by Limitation.
 - It is submitted that the Adjudicating Authority has erroneously relied on an unsigned letter dated 10.08.2016 and observed that it was an *Company Appeal (AT) (Insolvency) Nos. 373, 491, 492 & 493 of 2022*

offer from the Director of the Corporate Debtor 'for full and final settlement of the debt'. It is argued that the unsigned letter has nothing to do with the 'full and final settlement of the debt' and that the said letter was not in the record of NCLT and was served on the Advocate on 30.03.2019. It is also argued that the said document is a forged one and was filed before the NCLT without prior service to the Corporate Debtor.

- The Learned Counsel contended that the subject matter of the purportedly unsigned letter is 'amicable dispute resolution (without prejudice)' and that the letter was brought on record using fraudulent means without serving a copy of the Appellant and without any Diary number. The Learned Counsel submits that any offer of settlement given 'without prejudice' cannot be construed as acknowledgement under Section 18 of the Limitation Act, 1963, as letters using 'without Prejudice' are not admissible in law.
- The Learned Counsel strenuously contended that the account on 31.03.2014 was never 'sub-standard' and drew our attention to a letter dated 21.09.2014 addressed by the Financial Creditor/Cosmos Bank in which the outstanding balance overdue 'as on 20.09.2014 is termed as NIL' and therefore the date of default cannot be 30/03/2014. Further, it is argued that the CIBIL report dated 12/12/2014 showed the account to be 'standard'.
- Learned Counsel contended that the 'Document' dated 31/03/2014 is a fraudulent one, wherein the figures were filled in; the sanction date and the date of Agreement are blank and the signature was taken on a blank paper and hence cannot be considered as an 'acknowledgment of
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debt'. Moreover the 'Document' is dated 31/03/2014 and the Application is filed on 25/10/2018 and hence the same has no relevance. It is vehemently argued that there were no dues as on 20/09/2014 and also on 12/12/2014 and therefore the Application under Section 7 is not maintainable as the default was not in existence as on the date of filing of the Application.

- To buttress his arguments, Learned Counsel for the Appellant placed reliance on the following Judgments:
 - *'Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663.*
 - *'Goodyear (India) Limited Vs. Commissioner of Income Tax, Delhi', (2020) 15 SCC 137.*
 - *'Sternberg Reed Solicitors Vs. Harrison', (2020) 2 WLR 176.*
 - *'M/s. Invent Asset Securitisation and Reconstruction Pvt. Ltd. Vs. M/s. Girnar Fibers Ltd.', Civil Appeal No. 3033 of 2022.*
 - *'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminum Industries Private Limited & Anr.', (2020) 15 SCC 1.*
 - *'Shanti Conductors Private Limited Vs. Assam State Electricity Board and Ors.', (2020) 2 SCC 677.*
 - *'Shri Raju Chappakal Pappu & Anr. Vs. Shri Arunava Sikdar & Anr.', Company Appeal (AT) (Insolvency) No. 681 of 2019.*

4. Submissions of the Learned Counsel for the Respondent/Financial Creditor

- The Learned Counsel for the Respondent contended that the Respondent is an entity regulated by RBI and, therefore, when there was a direction by RBI that an error has occurred, the Financial *Company Appeal (AT) (Insolvency) Nos. 373, 491, 492 & 493 of 2022*

Creditor sought to rectify the same on 08.11.2014 and corrected the records regarding the date of NPA. The Learned Counsel placed reliance on the letter dated 20.04.2015 in support of his argument that the Appellant had acknowledged the debt as on 31/03/2015:

MIRCO DYNAMICS PVT.LTD.

Regd Office & UNIT I : T - 178, AND UNIT II: T-181-1/A,
M.I.D.C., Bhosari, Pune - 411026.
E MAIL : mirco@mircoindynamics.com / mirco_d@rediffmail.com

The Manager,
The Cosmos Co-operative Bank Ltd
Khadki Branch, Pune - 411 003.
Email : khadki@cosmosbank.in

20.04.2015

Sir / Madam

Subject : Regarding Various Loans : Interest / EMI / Outstanding / Disbursement & FDS

Please refer to our earlier queries wherein we have asked for the details about the Loans / EMI / Interest etc. Since we have not yet received the detailed working of the same, we have got the same done at our end and are submitting to you as following :

1. Term Loan No 00275180639 Sanction Letter No PRO 4 / 45 - A / 2009-10 Dt 20.07.2009
Amount : Rs 3,00,00,000/= (Rs 3 Cr)
Tenure : 4 month Moratorium & 60 Months from 03.09/2009 to 03.01.2015
First EMI on 03.10.2009
Interest as Per Sanction Terms & Conditions 13% / EMI Deducted @ Rs 6,74,940/=

Total Amount Paid till 31.03.2015 : Rs 4,16,81,540/=

(including interest during Moratorium of Rs 12,35,379/=)

As per Sanction Letter amount payable till 31.01.2015 (Loan Closes on this date)
Rs 4,17,31,779/=

Difference Rs 50,239/= Plus additional interest if any @ 2% PA on EMI delay on the amount of EMI which is delayed for the period of delay.

