

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

C.P (IB) No. 554/MB/2019

Under section 7 of the Insolvency & Bankruptcy Code,
2016

In the matter of,

**Asset Reconstruction Company (India) Limited
(ARCIL)**

[CIN: U65999MH2002PLC134884]

The Ruby, 10th Floor, 29, Senapati Bapat Marg, Dadar
(West), Mumbai - 400028.

...Petitioner

Versus

Prabhu Hira Ice & Cold Storage Limited

[CIN: U99999MH1976PLC018852]

10/11 Mafco A.P.M. Yard, Vashi Turbhe, Opp. Sanpada
Railway Station, Navi Mumbai, Maharashtra- 400703.

... Respondent

Order Pronounced on: 30.08.2022

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Deep Roy, Counsel.

For the Respondent : Mr. Janak Dwarkadas, Counsel.

ORDER***Per: Shyam Babu Gautam, Member (Technical)***

1. The present Company Petition is filed by **Asset Reconstruction Company (India) Limited (ARCIL)** (hereinafter referred to as the “Petitioner”) under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) against **Prabhu Hira Ice & Cold Storage Ltd** (hereinafter referred to as the “Respondent”).
2. The Respondent is a company incorporated under the Companies Act, 1956 having its registered address at 10/11 Mafco A.P.M. Yard, Vashi Turbhe, Opp. Sanpada Railway Station, Navi Mumbai, Maharashtra-400703. Its Corporate Identification Number (CIN) is U99999MH1976PLC018852. Thus, this Tribunal has the jurisdiction to entertain this petition.
3. The aggregate debt amounts to **Rs.56,07,02,586/-** (Rupees Fifty-Six Crore Seven Lakh Two Thousand Five Hundred and Eighty-Six Only) as on 31.12.2018. Following is the computation of Amount in default and the date of default:

| Sr. No. | Facility | Amount in Rs. | Date of Default |
|--------------|----------------------|---------------------|-----------------|
| 1. | Term Loan 1 | 7,69,15,094 | 30.09.2002 |
| 2. | Term Loan 2 | 32,11,68,461 | 30.09.2002 |
| 3. | Overdraft | 12,87,02,206 | 31.12.2002 |
| 4. | Packing Credit Limit | 1,53,95,163 | 31.12.2002 |
| 5. | EBD | 1,85,15,981 | 30.06.2002 |
| 6. | Temporary OD | 5,681 | 31.03.2003 |
| Total | | 56,07,02,586 | |

The date of NPA is 06.03.2003.

Submissions made by the Ld. Counsel of the Petitioner by the way of Petition:

4. It is the case of the Petitioner that the Respondent requested the Petitioner (original lender) to grant Term Loan and Working Capital Limit on 19.11.1997. Accordingly, a sum of Rs.540 Lakh was sanctioned by the Petitioner (original lender) vide its letter dated 23.12.1997. The breakdown of sum is as follows:

| Sr. No. | Facility | Amount in Rs. |
|--------------|------------------------|-----------------|
| 1. | Term Loan 1 | 500 Lakh |
| 2. | Overdraft | 25 Lakh |
| 3. | Packing Credit cum EBD | 15 Lakh |
| Total | | 540 Lakh |

5. The Petitioner has annexed the details of the following properties over which mortgage has been created in favor of the Petitioner:

| Sr. No. | Property Details | Date of creation of security |
|---------|---|---|
| 1. | Office Premises in Flat/Office No.-89 | Created initially on 01.01.1998 and subsequently extended on 22.12.2000, 12.07.2001 and 08.10.2001. |
| 2. | Godown Premises in Basement No.-9, Mittal Chambers. | Created initially on 01.01.1998 and subsequently extended on 22.12.2000, 12.07.2001 and 08.10.2001. |
| 3. | Land and Building alongwith Plant and Machinery at Plot No-10 & 11, MAFCO APM Market. | Created initially on 01.01.1998 and subsequently extended on 22.12.2000, 12.07.2001 and 08.10.2001. |
| 4. | The whole of Current Assets of the Respondent viz., the stocks of raw materials, stocks in progress, semi-finished and finished goods, stores | Created initially on 30.12.1997 and subsequently on 23.11.2000, 12.07.2001 and 06.10.2001. |

| Sr. No. | Property Details | Date of creation of security |
|---------|--|------------------------------|
| | and spares not relating to plant and machinery [consumable stores and spares], bills receivables and book debts and all other movables present and future. | |

Copies of Certificate of Registration for Modification of charge/Mortgage issued by Registrar of Companies with regard to the above securities is annexed as Annexure “E-Colly” to the Petition.

