

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

Company Appeal (AT) (Insolvency) No. 183 of 2021

[Arising out of Order dated 25.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court-2 in CP(IB) 268/NCLT/AHM/2020]

IN THE MATTER OF:

**Arrow Engineering Ltd.
Arrow House No.2
Arrow City, Manhattan Village,
Kandlepada, Taluka Pen,
Goa Highway N.H.-17,
Raigad- 402107
Email: arrowsales09@gmail.com**

...Appellant

Versus

**Golden Tobacco Limited
Darjipura, Post Amaliyara,
Vadodara 390022
Gujarat**

...Respondent

Present:

For Appellant:	Mr. Robin Jaisinghani, Mr. Vikas Mehta, Mr. Rajat Sehgal, Advocates.
For Respondent:	Mr. Dhaval Deshpande and Ms. Nidhi Shah, Advocates.

**J U D G M E N T
(02nd December, 2021)**

Ashok Bhushan, J.

1. This Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) challenging the order dated 25.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2, dismissing the

Application filed under Section 7 of the 'I&B Code' by the Appellant. The brief facts of the case and sequence of the events necessary for deciding the Appeal are:

The Respondent Company (Corporate Debtor) owned 8 acres of land situated at S.V. Road, Vile Parle (West) Mumbai. After some discussion with the Appellant and the Corporate Debtor, it was agreed that for development of the land of the Corporate Debtor marketing and financial assistance shall be provided by the Appellant. By letter dated 03.06.2011, the Corporate Debtor issued a Letter of Intent for marketing/ financial assistance, along with the letter Memorandum of Understanding was also enclosed containing the terms and conditions and the manner of advance to be made by the Appellant for development of the property of the Corporate Debtor. In pursuance of the said letter, the Appellant had advanced different amounts to the Corporate Debtor. Vide letter dated 22.07.2011, Corporate Debtor acknowledged the receipt of Rs.10 Crores. The letter also contained the broad terms of agreement between the parties. On 10.10.2011, the Corporate Debtor again wrote to the Appellant recording terms and conditions for financial assistance which was needed by the Corporate Debtor. A receipt of amount of Rs.15 Crores was also acknowledged. In subsequent letter dated 01.02.2012, the letter dated 10.10.2011 was referred to as Letter of Understanding which letter also acknowledged receipt of Rs.25 Crores. Even after 01.02.2012 till August, 2012, different amounts were paid by the Appellant to the Corporate Debtor totaling Rs.41.75 Crores. In the Balance Sheet of the Corporate Debtor for the year 2014-15 as on 31.03.2015 for the

years 2015-16, 2016-17, 2017-18 and 2018-19, the Corporate Debtor has acknowledged the receipt of financial assistance of Rs.40.75 Crores, which was duly reflected in the Balance Sheet. On 26.06.2015, the Appellant addressed a letter to the Corporate Debtor stating that sum of Rs. 41.75 Crores had been paid under the Memorandum of Understanding (MoU). The Appellant requested Defendant to fix a meeting between the representatives of both the parties and also to indicate how to proceed further with the terms of Memorandum of Understanding including the schedule of payments etc. The Respondent sent a letter dated 08.07.2015 denying signing and executing the MoU. It was also alleged that the Appellant had failed to raise the required funds as promised. The Appellant came to know that the Respondent intends to sell the property in question for which offers were invited. The Appellant filed Commercial Suit No. 782 of 2017 in the Bombay High Court for recovery of Rs.41.75 Crores. The Commercial Suit was filed on 28.07.2017. The Respondent (Corporate Debtor) filed reply to the notice of motion and Affidavit filed by the Appellant. In the reply, in paragraph 7, it was acknowledged that the Plaintiff had paid Rs. 40.75 Crores and has further agreed to pay Rs.300 Crores towards the aforesaid property. Allegation was made against the Plaintiff that they have without an authority put the advertisement in newspaper and tried to sell the land to the third party which cost financial loss to the Respondent. It was claimed that the Plaintiff (Appellant before us) are liable to pay compensation and damages to the Defendant Company. Bombay High Court in the aforesaid Commercial Suit passed an order on 14.10.2019 by which order it noticed that the Defendant has taken the contention that amount paid to the Defendant was