2. Term Loan No 00280125152 Sanction Letter No PRO / 361 / 2010-11 Dt 31.12.2010
Amount Rs 1,00,00,000/= (Rs 1 Cr)
Tenure : 0 month Moratorium & 84 Months from 24.03.2011 to 28.01.2018
First EMI on 23.06.2011
Interest as Per Sanction Terms & Conditions 11.5% / EMI Figure Mentioned @ Rs 1,74,000/=

Total Amount Paid till 31.03.2015 : Rs 83,09,572/=

As per Sanction Letter amount payable till 31.03.2015
Rs 83,57,000/=



1428

Difference Rs 42,428/= Plus additional interest if any @ 2% PA on EMI delay on the amount of EMI which is delayed for the period of delay.

Balance as per Sanction Letter on 31.03.2015 after paying Rs 83,52,000/= should be Rs. 52,72,450/=

3. Term Loan No 0027521528 Sanction Letter No PRO / 195 / 2012-13 Dt 20.11.2012
Amount Rs 1,00,00,000/= (Rs 1 Cr)

Tenure : 0 month Moratorium & 36 Months from 16.11.2012 to 16.11.2015

First EMI on 20.12.2012

Interest as Per Sanction Terms & Condition 14%

Till 31.03.2015, total 28 EMIs due & Rs 95,69,728/= become payable

Total Amount Paid / taken from our account till 31.03.2015 : Rs 88,24,303/=

As per Sanction Letter amount payable till 31.03.2015

Rs 95,69,728/=

Difference Rs 7,45,425/= yet to be Paid Plus additional interest if any @ 2% PA on EMI delay on the amount of EMI which is delayed for the period of delay. This outstanding amount is equivalent to 2.18 months of EMI.

Balance (8 EMIs) as on 31.03.2015 per Sanction Letter after already paying Rs 88,24,303/= till date, should be Rs. 34,79,633/=

4. Term Loan No.0028018055 Sanction Letter No PRO / 195 / 2012-13 Dt 20.11.2012

Amount Sanctioned Rs 3,60,00,000/= (Rs 3.6 Cr)

Tenure : 6 month Moratorium & 84 Months from 16.01.2013 to 16.07.2020

Interest as Per Sanction Terms & Condition 14%

Various Disbursements between 16.01.2013 till 18.05.2013 totalling to Rs 2,56,52,690/=

Amount Sanctioned but yet to be disbursed (reimbursement into CC account) :

Rs 1,03,47,310/=

Proportionate Interest @ 14% till 15 July 2013 (Moratorium Period) : 15,14,249/=

EMI @ 14% Interest for 84 month tenure works to Rs 4,80,731.71/=

EMIs due till 31.03.2015 : 20 EMIs

Amount to be paid by way of EMIs : 20 X Rs 4,80,731.71 = Rs 96,14,634/=

Total Amount including only Interest during Moratorium Period in this account to be paid from first disbursement on 16.01.2013 till 31.03.2015 :

Rs 15,14,249/= PLUS Rs 96,14,634/= i.e. Rs 1,11,28,883/=

Ammy

1429

Amount Actually paid till 31.03.2015 : Rs 1,09,14,784/=

Difference Yet to be paid : Rs 3,14,099/= which is equivalent to about 0.65 months EMI.

5. About CC Interest Payable & Paid, we are still working out and shall be shortly informing you of the calculation and in case any discrepancy is found either Plus Or even Minus, we shall request you to correct the same.

CONCLUSION :

A. As on 31.03.2015

Balance to be paid in TL Ac 639	: Rs 50,239/=
Balance to be paid in TL Ac 152	: Rs 42,428/=
Balance to be paid in TL Ac 528	: Rs 7,45,425/=
Balance to be paid in TL Ac 055	: Rs 3,14,099/=
TOTAL	: Rs 11,52,191/=

B. Please verify this amount so that we can immediately make the payment. In the meanwhile, please note the following :

As of now Rs 1,03,47,310/= yet to be reimbursed into CC account

Approximately Rs 3.7 Lakhs in free FD against BG for many years

FDs available with Bank (about 14 Lakhs)

About Rs 16 Lakhs available in our Account and can be taken against loan outstanding as above. All free FDs kindly be taken into our Loan Account/s against outstanding.

C. Please also clarify as to when the Balance Sanctioned amount of about Rs 103.47 Lakhs will be disbursed / reimbursed. This has been discussed on various occasions including during Pre Account Review visit by GM (Vaidya Sir) + CGM (Lagad Madam) in Aug /Sept 2014, in Account Review meeting In Oct 14, in meeting in Jan 2015. However we are not aware about the disbursement / reimbursement hence once again we are seeking clarification. Kindly do inform.

You are requested to kindly approve the above as the same As Per the relevant Sanction Letters. In case there is anything different please explain the same mentioning the term / condition so that we can cross verify and come to agreeable conclusion.

