

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH at AHMEDABAD
COURT 1**

TP 114 of 2019 [CP(IB) 405 of 2018]

**Coram: Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER (JUDICIAL)
Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (TECHNICAL)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF INDORE BENCH OF
THE NATIONAL COMPANY LAW TRIBUNAL ON 29.05.2020**

Name of the Company: Krishidhan Seeds Pvt Ltd
V/s
Krishidhan Vegetable Seeds India Pvt Ltd

Section: 7 of Insolvency and Bankruptcy Code, 2016

S.NO. NAME (CAPITAL LETTERS) DESIGNATION REPRESENTATION SIGNATURE

1.


2.

ORDER

The case is taken up through video conferencing.

The case is fixed for pronouncement of order today.

The order is pronounced in open Court as order in detail is recorded vide separate sheet.


**(PRASANTA KUMAR MOHANTY)
MEMBER (TECHNICAL)**


**(HARIHAR PRAKASH CHATURVEDI)
MEMBER (JUDICIAL)**

Dated this the 29th of May, 2020

**BEFORE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH at AHMEDABAD**

TP 114 of 2019 [CP (IB) No.405/7/NCLT/AHM/2018

In the matter of:

Krishidhan Seeds Pvt. Ltd.

Corporate Office:
9th Floor, Sai Capital Building
Opp.J.W. Marriott
Senapati Bapat Road
Shivaji Nagar
Pune-411 016

Registered Office

302, Royal House
11/3, Usha Ganj
Indore-452 001
Madhya Pradesh

..... Petitioner
(Financial Creditor)

Versus

**Krishidhan Vegetables Seeds India Pvt.
Ltd.**

Registered Office at:
302, Royal House
11/3, Usha Ganj
Indore-452 001
Madhya Pradesh

..... Respondent
(Corporate Debtor)

Order delivered on 29th May, 2020.

Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (J)


And

Hon'ble Mr. Prasanta Kumar Mohanty, Member (T)

Appearance:

Advocate, Mr.Kunal P. Vaishnav, for the Petitioner-Financial
Creditor.




Advocate, Ms. Natasha D. Shah, for the Respondent-Corporate Debtor.

ORDER

[Per: Mr. Harihar Prakash Chaturvedi, Member (J)]

1. The present Petition is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'I & B Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ["Adjudication Rules" for short] for initiation of Corporate Insolvency Resolution Process (CIRP) against **M/s.Krishidhan Vegetable Seeds India Private Limited**, the Corporate Debtor.
2. The Debtor Company, viz., M/s. Krishidhan Vegetable Seeds Private Limited, incorporated on 12.12.2016, under the provisions of the Companies Act, 1956, CIN: U01403MP2006PTC019048, having its registered office at 302, Royal House, 11/3, Usha Ganj, Indore-452 001, Madhya Pradesh.
3. The Authorized Share Capital of the Corporate Debtor company is INR 3,00,00,000/- and Paid Up Share Capital is INR 2,45,72,900/-.
4. The corporate office of the Petitioner, M/s. Krishidhan Seeds Private Limited, is situated at 9th Floor, Sai Capital

Building, Shivaji Nagar, Pune-411 016, and its Registered Office, 302, Royal House, 11/3, Usha Ganj, Indore-452 001, Madhya Pradesh, CIN: U01111MP1996PTC017386, date of incorporation: 05.02.1996.

5. It is stated that the **Corporate Debtor is 100% wholly owned subsidiary of the petitioner** as it possesses 100% share of the Corporate Debtor company.
6. It is stated that the petitioner has advanced loan of **Rs.16.19 crores as Inter Corporate Deposit** and other amount is also outstanding.
7. The details/particulars thereof and the total outstanding debts has been described in the prescribed format of the present application, which are stated as under:-

Part-IV

Particulars of Financial Debt

| | |
|---|--|
| Total Amount of Debt Granted | INR 17,26,19,414.81 (Rs. 16.19 cr as Inter Corporate Deposit and Rs.1.07 cr against sale of material) |
| Dates of Disbursement | The amount of Debt has been disbursed at several intervals since inception of the company till date. |
| Amount claimed to be in default and the date on which default occurred | INR 17,26,19,414.81 Details of Documents we rely upon are Ledgers and Financial Statements. |

8. In support of proof of loan amount disbursed to the Corporate Debtor, the petitioner has annexed copy of the ledger account, balance sheet, certificate of its Chartered Accountant.
9. However, the petitioner did not mention categorically that on which dates the default in making repayment of loan has occurred.
10. The Financial Creditor has duly proposed a name of the IRP, **Mr. Anil Bhattar**, (Registration No. IBBI/IPA-001/IP-P00583/2017-2018/11024 (having address at A-005, Western Edge II, Off. Western Express Highway, Borivali East, Mumbai-400 066). The Petitioner-Financial Creditor has also annexed a Written Communication (Annexure-E) received from the proposed Interim Resolution Professional by giving his consent in prescribed format by declaring that there is no disciplinary proceeding pending against him. As per the petitioner, such satisfies the requirement of Section 7(3)(b) of the I & B Code.
11. It is the case of the petitioner company that it sanctioned and disbursed aforesaid loan/credit facilities to the Respondent- Corporate Debtor. The said loan amount is recoverable along with interest at applicable rate. It is

contended by alleging that the Corporate Debtor company failed in discharging its debts liability towards petitioner. Thus, it committed default, hence, the present petition.