not Rs.42,75,00,000/- but Rs. 40,75,00,000/-. The High Court vide interim order issued injunction in terms of prayer (a) of the Application. The Respondent Company could not proceed with the development of the property. An Application dated 24.06.2020 was filed under Section 7 of the 'I&B Code' by the Appellant claiming as Financial Creditor for recovery of amount of Rs. 41.75 Crores together with interest accrued thereon @ 18% p.a. In the Application under Section 7 of the 'I&B Code' amount claimed was Rs. 41.75 Crores with interest and the date of default was mentioned as 12.07.2017 which was date of filing of the suit for recovery in the Bombay High Court. Reply was filed by the Respondent to Section 7 Application where it was stated that the Petitioner (Appellant before us) could only advance sum of Rs. 40.75 Crores in various tranches to the Corporate Debtor instead of admitted commitment to the tune of Rs. 300 Crores. Allegations were made against the Petitioner (Appellant) in the reply. It was stated in the reply that MoU was not finalized. It was further stated that the Corporate Debtor has filed counter claim in the Commercial Suit before the Bombay High Court which Corporate Debtor is entitled to seek from the Petitioner (Appellant).

2. The Learned Adjudicating Authority, after hearing the parties, passed the impugned order dated 25.01.2021 rejecting the Application filed under Section 7. The Adjudicating Authority in its judgment has observed that in continuation of the Letter of Intent dated 03.06.2011, no MoU was formally executed between the parties. It was held that no date of default has been given by the Appellant in absence of which limitation cannot be calculated. It

was further held that amount paid cannot be considered as 'financial debt' or 'operational debt'. It was held that the arrangement between the parties is in the nature of business sharing and there is no 'financial debt'. The Adjudicating Authority further held that the claim of Petitioner/ Appellant is barred by limitation. The Appellant aggrieved by the said judgment has come up in this Appeal.

3. We have heard Shri Robin Jaisinghani, Learned Counsel for the Appellant and Shri Dhaval Deshpande, Learned Counsel for the Respondent.

4. Learned Counsel for the Appellant submits that the Respondent having acknowledged receipt of Rs. 25 Crores under the MoU dated 10.10.2011 clearly proves that it was financial assistance given by the Appellant. The Adjudicating Authority has erred in holding that there was no financial debt. Further, the Adjudicating Authority committed error in holding that the Application of the Appellant under Section 7 was barred by time. It is submitted that in the Balance Sheets of the Respondent which have been filed before the Adjudicating Authority i.e. Balance Sheet of 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19, the Respondent has acknowledged the liability of Rs.40.75 Crores which acknowledgment amounts to an acknowledgment of debt as contemplated by Section 18 of the Limitation Act, 1963. The Application under Section 7 has been filed within the limitation and the Adjudicating Authority erred in holding the Application as barred by time. It is now well settled that acknowledgment of debt under Balance Sheets which are required to be mandatorily prepared under the Companies Act, 2013 is sufficient acknowledgment within the

meaning of Section 18 of the Limitation Act, 1963. Learned Counsel for the Appellant submits that in the Balance Sheet for the year 2014-15, the Respondent has clearly mentioned about refund of advance of Rs.40.75 Crores against Vile Parle (West), Mumbai property along with interest if decided by the BIFR where MDRS was submitted. With regard to counter claim of the Respondent, it is submitted that no written statement having been filed alleged counter claim cannot be looked into. Learned Counsel for the Appellant submits that the debt having been repeatedly acknowledged by the Respondent, the Application ought not to have been rejected. The Adjudicating Authority committed error in rejecting the Application.

5. Learned Counsel for the Respondent refuting the submissions of the Appellant submits that the Appellant is not a Financial Creditor under the 'I&B Code' and the debt claimed is not a 'financial debt'. The Respondent counsel further submits that the Application is clearly barred by limitation. The date of default shall be 01.09.2012 after which differences arose between the Appellant and the Corporate Debtor. Appellant was to infuse a sum of Rs. 300 Crores and there is no obligation to repay the said amount. It is submitted that there was no MoU executed between the parties. There is a counter claim against the Appellant in Commercial Suit filed before the Bombay High Court.

6. We have considered the submissions of the parties and perused the record.

7. From the submissions of the Learned Counsel for the parties and record, following are the issues which arise for consideration in this Appeal:-

(i) Whether Corporate Debtor owed a financial debt to the Appellant in the facts of the present case?

(ii) Whether Balance Sheets for the years 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19, contained acknowledgment of debt within the meaning of Section 18 of the Limitation Act, 1963 so as to give benefit of fresh limitation period to the Appellant?