6. Other documents relied upon by the Petitioner are as follows:

| Sr. No. | Particulars | Date of document | Annexure |
|---------|--|------------------|----------|
| 1. | Sanction Letter | 23.12.1997 | F |
| 2. | Board Resolution | 24.12.1997 | G |
| 3. | Agreement of Hypothecation (for creating security in respect of the Packing Credit of Rs. 15 Lakh and O/D Book Debt for Rs. 25 Lakh) | 30.12.1997 | H |
| 4. | Agreement of Hypothecation (for creating security in respect of the Packing Credit of Rs. 15 Lakh and O/D Book Debt for Rs. 25 Lakh) | 30.12.1997 | I |
| 5. | Agreement of Bill Discounting | 30.12.1997 | J |

7. In support of the Term Loan 1 for Rs.500 Lakh, the Petitioner has relied on the following documents:

| Sr. No. | Particulars | Date of document | Annexure |
|---------|--|------------------|----------|
| 1. | Articles of Agreement | 30.12.1997 | K |
| 2. | Letter of Hypothecation | 30.12.1997 | L |
| 3. | Form of Guarantee for Advances and Credits | 30.12.1997 | M |
| 4. | Memorandum of Deposit/Redeposit of Title Deeds | 01.01.1998 | N |

| | | | |
|----|-----------------------------|------------|---|
| 5. | Copy of the Sanction Letter | 07.11.2000 | O |
| 6. | Copy of Board Resolution | 09.11.2000 | P |

8. At the request of the Respondent, the credit facilities were enhanced to 610 Lakh vide a Sanction letter dated 07.11.2000, in the below given manner:

| Sr. No. | Facility | Amount in Rs. |
|--------------|------------------------|-----------------|
| 1. | Term Loan 1 | 500 Lakh |
| 2. | Overdraft | 70 Lakh |
| 3. | Packing Credit cum EBD | 40 Lakh |
| Total | | 610 Lakh |

The said facilities were time and again renewed and enhanced.

9. In support of the Overdraft for Rs. 70 Lakh, the Petitioner has annexed **Agreement of Hypothecation** to secure Demand Packing Credit against Goods by which the Respondent hypothecated in favor of CENTRAL BANK OF INDIA goods described in general terms in the schedule and all other tangible moveable property such as products, stock in trade and goods, whether finished or raw or in process of manufacture, and all articles manufactured thereon belonging to the borrowers.
10. Pursuant to the Overdraft of Rs.70 Lakh and PC-CUM-EBD of Rs.40 Lakh aggregating to Rs.110 Lakh the Petitioner has annexed the following documents:

| Sr. no. | Particulars | Date of Document | Annexure |
|---------|-------------------------|------------------|----------|
| 1. | Letter of Hypothecation | 23.11.2000 | R |
| 2. | Form of Guarantee | 23.11.2000 | S |

| | | | |
|----|--|------------|---|
| 3. | Memorandum of Deposit/Redeposit of title deeds | 22.12.2000 | T |
|----|--|------------|---|

11. At the request of the Respondent, a fresh Term Loan-2 of Rs.620 Lakh was accepted and allowed by the Petitioner vide a Sanction Letter dated 03.10.2001. A copy of the Board Resolution dated 03.10.2001 is annexed as Annexure V to the Petition.
12. In support of the Term Loan 2 of Rs.620 Lakh, the following documents are annexed by the Petitioner:

| Sr. No. | Particulars | Date of Document | Annexure |
|---------|--|------------------|----------|
| 1. | Articles of Agreement | 06.10.2001 | W |
| 2. | Letter of Hypothecation | 06.10.2001 | X |
| 3. | Letter addressed to the Central Bank of India declaring that the assets of the Respondent are free from encumbrances | 06.10.2001 | Y |
| 4. | Form of Guarantee | 06.10.2001 | Z |
| 5. | Memorandum of Deposit/Redeposit of title deeds | 12.07.2001 | AA |
| 6. | Memorandum of Deposit/Redeposit of title deeds | 08.10.2001 | BB |
| 7. | Copies of Form 8 and Form 13 filed with the Registrar of Companies | --- | CC-colly |

13. Pursuant to an Assignment Agreement dated 29.09.2010, Central Bank of India has unconditionally and irrevocably sold, assigned, transferred, and released in favor of the Petitioner, the financial assets including all security interest, guarantees, etc., & all its rights, title and interest therein and there under as more particularly set out in the Deed of Assignment dated 29.09.2010. A copy of the Assignment Agreement dated 29.09.2010 is annexed as Annexure- "DD" to the Petition.