Ishraat Dynamics Pvt Ltd
For : Ishraat Dynamics Pvt Ltd
Cc : Mr. Vaidya, G.M.
LRE-28

(Emphasis Supplied)

- The Learned Counsel submitted that the aforementioned letter shows that as on 31.03.2015 the Corporate Debtor himself agreed to pay these amounts of Rs.11,52,191/- and requested the Financial Creditor Bank to verify the amounts immediately, and therefore, the question of Date of NPA being in the year 2013 and the Application being barred by limitation does not arise, in view of the admission made on 25/04/2015 by the Corporate that the amount is 'due and payable'. Even if 15.06.2013 is taken as the 'date of default', as per the Appellant's own admission, the Balance Sheet acknowledgement for the Financial Years 31.03.2014 and Financial Year 2015-16 under "Note-3 Long Term Borrowing", the amount is clearly reflected.
- The Learned Counsel for the Respondent also drew our attention to the 'Declaration/Confirmation of Balance' and acknowledgement of debt issued by the Appellant herein on 31.03.2014 with respect to the credit facilities taken from the Financial Creditor Bank. It is submitted that the signature by the Corporate Debtor as on 31.03.2014 on this 'Document' clearly shows that there is a 'Debt' and 'Default' as required under the provisions of IBC. Learned counsel also contended that the aforementioned letter dated 20.04.2015 specifies that 'the amount would be immediately paid' and this letter does not specify 'without prejudice'.
- The Learned Counsel for the Respondent relied on the OTS letter dated 10.08.2016, which, though cites 'without prejudice' in the conclusion of the letter, it is stated that there is a 'mutual compromise' and all legal proceedings and notices stands withdrawn. The said letter is reproduced here as under:



Regd. Office & UNIT I : T-17/8, MIDC AND UNIT II: T-181-1/A,
M.I.D.C., Shosari, Pune - 411026.

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The Managing Director
The Cosmos Co-operative Bank Ltd
Pune.

10.08.2016

KIND ATTENTIONS : Shri Vikrant Ponshe Sir

Dear Sir

Subject : Amicable Dispute Resolution (without prejudice)

This has reference to the discussion that we had on 09.08.2016 with you and also with the Hon Chairman at your office. We thank you for sparing your valued time and also for taking positive interest in amicably resolving the dispute.

We write in as follows the understanding that arrived at during the discussion which you need to confirm in writing.

= The total over-all amount that was mutually agreed to be paid was finalized at Rs. 10.5 Cr (Rs Ten Crore Fifty Lakhs Only).

= There shall not be any interest to be paid on this amount till 30th Sept 2016 and thereafter simple interest @ 13.5% PA to be paid on the outstanding amount.

= We proposed that we shall be giving a major part of one property on Lease and by discounting the Lease rental we shall pay and for balance we shall be suitably disposing of the other property.

It was agreed that the Bank shall give NOC to MIDC for sub-lease and also conditional NOC to the Financial Institution discounting the lease rental i.e. condition being that amount to be paid to the Bank through Lease Rental Discount shall be 50% of the outstanding i.e. at least Rs 5.25 Cr, which once received by the Bank the charge on the said property shall be released in favour of the said Financial Institution.

1779

For balance amount charge on the other property shall remain till full balance amount is paid, after which the charge shall be released. Bank shall co-operate in we selling / disposing of the other property suitably.

= The payment should be made by End Dec 2016 as far as possible (extendable by 3 month i.e. upto 31 March 2017).

= With this mutual compromise, all the legal proceedings / notices etc stand withdrawn.

Kindly confirm in writing at the earliest convenience.

Thanking you.

Yours sincerely
For MiRco Dynamics Pvt Ltd

Ishrat Ali
Managing Director

(Emphasis Supplied)

- The Learned Counsel further contended that the phrase 'without prejudice' does not in the context of IBC, specify that it is not under Section 18 of the Limitation Act, 1963. It is further contended that the

letter dated 10/08/2016 is referred to by the Bank in their confirmation to the said offer and the same is reproduced as hereunder:

1780

 **COSMOS BANK**
THE COSMOS CO-OP. BANK LTD. (Multistate Scheduled Bank)

Reference No.: -Reco//43/2016-17

Date: -25.08.2016

Without Prejudice

To,
The Director,
M/s. Mirco Dynamics P Ltd.,
Unit I: T178, MIDC & Unit II: T-181-1/A,
MIDC, Bhosari, Pune 411026.

Subject:-Your NPA Loan accounts with us.

Reference:-Your letter Dt.10.08.2016.

Dear Sir,

This is with reference to your above referred letter, wherein you have shown your willingness to close all your NPA loan accounts with us by paying certain amount & also made requests for allowing the manner/mode of payments & the period required to effect the entire payment to close loan accounts.

In this matter, this is to inform you that, by considering the long relationship of your Co. with the Bank, your intention to bring amicable resolution to close all your NPA loan accounts etc., Bank has considered your requests favorably on following terms & conditions:-

1. You need to pay an amount of Rs.10.50Crores (plus Interest as mentioned below) to close all your NPA loan accounts.
2. No Interest will be charged by the Bank on above amount till 30th Sept. 2016. However, from 1st Oct. 2016 Interest @13.50% p.a. (simple Interest) will be charged till entire payment of amount.
3. On confirmation of the sources of payment of Rs.5.25Crores to the Bank, Bank will issue conditional NOC for giving one part of your Factory Land & Building on Lease basis (& also for obtaining MIDC NOC for sub leasing) so as to enable you to get the Lease/Rent Discounted from any Bank or Financial Institution. The mortgaged charge on above, will be released only after receipt of Rs.5.25Crores from said Lease/Rent Discounting arrangement. The balance amount should also receive thereafter well within time.
4. Time is the essence factor, hence, It is expected that the above entire amount of Rs.10.50Crores plus interest must receive by the Bank before 31st Dec. 2016. The decision for any extension of period for any shortfall amount if any, will be taken at that time only depending on the payments actually effected till 31st Dec. 2016. Hence, Bank reserve its right on the same.