(iii) Whether the Application filed under Section 7 by the Appellant was barred by time and has rightly been rejected by the Adjudicating Authority?

All the above questions being inter-related are being taken together.

8. The word 'debt' has been defined in Section 3(11) in following words:-

"3. Definitions.-(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"

9. Section 5(8) defines 'financial debt' which is to the following effect:-

"5. Definitions.- (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

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

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

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

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

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

10. One of the sub-clauses of Section 5(8) by which 'financial debt' is defined in clause (f) which provides:-

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

11. We may first notice certain correspondences between the parties and other documents on record which throw considerable light on the nature of transaction between the parties. Letter dated 03.06.2011 which was sent by the Respondent- Corporate Debtor to the Appellant along with which MoU was sent containing terms and conditions which terms and conditions however could not be formally executed between the parties. The next document to be considered is letter dated 22.07.2011 issued to the Appellant, which letter acknowledged receipt of Rs. 10 Crores. The letter

further noticed that on discussion between the parties on 13.07.2011, in connection with marketing/ financial assistance to Corporate Debtor, certain agreement was arrived at. The next document is letter dated 10.10.2011 which has been sent by the Corporate Debtor to the Appellant containing signature of both the parties i.e. Corporate Debtor as well as containing confirmation on behalf of the Appellant. This letter has been subsequently referred as MoU between the parties. Hence, it is useful to notice the entire letter which letter is to the following effect:-

"October 10, 2011

*M/s. Arrow Engineering Ltd.
Bldg. No.7, 'J' Block
Platform Level,
Belapur Commercial Complex
CBD Navi Mumbai- 400614*

Dear Sir,

Subject: *Financial and Marketing assistance in Vile Parle Project*

We are seized and possessed of the piece of land at Vile Parle, more fully described in Annexure to the letter.

We had entered into a MOU dated December 26, 2009 with Seth Developers Pvt. Ltd. and Suraksha Reality Ltd., for development of the said property.

Two minority shareholders filed a suit in the Bombay City Civil Court, Mumbai (Din Doshi Branch) and moved an interim application. The Hon'ble Court passed ad interim injunction restraining the Company from giving effect to the resolution dated January 18, 2010 thereby restraining the Company from going ahead with the said MOU.

In view of the said injunction and in view of the fact that getting the stay vacated will take a long time, we have decided to develop the said property on our own.

In order to do that we need financial assistance and also marketing expertise which you have agreed to us and pursuant thereto, you had advanced a sum of Rs. 15 crores (Rupees Fifteen Crores Only) to us.

We hereby wish to record the other terms and conditions:

- a) We shall enter into a MOU with you on Revenue paper duly signed with you recording the terms and conditions of our agreement whereby you will be giving us financial assistance and marketing services and advice. This will be done simultaneously with our giving notice of termination to Sheth Developers Pvt. Ltd. and Suraksha Reality Ltd.*
- g) In consideration of your providing marketing services and marketing of the project, as well as financing of costs to be incurred for development of the said property as mentioned above together with interest, we shall pay 50% of the sale realization to you in full and final settlement pro rata wise of the finance provided by you together with interest and for marketing services. This will be in full and final settlement of the finance provided, interest and marketing services and marketing advice.*
- h) You guarantee that because of your marketing services and advices, the amount receivable by us after deducting the payment already received by us at per clause (b, c and d) for your finance and marketing advice, the amount available to us will not be less than Rs. 1,000/- crores (Rupees One Thousand crores only). In case, for any reason, if the amount receivable to us is less than Rs. 1,000 crores (Rupees One Thousand crores only), in that event to cover the short fall, the amount payable by us to you for your financing and services will be reduced by the amount of the shortage.*
- i) In a case where GTL terminate/ defers this marketing arrangement then GTL shall pay back the amount advance by you with interest.*
- j) Time is the essence of this understanding between the parties and the same would be strictly adhered to.*

Kindly sign a copy of this letter as your confirmation of the above.

*Yours faithfully,
For GOLDEN TOBACCO LTD.
Sd/-
A.K JOSHI
(Director Finance)*

*We confirm
For Arrow Engineering Ltd.*

*Sd/-
VINEET MALHOTRA
(Director)”*

12. In letter dated 01.02.2012, Corporate Debtor has stated following:-

“February 01, 2012

*M/s. Arrow Engineering Ltd.
Bldg. No.7, ‘J’ Block
Platform Level,
Belapur Commercial Complex
CBD Navi Mumbai- 400614*

Sub: Letter of Understanding dated 10th October, 2011

In terms of the above mentioned LOU, we have already received a sum of Rs. 25 Crores (Rupees Twenty Five Crores Only) towards Financial and Marketing Assistance. As mutually agreed by us, please advance a further sum of Rs. 2 crores (Rupees Two crores only) and oblige.