14. A copy of the Statement of Accounts as maintained by Asset Reconstruction Company India Limited is annexed as Annexure “EE” to the Petition.
15. A Loan Recall Notice dated 06.03.2003 was issued by the Original Lender, Central Bank of India through their Advocates to the Respondent, thereby, terminating the Loan Agreement and calling for payment of outstanding dues as on the date of the notice. A copy of the Loan recall Notice issued by original lender Central Bank of India, upon the Respondent is annexed as Annexure “FF” to the Petition.
16. Further, the original lender, Central Bank of India issued a Notice under section 13(2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act on 07.03.2003 calling upon the Respondent and the Guarantors to pay to the Petitioner, the amounts due to it in respect of the facilities, as mentioned in their letter dated 06.03.2003, with further interest thereon, at the contractual rate until payment and/or realization. The Petitioner also listed the Secured Assets which would be enforced by it in the event of non-payment. A copy of the Statutory Notice dated 07.03.2003 is annexed as Annexure “GG” to the Petition.
17. Central Bank of India caused a notice to be issued through their Advocates inter alia, upon the Respondent/Respondent and Guarantors to make payment of the outstanding amounts on 15.10.2003, failing which the Petitioner will initiate appropriate legal action for recovery of its dues. A copy of Letter dated 15.10.2003 is annexed as Annexure “HH” to the Petition.

Submissions made by the Ld. Counsel of the Respondent by the way of Reply:

I. Barred by Limitation:

18. The Petitioner submits that the Application is barred by law of limitation. As per the own case of the Petitioner, the date on which default has occurred is 06.03.2003. The date of NPA is also 06.03.2003. Taking the date of default as 06.03.2003, the Petitioner has filed OA No.15 of 2001 which is now renumbered as Transfer Original Application No.1849/2016.
19. Admittedly, the date of default is 06.03.2003 and the present Application is filed in February, 2019 i.e. after expiry of 16 years from the date of default hence is barred by law of limitation.
20. In *B.K. Educational Services Private Limited V. Parag Gupta and Associates* the Hon'ble Supreme Court has held that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the 'I&B Code' from the inception of the Code, and as such Article 137 of the Limitation Act gets attracted.

The Hon'ble Supreme Court has in the above judgment held in categorical term that:

"Section 7 applies to a Petitioner who may file an application for initiating a corporate insolvency resolution process against the Respondent when the 'default' has occurred". The Hon'ble Supreme Court has further observed that "This again is an important pointer to the fact that when the expression 'due' and 'due and payable' occurred in Section 3(11) and 3(12) of the Code, they referred to a 'default' which is non-payment of debt that is due in law i.e. that such date is not barred by law of limitation". The Hon'ble Supreme Court has in para

27 has observed "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 occurs 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"

21. It is thus clear from the judgment of the Hon'ble Supreme Court in the case of *B.K. Educational Services Pvt. Ltd.* that an application under Section 7 of the Code has to be to be filed by the Respondent within a period of three years from the date on which default occurred. In the present case, it is clear from the Petition itself that the first default occurred in the year 2003.
22. It has been case of this Respondent consistently since beginning that there is no legal and valid mortgage created in relation to any of the assets of the Respondent and the Petitioner and its predecessor Central Bank of India has not been able to produce the original documents which were supposed to have been deposited by the Respondent for creating the mortgage. The Respondent emphatically denied that the alleged debt of the Petitioner is a secured debt.
23. The Respondent submits that, in view of all the above judgments passed by Hon'ble Supreme Court and Hon'ble NCLAT, the present application is barred by law of limitation as it is filed after a period of 16 years. Hence, the present Application deserves to be dismissed on this ground alone.