Registered Office: 'Cosmos Tower', Plot No-5, ICS Colony, University Road, Ganeshkhind, Shivajinagar, Pune - 411007
P-020-67086708 | E-customer@cosmosbank.in | www.cosmosbank.com | follow us on:  

(Emphasis Supplied)

Assessment:

5. The main issues which fall for consideration in this Appeal are:

- (a) Whether Limitation under Section 7 Application is triggered from 15/06/2013 the date of 'default' or from 31/03/2014 on which date the Bank has classified the Account of the 'Corporate Debtor' as 'NPA'.
- (b) Whether an OTS proposal given 'without Prejudice' construes 'Acknowledgement' as stipulated under Section 18 of the Limitation Act, 1963.
- (c) Whether the Adjudicating Authority was justified in admitting the Section 7 Application holding that the Application was not 'barred by Limitation'.

6. It is the case of the Appellant Counsel that the Date of NPA is not 30.03.2014 but 15.06.2013 and that, in fact, the Bank has never given any accurate date for classifying the account of the Corporate Debtor as an 'NPA'. It was strenuously argued that the account was 'standard' as per the CIBIL Report dated 12/12/2014 and also as per the Statement of account dated 21/09/2014 and hence dues were discharged by 20/09/2014 and there was no 'fresh default' thereafter.

7. A perusal of the Audit Report issued by the RBI, it is seen that as on 31/03/2014, the Term Loan Account was termed 'Sub-Standard' as 7.45 EMIs were overdue in Term Loan Account No. 21528, 4.75 EMIs were overdue in Term Loan Account No. 80639 and 4.74 EMIs were overdue in Term Loan Account No. 25152. These overdue Accounts reflected in the Audit Report of RBI set out that the Account was 'substandard' as on 31/03/2014. The contention of the Learned Counsel for the Appellant that only the CIBIL Report dated 12/12/14 showing the 'Corporate Debtor' Account to be a 'Standard'

should solely be considered, cannot be sustained, as it is not substantiated by any documentary evidence either regarding the duration, or any other relevant information. Moreover, we are of the view that the Audit Report of RBI for FY 2013-14 specifically mentions the period, the Term Loan Account Nos. and the exact EMIs which were defaulted terming the account to be 'substandard', as on 31/03/2014, which wraps up the issue that there was a continuing 'default' of EMIs as on that date.

8. In '**B. K. Educational Services Private Limited Vs. Parag Gupta and Associates**', (2019) 11 SCC 633, the Hon'ble Supreme Court observed as hereunder:

'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)

9. In '**Jignesh Shah Vs. Union of India**' (2019) 10 SCC 750, the Hon'ble Supreme Court held that *'the period of limitation for making an Application under Section 7 or 9 of the IBC three years from the date of accrual of the **right to sue, that is, the date of default.**'*

10. This Tribunal is of the considered view that it is not the specific '*date when the amount was classified as NPA*' but the date when the '*default has occurred*' is what is relevant for deciding the issue of Limitation as held by the Hon'ble Supreme Court in a catena of Judgements together with the fact that

the matter has been set at rest in a decision of a three Judge Bench of the Hon'ble Apex Court in '**Laxmi Pat Surana Vs. Union Bank of India & Anr.**', (2021) 8 SCC 481 where it is held:

“42. Notably, the provisions of the Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238-A predicates that the provisions of the Limitation Act shall, as far as may be, apply to the proceedings or appeals before the adjudicating authority, NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238-A IBC on 6-6-2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing Application under Section 7 IBC would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code.

43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits “default”. Section 7, consciously uses the expression “default” — not the date of notifying the loan account of the corporate person as NPA. Further, the expression “default” has been defined in Section 3(12) to mean non-payment of “debt” when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect

Company Appeal (AT) (Insolvency) Nos. 373, 491, 492 & 493 of 2022

of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 IBC ensures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 IBC.”

(Emphasis Supplied)

11. We do find force in the submission of the Learned Counsel for the Appellant that the date of default on record is 15/06/2013. The evidence on record also establishes that the amounts were due and payable even prior to 31/03/2014. As per the ratio of the Hon’ble Supreme Court in ‘B.K. Educational Services Private Limited’, (*Supra*) and ‘Jignesh Shah (*Supra*)’ the period of limitation for making an Application under IBC is three years from the date of accrual of the ‘right to sue’ that is the ‘date of default’. In the Judgement of ‘Laxmi Pat Surana’ (*Supra*) the Hon’ble Supreme Court has held that ‘Section 7 comes into play when the ‘Corporate Debtor’ commits ‘default’. Section 7 consciously uses the expression ‘default’ not the date of notifying the Loan Account of the ‘Corporate Debtor’ as NPA’. Later, in the same para 43 of the Judgement, the Hon’ble Apex Court speaks about the Application of Section 18 of the Limitation Act, 1963, under IBC. ‘Section 18 of the Limitation Act, 1963 gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate Resolution Process under Section 7 of

IBC ensures. Section 18 of the Limitation Act would come into play every time when the Principal Borrower and/or the Corporate Guarantor (Corporate Debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to 'acknowledgment of the debt', from time to time, for institution of the proceedings under Section 7 of IBC. Further, the acknowledgment must be of a liability in respect of which the 'Financial Creditor' can initiate action under Section 7 of IBC.' Keeping in view the ratio of these Judgements this Tribunal is of the earnest view, based on the facts of the attendant case, that it is the 'date of default' which is significant for calculating the period of limitation.