Thanking you,

*Yours faithfully,
For GOLDEN TOBACCO LIMITED*

*Sd/-
AUTHORIZED SIGNATORY”*

13. When we look into the letters written by the Corporate Debtor to the Appellant and the terms and conditions of MoU dated 10.10.2011, it is clear that the Appellant was to give financial assistance and marketing service and advices. One of the clauses of letter dated 10.10.2011 was that in case where the Corporate Debtor terminate/ differ marketing arrangement then the Corporate Debtor shall pay back the amount advanced by the Appellant with interest. At this juncture, it is also relevant to notice the financial document i.e. Balance Sheet maintained by the Corporate Debtor where the receipt of amount of Rs. 40.75 Crores has been admitted. In the Balance Sheet for the year 2014-15 as on 31.03.2015, in the column 'long term liabilities', there is mention of Rs.40.75 Crores as 'advance received towards project development (also refer note no. 25.7(a))'. We also need to refer to note 25.7(a) which also clearly acknowledged the advance of Rs. 40.75 Crores and in the above note, following has been stated:-

“The Parent Company has submitted MDRS to the Operating Agency (OA) appointed by BIFR sought for refunding above advances and also the advances of Rs. 40,75,00,000 received from a strategic investor against Vile Parle Property along with interest, if any as decided by BIFR by selling the said property. (Reference is invited to Note no. 25[1.1b(iii)] about the Hon’ble Supreme Court’s Order for not to encumber or in any way alienate the property).”

14. The Corporate Debtor was before BIFR and MDRS was submitted to the Operating Agency where advance of Rs. 40.75 Crores received by strategic investor i.e. Appellant was noticed and it was also mentioned that if decided by BIFR, by selling the said property the amount shall be refunded.

15. Similarly, Balance Sheet of 2016-17 as on 31.03.2017 also in the Column of 'other current liabilities' mentions 'advance received towards project development Rs. 407,500,000/-'. We may also refer to the Commercial Suit No. 782 of 2017 which was filed by the Appellant for recovery of Rs. 40.75 Crores with interest. The reply of Respondent in the Commercial Suit has been brought on record wherein paragraph 7 of the Affidavit, Notice of Motion was replied. It is useful to refer paragraph 7 of the reply which is to the following effect:-

"7. I shall now deal with the para wise comments of the said Notice of Motion:

a) With reference to para 1 of the Affidavit it is submitted that Plaintiffs have paid a sum of Rs. 40.75 crores as the Plaintiffs acted as the marketing and finance consultant to the aforesaid property and it was further agreed that the Plaintiffs would pay a sum of Rs. 300 crores towards the aforesaid property so that the Defendants could pay the settled amount after negotiations to the Sheth Developers Pvt. Ltd. (SDPL) and Suraksha Realty Limited (SRL) to enable to terminate the agreement executed between the Defendants and SDPL and SRL. As the

Plaintiff illegally and without any authority put the advertisement in the papers and tried to sell the land to third party because of which the whole process got derailed and the company's reputation came to stake. This deliberate default on the part of the Plaintiffs caused huge financial loss to the Defendant Company. The plaintiffs are liable to pay compensation and damages for the same to the defendant company."

16. The Bombay High Court in Commercial Suit No. 782 of 2017 on Notice of Motion No. 68 of 2018 has passed an order on 14.10.2019 where the High Court noticed the stand of the Defendant. It is useful to look into paragraph 9 of the judgment of the High Court which is to the following effect:-

"9. On behalf of the defendant, it is submitted by learned counsel that only an amount of Rs. 40,75,00,000/- has been received; however, while admitting the liability, it is contended that the defendant is not liable to repay at this stage in view of the counter claim lodged by the defendant as against the plaintiff. As on date, he submits that no money is payable to the plaintiff. On a specific query as to the state of the attachment levied, it is submitted that the Income Tax Authority has lifted the attachment and in that behalf, he relies upon a copy of the letter dated 3rd January, 2018 issued by the Tax Recovery Officer, whereby the attachment was withdrawn with immediate effect. The defendant has communicated about it to the plaintiff; however, there is some difference of

opinion between the learned counsel on this aspect. However, on a query from the court, the learned counsel fairly conceded that the Income Tax department has filed an appeal, which is pending in this court.”