II. Locus of Petitioner:

24. The Petitioner is not the original creditor of the Respondent Company. The Petitioner has acquired the debt of the Respondent Company from the original alleged creditor, Central Bank of India by an alleged assignment agreement dated 29.09.2010 for a consideration of Rs.9.10 crore. A copy of the assignment agreement is annexed as Exhibit “DD” pg 201, to the Petition.
25. On 19.11.2010 the Petitioner issued an advertisement inviting an expression of interest for selling of certain financial assets which included the account of the Respondent Company.
26. On issuance of advertisement one private limited company namely Wonder Precious Stone Trading Private Limited, which is neither a bank nor a financial institution, nor a NBFC expressed its interest to purchase few accounts including the account of the Respondent. The interest so expressed by Wonder Precious Stone Trading Private Limited was accepted by the Petitioner and by a letter dated 14.02.2011 the Petitioner approved the assignment of financial assets pertaining to Respondent group to Wonder Precious Stone Trading Private Limited. A copy of the letter dated 14.02.2011 is annexed as Exhibit A to the Reply.
27. The Petitioner agreed to sell and Wonder Precious Stone Trading Private Limited agreed to purchase the accounts (including the account of the Respondent) for a sum of Rs.11.68 crores. Accordingly, a Memorandum of Undertaking dated 15.02.2011 came to be executed between the Petitioner and Wonder Precious Stone Trading Private Limited. A copy of the same is annexed as Exhibit B to the reply.

28. Thereafter, Wonder Precious Stone Trading Private Limited paid the entire consideration of Rs.11.68 Crores to the Petitioner company, which the Petitioner has admitted in the Written Statement Commercial Suit No.220 of 2019 pending before the Hon'ble High Court at Bombay.
29. The Petitioner had forfeited the amount deposited by Wonder Precious Stone Private Limited. Being aggrieved by which, Wonder Precious Stone Trading Private Limited has filed Commercial Suit No.220 of 2019 before the Hon'ble High Court at Bombay against the Petitioner for specific performance, for damages of Rs.5 Crore and many other reliefs as prayed therein. The present Respondent is arrayed as Defendant No.6 in the above suit. The copy of Commercial suit No.220 of 2019 without annexures is annexed as Exhibit -D to the Reply.
30. The Central Bank of India has assigned the debts and account of the Respondent herein and few other accounts to the Petitioner for a total consideration of Rs.9.11 Crores. Prior to assignment of debt by the Central Bank of India to the Petitioner herein for a consideration of Rs.9.11 Crore, the Respondents has given an OTS offer to the Central Bank of India of Rs.10.17 Crore. The Central Bank of India without any reason sold the accounts of the Respondent and other accounts as well to the Petitioner for a sum of Rs.9.11 crore i.e. in loss of Rs.1.06 Crore.
31. As on date the Locus of the Petitioner, Asset Reconstruction Company (India) Limited itself is under lawful scrutiny before Hon'ble DRT in such peculiar circumstances till the decision of Hon'ble DRT in legality & Validity of Assignment in favor of Petitioner, it would be highly irrational to accept the Petitioner as a lawful creditor & proceeds to pass draconian orders under the provisions of Insolvency and Bankruptcy Code, 2016. It is pertinent to note that Hon'ble DRT after hearing the

parties have admitted the said Misc Application No.18/2014 & tagged the same with Original Application.

32. In furtherance of the same, Petitioner has already sold the said alleged loan accounts in favor of Wonder Precious Stone Trading Pvt. Ltd for consideration of Rs.11,68,00,000/-.
33. Wonder Precious Stone Trading Pvt. Ltd being Private Limited Company can't be equated with Petitioners within the meaning of u/s 7 of the Petition, thus on this count also present Petition becomes infructuous & is liable to be rejected.
34. Moreover, the said Wonder Precious Stone Trading Pvt. Ltd has also filed Suit before Hon'ble High Court in which dispute between Petitioner & Wonder Precious Stone Trading Pvt. Ltd claiming rights over the loan amount & securities therein is pending. Thus, Judicial Propriety requires till the appropriate decision of Hon'ble High Court over the rights of Wonder Precious Stone Trading Pvt. Ltd & Asset Reconstruction Company (India) Limited comes out, Petitioner can't be given preference.
35. Being aggrieved by the alleged assignment, the Respondent filed an Misc. Application No.18 of 2014 before the DRT-II, Mumbai to hold enquiry and nexus between the Central Bank of India and the Petitioner herein. The Hon'ble DRT has vide its order 10.09.2015 passed in the Misc Application 18 of 2014, clubbed the Misc Application with main Original Application and has also held that assignment of the Petitioner in place of the Central Bank of India will be decided separately in the Original Application. A Copy of order dated 10.09.2015 is annexed as Exhibit -E to the Reply.
36. Subsequent to assignment of debt to the Petitioner herein, the Petitioner filed an Misc Application before the Hon'ble DRT-II, Mumbai in the