12. Now it is to be seen as to whether the default amounts were acknowledged to be due and payable within three years of 15/06/2013. The 'Declaration/Confirmation of balance' and 'acknowledgement of debt' dated 31.3.2014 clinches the issue that the Appellant has acknowledged that there was a 'Debt' and a 'Default' as on 31.03.2014. For the sake of brevity, the relevant pages of the Document is reproduced as hereunder:

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DECLARATION / CONFIRMATION OF BALANCE AND ACKNOWLEDGEMENT OF DEBT

I Mr. Ali Ishrat Shaikat
Director of M/s. Mirco Dynamics Pvt Ltd
do hereby states and declares as under :-

1. I/We have taken the various credit facilities from The Cosmos Co-Op. Bank Ltd., aggregating to the extent of Rs.1665.00 Lacs (Rs. One Thousand Six Hundred Sixty Five lacs Only)

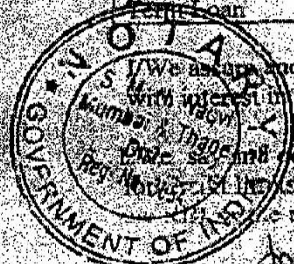
I/ We have taken following Credit facilities from The Cosmos Co-Op. Bank Ltd.

Type of Loan	Purpose of Loan	Sanction Date	Date of Agreement	Sanction Amount (In Lacs)	O/S Bal. as on 31/03/14 (In Lacs)
Cash-Credit	Working Capital			650.00	650.00
Bills Purchase				5.00	—
Packing Credit				100.00	—
Term Loan	Machinery			50.00	1.75
Term Loan	Machinery			300.00	112.45
Term Loan	Plant & Mach.			100.00	86.82
Term Loan	Mort Loan			100.00	84.79
Term Loan	Machinery			360.00	256.95

I/We have executed various documents including D.P. Notes, Loan Agreement, Deed of Hypothecation, Letter of Authority, Letter of Lien and Set off etc. I/We agree to undertake and abide by all the terms and conditions of such agreement/s, document/s. Also, this Acknowledgement of Debt is in continuation of the Loan Agreement/s executed by me/us for aforesaid limits.

2. I/We say and declare that we have gone through all the provision of the bye-Laws of the Bank and relating to the rules, of the Working Capital / Term Loan facilities and as per the rules, Byelaws and terms and conditions of the contract, we agree to pay the compound interest and in the event of default on our part agree to pay the additional interest at the rate prescribed by the bank from time to time not by way of penalty but stipulation of contract and we have verified all and each and every entry made by the bank and show in our Working Capital / Term Loan accounts and all the entries are found true and correct and I/We have no any grievance, complaint of whatsoever nature relating to any entry made in the said account and I/We confirmed that the balance amount shown and payable by me / us at the foot of the Working Capital and Term loan accounts are follows:

Type of loan	Account No.	O/S Bal. as on 31/3/14 (In Lacs)
Cash-Credit	002105117092027	650.00
Bills Discounting	0026001519	—
Packing Credit	—	—
FBD Term Loan	00275180013	1.75
IC/Buyers Credit	—	—
Bank Guarantee	—	—
WCTL	00251800239	112.45
FCTL	0027521528	86.82
Term Loan	0028012152	84.79
Term Loan	0028018055	256.95



I/We assure and promise and undertake to make the repayment of the said sum, together with interest in terms of contract / Agreement dated as mentioned herein above No. 1

One says and declare that we agree to pay the interest at the rate on the said sum together with interest at the rate of 12% per annum or at such rate bank may fixed from time to time as per the directives of the resolution of the Board of Directors and it is one of conditions under

14. I/We are well aware that the Working Capital facility granted by the bank to us is not for specific period and the bank is having authority to call back such loan amount and/or outstanding payable by us at the foot of the loan a/c at any time by giving notice in writing to us and in such event, I/We will not be entitled either under contract or practice to claim any further time for the repayment of all such outstanding and dues of the Bank.

15. Further I/We confirm and declare that the charges debited or to be debited from time to time in my/our account are as per the decision of the Board of Director and I/We are bond to pay the same without demure or protest. The said charges are in conformity and in consonance with the loan transaction and contract thereof.

Date: 31/03/14

Borrowers

For MIRCO DYNAMICS PVT. LTD.

[Signature]

Managing Director



(Signature of Borrower with Rubber stamp)

I/We the guarantor/s do hereby concur with the forgoing acknowledgement of liability and confirm that the letter of Guarantee dated _____ executed by us as stated hereinabove is in all force and effect and that I/We continue to be liable to your Bank in accordance with the terms thereof.