17. High Court of Bombay had issued interim injunction order expressing the opinion that there is a clear admission of liability, hence, the Plaintiff cannot be denied the relief. The Commercial Suit is said to be pending.

18. The materials as noted above clearly indicate that amount of Rs.40.75 Crores was advanced by the Appellant to the Respondent as financial assistance to develop S.V. Road property situated at Vile Parle. The MoU dated 10.10.2011, which cannot be denied by any of the parties, do contain the manner in which the advance received from the Appellant shall be dealt with. In the MoU dated 10.10.2011 in clause (i) following was stated:-

“i) In a case where GTL terminate/ defers this marketing arrangement then GTL shall pay back the amount advance by you with interest.”

19. We have further noticed that in the Balance Sheets which are required to be mandatorily maintained under the Companies Act, 2013, the receipt of advance of Rs.40.75 Crores from the Appellant has been acknowledged and admitted. In the Balance Sheet, it was also mentioned that in the Notes-25 (7)(a) that if BIFR so directs the advance of Rs. 40.75 Crores shall be refunded with interest. When we look into the relevant material that were brought on record the conclusion is inescapable that the Appellant was to

finance the development project of the Corporate Debtor with regard to which amount of Rs. 40.75 Crores was admittedly advanced by the Appellant. It is also on the record that earlier the Corporate Debtor had entered into MoU on 26.12.2009 with one 'Sheth Developers Pvt. Ltd.' and 'Suraksha Reality Ltd.' for development of the said property. There being some order by the Civil Court in a suit filed by the Shareholders, the said MoU could not be given effect to and it was only thereafter the Corporate Debtor decided to develop the property on his own and hence discussion and understanding was arrived with the Appellant for financing the development of the land. The above material clearly proves that the amount was advanced as financial advances and it is a financial debt which debt has been duly and clearly acknowledged by the Corporate Debtor in his Balance Sheets as noted above.

20. The Adjudicating Authority after referring the Letter of Intent dated 03.06.2011 observed that MoU having not been formally executed is incomplete and does not fulfill the conditions of Section 10 of the Contract Act. The Adjudicating Authority has not adverted to the letter dated 10.10.2011 which was sent by the Respondent and confirmed by the Appellant which letter was treated as MoU by the Respondent themselves in the letter dated 01.02.2012. MoU dated 10.10.2011 having contained the agreement of both the parties, the said letter ought to have been looked into to find out the real nature of transaction between the parties. The Balance Sheet of the Respondent, as noted above, also clearly mentions the aforesaid acknowledgement of amount of Rs. 40.75 Crores as advance which debt is clearly acknowledged and as noticed above in Notes-25(7)(a) in the Balance

Sheet of 2014-15, it was mentioned by the Corporate Debtor that in event BIFR directs after-sale of the property, the amount of Rs. 40.75 Crores shall also be refunded with interest to the Appellant. The Adjudicating Authority has not referred to the Balance Sheets which were also part of the Application filed under Section 7 by the Appellant in Part-V under the heading as 'Particulars of Financial Debt (Documents, Records and Evidence of Default)'. It is useful to extract Column 3 under the above heading:-

"PART-V

<i>PARTICULARS OF FINANCIAL DEBT (Documents, Records and Evidence of Default)</i>		
3.	<i>Record of default with the information utility, if any (attach a copy of such record)</i>	<i>Balance Sheets for the Financial Years 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2018-2019. Copies of the Balance Sheets are annexed as Exhibit 'G' to 'L' hereto.</i>

21. When we consider all the above documents and correspondences including the Balance Sheets, the conclusion is inescapable that the amount of Rs. 40.75 Crores advanced by the Appellant was nothing but was a financial debt within the meaning of 'I&B Code' and the Adjudicating Authority committed error in holding that the Appellant is not a 'Financial Creditor'.