Original Application No.15 of 2004 for substitution of Petitioner in place of the Central Bank of India. However, vide order dated 10.09.2015 the Hon'ble DRT-II, Mumbai did not permit the Petitioner to be substituted in place of Central Bank of India, but only allowed the Petitioner to implead themselves as Applicant No.2. The Hon'ble DRT has not upheld the legality of the assignment since it is disputed by the Respondent herein. The Hon'ble DRT has allowed the amendment application filed by the Petitioner, leaving all objections and contentions of the Respondent open. The DRT has categorically recorded in the said order that the substitution of the Assignee in place of the Central Bank of India would not be proper in view of the objections. The copy of order dated 10.09.2015 is annexed as Exhibit-F to the Reply.

37. DRT being adjudicatory authority and correct forum to decide the validity of the substitution, since the above substitution is made under Section 5 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) has not approved the assignment, on the contrary DRT has kept the issue of validity and legality of the assignment open for consideration.

III. Inclusion of Non-Respondent or Non-Corporate Guarantor's debt:

38. The Petitioner has in Part-V of the Application, in the details of Particulars of Financial debt and under the heading particulars of security held included and mentioned properties which does not belong to the Respondent.
39. The properties mentioned therein viz office premises Flat No. 89, 8th Floor, Mittal Chamber, Nariman Point, Mumbai-400021 and godown premise Basement No.9, Mittal Chambers, Nariman Point, Mumbai-400021 belongs to Prabhudas Hirji and Co. Admittedly, Prabhudas Hirji

and Co., is neither a private limited company nor a Public Limited Company. Hence, the Petitioner could not have included the property belonging to a non-corporate identity.

40. The above properties alleged to be mortgaged to the Central Bank of India, the alleged assignor of the Petitioner, to secure the dues and debts that Prabhudas Hirji and Co has availed from the Central Bank of India.
41. The Respondent submits that a mere look at Demand Notice issued under section 13(2) of the SARFAESI Act, 2002(Ex-CG, Pg 278) will show that debts belonging to some third persons who are not corporate identities are merged and claimed in the present Petition, this Petition deserves to be rejected.

Affidavit in Rejoinder filed by the Learned Counsel of the Petitioner on behalf of the Petitioner:

42. In the reply, the Respondent has primarily raised two objections, being:
 - i. The Petition is barred by limitation, and
 - ii. The lack of locus of the Petitioner to present the Petition.

In response to the same, the Petitioner submits the following:

Limitation:

- a) The account of the Respondent had been declared as Non-Performing Asset ("NPA") on 06.03.2003 upon which a demand notice dated 07.03.2003 was issued to the Respondent. However, since, no payment was received, the Petitioner filed an Original Application before the Hon'ble Debts Recovery Tribunal No. II bearing O.A. No.15 of 2004 re-numbered as T.O.A. No.1849 of 2016, which is presently pending in

DRT-I. The Respondent has been acknowledging the debt of the Petitioner from time to time and has been recording it in its Annual Report as well as its Balance Sheets. From the documents available with the Petitioner, a principle sum of Rs.8.16 Crores has been shown to be due to the Petitioner every year, starting from the financial year 2006-2007. A perusal of the Annual Report of the year 2006-2007 clearly reflect debts owed to the Original lender, i.e., Central Bank of India at least in respect of three loan facilities being Term Loan, Packaging Credit against Exports and Cash Credit facility in respect of which the debt owed is shown to be Rs. 8,16,92,466.27. The said figure is reflected in all the subsequent balance sheets filed with the Registrar of Companies till the financial year 2016 - 2017. The copies of all the balance sheets for the Financial Years 2006-2007 upto 2016-2017 are annexed as Exhibit –“A” colly to the Rejoinder. The Petitioner craves leave to refer and rely upon the Balance Sheet and Annual Reports of the Respondent prior to the year 2006, as and when produced. In the circumstances, the Petitioner states that the Respondent has admitted its liability to the Petitioner from even prior to 2006 and repeatedly thereafter till the year 2017, whereafter the Petitioner has not filed its balance sheet.