Date: 31/03/14

[Signature]

Guarantor-1



[Signature]

Guarantor-2



[Signature]

Guarantor-3



Guarantor-4



Guarantor-5

Guarantor-6



13. Therefore, in view of this letter, signed and stamped by the 'Corporate Debtor', the specific 'Date' on which the account was declared as NPA for the

purpose of Limitation pales into insignificance. What is pertinent herein is that the Appellant has acknowledged that there is a loan of Rs. 1665.00 Lakhs/- which was taken under various heads that there is an amount which is 'due and payable' as on 31/03/2014 meaning thereby that there is a 'Debt' as defined under Section 3(11) of the Code and a 'default' as defined under Section 3(12) of the Code is reproduced as hereunder:

3. Definitions.—*In this Code, unless the context otherwise requires,—*

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

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1 [Paid] by the debtor or the corporate debtor, as the case may be;"

14. The aforementioned letter signed and stamped by the 'Corporate Debtor' acknowledged, the debt as on 30/03/2014, construes clear 'acknowledgment of debt' as stipulated under Section 18 of the Limitation Act, 1963, thereby granting a fresh period of Limitation for another three years from 30/03/2014, which is nine months from the *admitted* 'date of default'.

The effect of the OTS Letter dated 10/08/2016, given 'without prejudice':

15. Now we address ourselves to the contention of the Learned Counsel for the Appellant that the Adjudicating Authority has erroneously placed reliance on the letter dated 10.08.2016 which specifically notes that it was given 'without prejudice' and therefore, could not have been taken as acknowledgement under Section 18 of the Limitation Act, 1963.

16. It remains trite that the question of Limitation is essentially a mixed question of fact and law and in this case a strong foundation has been laid in

Part V of the Application. It is noteworthy to state that ‘a document constituting an acknowledgment has to be construed in the context in which it is given. At this juncture, we find it relevant to quote, **‘TTC Vs. Blue Coast Hotels Ltd. & Ors.’, (2018) 15 SCC 99**, in which the Hon’ble Supreme Court dealing with whether Section 3(A) of Section 13 of SARGAESI, was mandatory or directory, took note of the ‘Notices’ issued by the ‘Financial Creditor’ and the different proposals made by the Debtor including a ‘Letter of Undertaking’ saying that they were given ‘without Prejudice’ and held as follows:

“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]

17. This Tribunal had an occasion to consider this issue in **‘Abhishek Gupta Vs. Asset Reconstruction Company India Limited’ in Company Appeal (AT) (Insolvency) No. 1094 of 2021**, wherein it was held that the words ‘without Prejudice’ are irrelevant for the purpose of Section 18. The same view was taken by this Tribunal in **‘Bank of India Multi ARC Coating and Strips Limited’ 2020 SCC OnLine NCALT 914**, keeping in view the aforementioned principles and the ratio of the Hon’ble Apex Court in **‘ITC Ltd. Vs. Blues Coast Hotels Ltd. & Ors.’ (Supra)** viewed from any angle, merely, because the standard phrase ‘without Prejudice’ is written does not imply any denial of the ‘debt’ involved, we are of the considered view that it does not extinguish the ‘right’ as it does admit ‘liability’. The Judgement of **‘Chairman and MD NTPC Ltd. Vs. Reshmi’ (Supra)** relied upon by the Appellant refers to correspondence given ‘without Prejudice’ under ‘undue influence and coercion’ and is clearly distinguishable from the facts of this case as there is no such pleading of undue influence and coercion here. **‘Goodyear (India) Ltd. Vs. CIT’ (Supra)** is also not applicable as it is not from the perspective of Section 18 of the Limitation Act, 1963.

Company Appeal (AT) (Insolvency) Nos. 373, 491, 492 & 493 of 2022

18. The Appellant cannot blow hot and cold at the same time, firstly saying the letter dated was unsigned and never served on them and again in the same breadth saying that it was given 'without prejudice'. Having observed so, we note that this letter was appended to an email dated 10/08/2016 addressed by the 'Corporate Debtor' to the 'Financial Creditor'. As it is relevant to the issue of 'acknowledgement of debt' the said email is reproduced as hereunder:

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IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, COURT III
M.A. 472/2019 & M.A. 479/2
IN C. P. No. 4108

22

Avinash Rana

From: Vikrant P. Pongshe
Sent: Wednesday, August 10, 2016 5:23 PM
To: apekshita thapsay; Avinash Rana
Subject: Fwd: Mutual & Amicable Settlement
Attachments: 2nd-LTR_MrPongshe.pdf; A1106001.htm

Sent from my iPad

Begin forwarded message:

From: mirco dynamics <mirco_d@rediffmail.com>
Date: 10 August 2016 at 16:58:59 IST
To: <vikrant.pongshe@cosmosbank.in>
Subject: Mutual & Amicable Settlement

Dear Sir

Kindly refer to the enclosed attachment which is in line with what we discussed and mutually agreed to.

Regards

Ishrat Ali

for MiRco Dynamics Pvt Ltd

MIRCO DYNAMICS PVT. LTD.
T-178 & T-181-1/A, MIDC BHOSARI
PUNE - 411 026
Ph: +91-020-27120839, 27129099
Fax: +91-020-7122678
email: mirco@mircodynamics.com
: mirco_d@rediffmail.com

(Emphasis Supplied)

19. This email dated 10/08/2016 sent by the Appellant himself to the Respondent Bank appending the subject letter evidences that the letter was indeed discussed and mutually agreed to.