22. Now we come to the question as to whether the acknowledgment contained in the Balance Sheets as noted above, the Appellant will have a

fresh period of limitation as per Section 18 of the Limitation Act. The Appellant has filed the petition under Section 7 claiming the date of default as 12.07.2017 when he filed Commercial Suit for recovery of Rs. 41.75 Crores with interest. The Adjudicating Authority has observed that the said date cannot be treated to be date of default and when the document dated 03.06.2011 is taken into consideration the Application became time barred. According to the Adjudicating Authority, the document dated 03.06.2011 was not executed between the parties whereas the MoU between the parties was entered on 10.10.2011 as noted above. It has further come on the record that even after advance of Rs. 40.75 Crores the development project could not be taken up further by the Corporate Debtor and there were some issues between the parties with regard to which reference has been made in the reply filed by the Corporate Debtor before the High Court in Commercial Suit No. 782 of 2017. The reply which was filed in the Commercial Suit by the Corporate Debtor, as referred above, clearly indicates that although the advance of Rs. 40.75 Crores was not denied but in paragraph 7, as extracted above, the Corporate Debtor has instead of accepting his liability to repay the amount to the Appellant has stated that he is entitled to damages from the Appellant. The said reply can be very well treated as stand of the Respondent not to make any payment. The reply having been filed after 12.07.2017, on which date Commercial Suit was filed, the Application filed by the Appellant under Section 7 is well within three years from the said denial of claim of the Appellant by the Respondent. In his submissions, the Respondent has come up with the case that the default shall be treated to have occurred on 01.09.2012. Even assuming for argument's sake that default has taken place

on 01.09.2012, we may notice the following submissions of the Corporate Debtor as contained in paragraph 5 (vi) of the written submissions:

“vi. It is therefore submitted that if at all there was a default on part of the Corporate Debtor the said default would have been committed only on 1st September, 2012 as opposed to the claim of the Appellant. A petition under the provisions of the Insolvency and Bankruptcy Code, 2016 in respect of a default committed on 1st September, 2012 is hopelessly barred by limitation inasmuch as the limitation for filing the such a petition is only of three years.”

23. Thus, even if 01.09.2012 is treated to be the date of default, the three years' period will be there till 31.08.2015 and there being acknowledgment of the debt in the Balance Sheet for the years 2014-15 upto 2018-19 there shall be fresh period of limitation on each acknowledgment and Application filed on March, 2020 cannot be said to be barred by time. The question as to whether the acknowledgment in the Balance Sheet can give lease of fresh period of limitation is no more *res integra* in view of the recent judgment of the Hon'ble Supreme Court in **“Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal and Anr.- (2021) 6 SCC 366”**. The Hon'ble Supreme Court in the said judgment after considering all earlier judgments of the Hon'ble Supreme Court and High Courts has held that acknowledgment in the Balance Sheet is sufficient for attracting the provisions of Section 18 of the Limitation Act, 1963. The Hon'ble Supreme

Court in the above case has quoted an earlier judgment of the Hon'ble Supreme Court in ***"Khan Bahadur Shapoor Fredoom Mazda vs. Durga Prasad Chamaria and Ors.- AIR 1961 SC 1236"***, a passage from the above judgment was quoted. Para 15 of the judgment is as follows:-

"15. In an illuminating discussion on the reach of Section 18 of the Limitation Act, including the reach of the Explanation to the said Section, this Court, in Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad, (1962) 1 SCR 140 ["Shapoor Fredoom Mazda"], after referring to Section 19 of the Limitation Act, 1908, which corresponds to Section 18 of the 1963 Act, held:

"6. It is thus clear that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding

circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter.”

24. In paragraph 40 of the judgment, the Hon’ble Supreme Court after considering all relevant case on the subject laid down following:-

“40.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 31-3-2002 of the accounts of the sundry creditors’ amounts to an acknowledgment 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.”

25. It is true that each Balance Sheet has to be examined on a case to case basis to establish whether acknowledgment of liability in fact has been made. We have noted that all the Balance Sheets referred above clearly establish acknowledgment of liability by the Corporate Debtor. Thus, Section 18 is clearly attracted giving fresh period of limitation even in the event, we accept the submission of the Respondent that default was committed on

01.09.2012. We, thus, are of the opinion that the Adjudicating Authority committed error in rejecting the Application filed by the Appellant under Section 7. The Appeal deserves to be allowed. The impugned judgment dated 25.01.2021 is set aside. We further direct the Adjudicating Authority to pass consequential orders including the order of Moratorium within one month from the date of copy of this order is produced before the Adjudicating Authority during which period it is always open to the parties to endeavor to enter into a settlement.

The Appeal is allowed accordingly.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
Anjali