- b) The Respondent has admitted being liable to pay Rs.8.28 Crores to the Petitioner, specifically in its letter dated 10.11.2016 addressed to the Reserve Bank of India (RBI). The letter also stated that various OTS offers were made to the original lender after the debt came to be assigned to it by Central Bank of India, including revised offers. Therefore, there has been no denial or dispute of the debts owed by the Respondent to the Petitioner. This Tribunal has in the matter of TJSB Sahakari Bank Ltd. Vs. Unimetal Casting Ltd. held that for the purpose

of ascertaining limitation, liability shown in balance sheet would amount to acknowledgment of debt and would renew the period of limitation for further period of 3 years. Considering the settled position, the claim of the Petitioner is very much within limitation as the liability has been reflected in the balance sheet of the Respondent, lastly for the FY ending 31.03.2017. The present Petition having been filed on 06.02.2019 is clearly within 3 years of the last admission of the Respondent and is covered under Article 137 of the Limitation Act. The copy of the OTS letters and the letter addressed to RBI by the Respondents is annexed as "Exhibit B Colly" in the Rejoinder.

Locus of the Petitioner:

- a. The contention of the Respondent that the Petitioner having assigned debts to a third party called Wonder Previous Stone Trading Private Limited does not qualify as Petitioner under the Code, is also not tenable as the debts have not been assigned to any third party till date. There were negotiations between the two of them in pursuance of which an MOU was entered into between both the parties however it did not culminate into a registered Assignment Agreement for assignment of debt owed by the Respondent to the Petitioner. The said MOU was also terminated by the Petitioner vide its letter dated 12.04.2018 on account of failure of the said Wonder Previous Stone to execute the Assignment Agreement despite a lapse of 4 years. Wonder Previous Stone, aggrieved by the termination initiated a civil proceeding before the Hon'ble Bombay High Court in respect of the same, which is presently pending. This in no way is connected and having any bearing on the present petition. The Petitioner states that this Tribunal does not have the jurisdiction to decide the said issue apart from the fact that the same is

sub-judice before the Hon'ble Bombay High Court. Likewise, the objection as to insufficient stamp duty in respect of Assignment Deed cannot be raised before this Tribunal.

Affidavit in Sur Rejoinder filed by the Learned Counsel of the Respondent on behalf of the Respondent:

43. The Petitioner is relying on the balance sheet for the year 2006-2007 of this Respondent to claim that the debt has been acknowledged by the Respondent and therefore in accordance with the provisions of Section 18 of the Limitation Act, the period of limitation gets extended. A copy of the annual directors report for the year 2006-2007 produced by the Petitioner shows that it is dated 01.09.2007. The balance sheet also represents the same date. The annual report, the Directors report and the balance sheet specifically states that "balance sheet of state of affairs of the company as at 31.03.2007", thus the balance sheet shows the state of affairs existing on 31.03.2007 which is well beyond the period of three years from 06.03.2003. Even if it is assumed that because the balance sheet pertains to the year 2006-2007, the acknowledgment is on 01.04.2006, then also the acknowledgement would be beyond the period of three years from 06.03.2003. The Respondent submits that according to the provisions of Section 18 of the Limitation Act the acknowledgment should be a within the period of limitation and an acknowledgment made after the expiry of period of limitation does not revive a time barred debt.
44. It is further submitted that in any case the alleged acknowledgements are not clear and unambiguous for the purpose of extending the period of limitation under Section 18 of the Limitation Act. The

acknowledgement should be clear and unambiguous. In the balance sheets of the Respondent, relied upon by the Petitioner there is no clear and unambiguous admission of liability. There is a note in the balance sheet and the report referring to the dispute which is pending in the Court in relation to the recovery of the alleged debt. Thus, it becomes clear that the acknowledgements are with a rider or caveat that the liability is disputed by the Respondents and do not in any case amount to acknowledgement.