20. Additionally, the admission of the 'debt' 'due and payable' is further explicit in the letters dated 20.04.2015 which is reproduced in the aforementioned para 4 wherein the Corporate Debtor has admitted the debt, and has also undertaken to pay the amount and requested the Financial Creditor to '*verify the amount so that it could be immediately paid*'. It is significant to mention that in this letter dated 20.04.2015 the phrase 'without prejudice' is omitted.

21. For the foregoing reasons, we note that the default amount has already been acknowledged on 31/03/2014, on 20/04/2015 and on 10/08/2016 in confirmation with Section 18 of the Limitation Act, 1963.

Acknowledgement in Balance Sheets for the FY 2016-17:

22. Section 134 of the Companies Act, 2013 requires that every Balance Sheet shall be signed by not less than two directors of the Company. The Balance Sheet for the Financial Year 2016-2017 evidences acknowledgement of the loan/borrowings and is duly signed on 04.09.2017 by the Chartered Accountant and by both the directors, one of whom is the Appellant himself.

23. The Hon'ble Supreme Court in '**Asset Reconstruction Co. (India) Ltd. Vs. Bishal Jaiswal**', **2021 SCC OnLine SC 321**, held that entries in a Balance Sheet amount to an acknowledgment of liability for the purpose of Section 18 of the Limitation Act, 1963 observing as follows:

139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgement to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai

Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-17, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May, 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.”

(Emphasis Supplied)

24. The Hon’ble Apex Court in a recent Judgment in **‘State Bank of India Vs. Krishidhan Seeds Pvt. Ltd.’ Civil Appeal No. 910 of 2021** decided on 18/04/2022 specifically addresses to acknowledgement in a Balance Sheet under IBC Proceedings and observed as follows:

“11. This principle also emerges from the decision **in Asset Reconstruction Company** (supra), which noted the decisions in **Sesh Nath Singh** (supra) and **Laxmi Pat Surana** (supra). This Court held:

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

made, thereby extending limitation under Section 18 of the Limitation Act.”

12. The decisions in **Sesh Nath Singh** (supra), **Laxmi Pat Surana** (supra) and **Asset Reconstruction Company** (supra) have subsequently been followed in numerous decisions of this Court delivered by two-Judge Benches, namely: (i) **Dena Bank v C. Shivakumar Reddy**; (ii) **State Bank of India v Vibha Agro Tech Limited**; (iii) **Devas Multimedia Private Ltd. v Antrix Corporation Ltd. and Another**; and (iv) **SVG Fashions Pvt. Ltd. (Earlier Known As SVG Fashions Ltd.) v Ritu Murli Manohar Goyal and Another**. Besides the above decisions, there is a more recent decision of a three-Judge Bench of this Court in **Rajendra Narottamdas Sheth and Another v Chandra Prakash Jain and Another**, where, speaking for the Bench, Justice L Nageswara Rao held:

“25. We have already held that the burden of prima facie proving occurrence of the default and that the Application filed under Section 7 of the Code is within the period of limitation, is entirely on the financial creditor. While the decision to admit an Application under Section 7 is typically made on the basis of material furnished by the financial creditor, the Adjudicating Authority is not barred from examining the material that is placed on record by the corporate debtor to determine that such Application is not beyond the period of limitation. Undoubtedly, there is sufficient material in the present case to justify enlargement of the extension period in accordance with Section 18 of the Limitation Act and such material has also been considered by the Adjudicating Authority before admitting the Application under Section 7 of the Code.....

(Emphasis Supplied)

25. Since the ratio of the Judgements relied upon by the Counsel for the Appellant regarding ‘Limitation’, have been addressed to by the Hon’ble Supreme Court in the aforementioned Judgements, the same are not being reproduced here, for the sake of the brevity. In the instant case, the Balance Sheet for the Financial Year 2016-17 and the appended notes to the Financial

Statements clearly specify the 'debt' owed to the 'Financial Creditor'. The material on record does not define any 'caveats' forming part of the Financial Statements to prove otherwise. Keeping in view the ratio of the aforementioned Judgements, this Tribunal is of the considered view that the acknowledgement in Balance Sheet for FY 2016-17, relied upon by the Financial Creditor, is unequivocal and crystallizes the issue of 'acknowledgement of debt' as defined under Section 18 of the Limitation Act, 1963.

Conclusion:

26. The following few dates, settles the issue that the Section 7 Application cannot, viewed from any angle, be said to be 'barred by Limitation':

- 15/06/2013 *The date when the 'Corporate Debtor accepts ought to be the date of NPA.*
- 30/03/2014 *The date of default specified in the RBI Inspection Report; and in the Balance Sheet for the FY 2013-14.*
- 30/03/2014 *The 'Declaration & Acknowledgement of Debt Document'.*
- 20/04/2015 *Letter by Appellant seeking to settle the dues.*
- 10/08/2016 *Letter appended to an email sent by the Appellant himself also referred to in the communication of the Bank dated 25/08/2016.*
- FY 2016-2017 *The Balance Sheet Confirmation of dues.*