45. The Respondent submits that the Petition filed by Wonder Precious Stone Trading Private Limited has been filed for recovery of money which is allegedly owned by this Respondent to the Petitioner. From the averments filed by Wonder Precious Stone Trading Private Limited in the Civil suit and the documents produced it before the Hon'ble Bombay High Court, it is clear that the Petitioner has received an amount of Rs.11.68 crores on a promise made to that party to transfer the assets owned by this Respondent to that party. Therefore, the transaction was a relevant and material fact and its suppression of that transaction from this Tribunal amounts to a misconduct by the litigant and fraud on this Tribunal. The copies of the annexures to the suit filed in the Hon'ble High Court by Wonder Precious Stone Trading Private Limited are annexed as Exhibit "A" to the Sur Rejoinder. Also, the Petitioner has admitted the receipt of the entire assignment amount in its written statement filed in the suit before the Hon'ble Bombay High Court. A copy of the written statement filed by the Petitioner is annexed as Exhibit "B" to the Sur Rejoinder.

Findings:

46. We have heard the arguments of Financial Creditor and Corporate Debtor and perused the records.

47. In the backdrop of facts of this case it is observed that date of default is 06.03.2003 and there is assignment of debt of corporate debtor twice.

- i. Central Bank of India to ARCIL/Petitioner on 29.09.2010 for a consideration of 9.11Cr.
- ii. ARCIL/Petitioner to Wonder Precious Stone Trading Private Limited on 14.02.2011 for a consideration of 11.68Cr.

In case of second assignment dated 14.02.2011 Total agreed consideration received by petitioner and MOU is also formed which stated to be revoked by petitioner but other party to MOU filed commercial Suit 220 of 2019 at Hon'ble High Court at Bombay for Specific performance copy of the same is placed on record by Corporate Debtor. Therefore, Original holder of debt and Locus of Petitioner is also in question.

According to records produced by Petitioner default stated to be of 2003 and first acknowledgement of debt produced is of 2007 which is beyond period of limitation as per Section 18 and Article 137 of Limitation Act, 1963. Further no documents produced to show acknowledgement within Limitation and Petition came to be filed in 2019, which is clearly beyond the period of limitation as the same expired in the year 2006.

Moreover, it is settled position of law acknowledgment of debt, if any has to be produced within the period of Limitation. Hence it can be concluded that debt and default does not stand established and petition is liable to be rejected.

48. The Petitioner herein has concealed from this Tribunal the facts that their assignment is under dispute before Hon'ble DRT and Hon'ble DRT has not permitted Petitioner to substitute themselves as creditor of Respondent in the Original Application.

The Petitioner has also concealed the fact from this Tribunal that they have assigned the debt to some third party and have even received the entire assignment amount. Even the fact of a commercial suit being pending is concealed from this Tribunal.

49. Since the assignment in favour of Petitioner is under challenge, coupled with the fact that Petitioner has in turn assigned the debt to some third party, the Petitioner had no locus to file present Petition. The concealment of the above facts and also concealment of pendency of commercial suit amounts to playing fraud on this Tribunal. The Petitioner today cannot even give a valid discharge of the alleged debt on account of very assignment deeds/action are under challenge. Even the Petitioner admits that issue of assignment and MOU is Pending before Hon'ble High Court at Bombay.
50. Moreover, Respondent submits that the nature of proceeding u/s. 19 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) filed by predecessor/Original lender before DRT, Mumbai is an application for recovery of money, whereas the present Petitioner filed u/s. 7 of IB code is not the suit for recovery and/or can't be equated with suit for recovery of money but is it process for resolution of the Insolvency. Thus, even pendency of an Original Application before DRT will not extend the period of Limitation for the purpose of Petition filed u/s. 7 of Insolvency and Bankruptcy Code.
51. Tribunal also relies upon the decisions of the Hon'ble Supreme Court in *Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited [C.A No. 9597/2018 dated 23.10.2018 (2018) 147 CLA 112 [SC] para 15*, wherein the Supreme Court had observed as under:

“In a recent judgment of this Court in Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353, this court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked...”

52. In view of all the above judgments passed by Hon'ble Supreme Court and Hon'ble NCLAT (supra), the present application is barred by law of limitation as it is filed after a period of 16 years. Hence, the present Application deserves to be dismissed on this ground alone.

53. It is, accordingly, hereby ordered as follows: -

The petition bearing **CP (IB) 554/MB/C-I/2019** filed by **Asset Reconstruction Company (India) Limited**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Prabhu Hira Ice & Cold Storage Limited [CIN: U99999MH1976PLC018852]**, the Corporate Debtor, is **rejected**.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

30.08.2022
SAM

Sd/-

JUSTICE P. N. DESHMUKH
Member (Judicial)