27. Taking into consideration the date which the Appellant themselves confirm is the 'date of default' i.e., 15/06/2013, the Balance Sheet of the Financial Year 2013-14, dated 04/09/2014, the declaration of 'acknowledgement of debt', letter dated 31/03/2014 read with the RBI Inspection Report of the FY 2013-14 and the letter dated 20/04/2015, whereby the 'Corporate Debtor' had offered to make immediate payment of outstanding dues, we are of the considered view that the correspondence is well within the three year period from 15/06/2013 and would provide a fresh

Limitation Period of three years from the respective dates of the documents. Furthermore, the OTS document dated 10/08/2016 communicated between the parties having a jural relationship, would also provide a fresh period of Limitation as we have held that merely because the letter was given 'without Prejudice' does not extinguish any 'liability'. Additionally, the Balance Sheets for the FY 2016-17 and the appended notes to the Financial Statements clearly specifies the debt and construes an acknowledgment of the outstanding dues providing a fresh period of Limitation. Keeping in view all the aforementioned dates, this Tribunal is of the earnest view that the Application filed under Section 7 of the Code is well within the period of Limitation.

28. Now we address ourselves to the other issues raised by the Appellant that the Section 7 Application was filed without authorization and therefore the Petition itself ought to have been dismissed as not maintainable. It is the case of the Appellant that the authorization ought to have been by the CEO and none other and that the person signing the authorization must have been a Member of the Board of Directors of the Respondent Bank. At this Juncture we find it relevant to reproduce Section 51(1) of the Multi State Cooperative Societies Act, 2002, ('MSCS Act') as hereunder:

"51. Chief Executive.—(1) There shall be a Chief Executive, by whatever designation called, of every multi-State co-operative society to be appointed by the board and he shall be a full-time employee of such multi-State co-operative society.

(2) The Chief Executive shall be a member of the board and of the Executive Committee and such other committees or subcommittees as may be constituted under sub-section (1) of section 53.

(Emphasis Supplied)

29. This Section 51(1) of the MSCS Act, 2002 specifies “by whatever designation called” and therefore we hold that as the Bank does not have a designation of the ‘Chief Executive’ but only that of the ‘Managing Director’ the aforementioned Section 51(1) of the MSCS Act, 2002, is duly satisfied. Further, ‘Managing Director’ is a Member of the ‘Board of Directors’ as required under Section 51(2) of the MSCS Act, 2002 and it is evident from the nomenclature used. We are of the view that the Adjudicating Authority has rightly held that the circular dated 27/02/2019 could not have been applied retrospectively as the Section 7 Application was filed prior to this Circular.

30. As regarding the contention of the Learned Counsel for the Appellant that the ‘Corporate Debtor’ had initiated Proceedings under Section 14 of the SARFAESI Act, 2002 and has recovered some amounts and taken physical possession of some of the assets and therefore the ‘Financial Creditor’ is precluded from initiating CIRP under IBC, 2016, is without merit, especially keeping in view Section 238 of the Code which overrides other laws. The material on record also shows that the Bank has specifically pleaded that the Application moved under Section 14 of the SARFAESI Act, 2002 on 04/02/2017, was dismissed by the ADM on 03/10/2017 and that the assets were never sold and no money was realized against the same. The documentary evidence on record shows that a Writ Petition was also preferred before the Hon’ble Bombay High Court and the Bank was given the liberty to file a fresh Application under Section 14 of the SARFAESI Act, 2002 vide Order dated 02/05/2018. We find force in the contention of the Learned Counsel for the Respondent that the paragraph relied upon by the Appellant stating that it was submitted before the Hon’ble Supreme Court, is a statement which is to be read on the whole. In fact, the attempt to highlight the two paragraphs

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from the Affidavit, filed by the Bank, without reading/interpreting the content as a whole, is deprecated.

31. For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

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32. The Appellant preferred Application No. I.A. 2417/2021 seeking direction for taking action against the 'Financial Creditor' for committing perjury on the main ground that the Respondent Bank has stated that only symbolic possession of the assets has been taken whereas in the Rejoinder before the Hon'ble Supreme Court they have stated that physical possession has been taken and some amounts have been recovered and therefore, there were some discrepancies in the Affidavit amounting to fraud and forgery. Learned Adjudicating Authority has dismissed the Application on the ground that there was no material suppression of any fact as alleged by the Corporate Debtor. For reasons cited in para 30 of CA (AT) (Ins.) 373 of 2022, we find no merit in this Appeal and the same is dismissed accordingly.

Company Appeal (AT) (Insolvency) No. 492 of 2022

33. Appellant/Applicant preferred MA 2420/2019 on the ground that C.P. No. 4108/2018 is not maintainable as it was filed by a person who does not hold specific authorization to initiate CIRP. For reasons cited in paras 28 & 29 of CA (AT) (Ins.) 373 of 2022, we find no merit in this Appeal and the same is dismissed accordingly.

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34. Two Applications, MA 472/2019 and MA 479/2019 were filed regarding maintainability of the CP No. 4108/2018 on the ground that the date of NPA is not 31/03/2014 and that the debt was time barred. As the issue of limitation has already been addressed to in detail in *CA (AT) (Ins.) 373 of 2022*, we find no merit in this Appeal and the same is accordingly dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Ms. Shreesha Merla]
Member (Technical)**

**NEW DELHI
24th May, 2022**

Himanshu /Brijmohan