12. In response to the above stated IB Petition, the corporate debtor filed its Affidavit in reply-cum-objections as well as written submission to oppose the Admission of the present IB Petition. The relevant paragraphs of the Affidavit-in-reply as well as the written submission of the respondent, may be reproduced hereinbelow:

- 1) XXXX
- 2) XXXX
- 3) I state that the present application deserves to be dismissed in limine on the following, amongst other grounds
 - a) It is stated that the respondent company is **100%** wholly owned subsidiary of the applicant, i.e. **Krishidhan Seeds Private Limited**
 - b) That the present application has been filed by Krishidhan Seeds Private Limited **is time barred as stipulated under the provisions of Section 238 of Insolvency and Bankruptcy Code, 2016 read with Limitation Act, 1963.**
 - c) The present application is preferred without proper authority. It is filed by Shri Jaynarayan Karwa, purportedly claiming to be authorized to file the present application. However, there is no document, much less a requisite Board Resolution evidencing authorization, for filing the present application.
 - d) It is contended that a joint application declaring purported outstanding debt that comprises of **operational debt** as well as **financial debt** is not

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contemplated nor is permitted under the provisions of the Insolvency and Bankruptcy Code, 2016.

- e) The present application is not in conformity with the form and requirements mandated as per Section 7 of the Code, 2016 read with the IBBI (Application to Adjudicating Authority) Rules, 2016.
 - f) Since the form is not in prescribed form and format. The application is not in conformity with the mandatory requirements of the Insolvency and Bankruptcy Code, 2016, particularly, Section 7 of the Code, such defects go to the root of the matter and are substantial defects, which cannot be cured at this stage and, thus, the application is liable to be dismissed.
4. In addition to the above, the respondent has sought leave to bring following facts on record, which are relevant to the present petition.
- a) Krishidhan Seeds Private Limited, the applicant herein, is a company incorporated under the provisions of the Companies Act, 1956 that comprised of two family groups, i.e. Mr. Ashish Karwa, Mr. Mukund Karwa, Mr. Anup Karwa and Smt. Kaushalya Karwa and their family members (hereinafter referred to as the 'SPK Group' holding 40% shares of the applicant and Mr. Jaynarayan P. Karwa, Mr. Sushil Karwa, Mr. Manish Karwa, Mr. Vishnu Karwa and their family members (hereinafter referred to as 'JPK Group') holding 60% shares of the Applicant.

Copies of relevant pages of the Memorandum of Association and Articles of Association have been annexed with the reply, as Annexure-I.

- b) That, by 2014, Mr. Sushil Karwa and Mr. Jaynarayan Karwa of the JPK Group and Mr. Mukund Karwa of the SPK Group were the only Directors of the

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applicant and the other independent directors had resigned from the Board of the Applicant.

- c) That, on account of being aggrieved by various acts of oppression and mismanagement at the hands of the JPK Group in collusion with other executive of KSPL, the SPK Group was constrained to initiate proceedings before the Company Law Board, Mumbai Bench, bearing C.P. No. 17 of 2014 under the provisions of Sections 397 read with 398 of the Companies Act, 1956 for reliefs more particularly mentioned therein including but not limited to appointment of an independent Committee and/or Administrator.
- d) That, during the pendency of the said Company Petition, the JPK Group persuaded the SPK Group to refer the disputes between both the groups to arbitration to be conducted as per the mutually agreed procedure. I state that though the JPK Group had willingly participated in the arbitration proceeding and during the pendency thereof not raised any objections in relation to procedure adopted by the Learned Arbitrators Award dated 31st July, 2014, backed out and have challenged the said Award under Section 34 of Arbitration and Conciliation Act, 1996, being Petition bearing Suit No. 104774/2014 before the District & Session Court, Pune.
- e) That, considering that the JPK group had withdrawn from the settlement arrived at by way of Arbitral Award dated 31st July 2014, Company Petition No. 17 of 2014 came to be conducted and the erstwhile Company Law Board was pleased to grant interim relief directing, inter alia, appointment of Hon'ble Justice K.K. Lahoti by way of order dated 25.04.2014.

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A copy of order dated 25.04.2014 has been annexed, as Annexure-II.

- f) I state that thereafter the said Company Petition came to be transferred to this Hon'ble Tribunal and upon hearing the submissions made by respective parties, this Hon'ble Tribunal by way of an order dated 12.09.2017 issued the following directions:

"In the Interest of the shareholders of KSPL, in the interest of SPK group, JPK group and taking into consideration the Arbitral Award has not reached finality and not yet implemented, the following order passed by this Tribunal:

- I. **Hon'ble Justice Mr. K.K. Lahoti is functioning as Observer cum Facilitator is appointed as Interim Administrator of the first respondent company** without superseding the existing Board of Directors of KSPL.
- II. Interim Administrator Hon'ble Justice Mr. K.K. Lahoti is empowered to propose names of two independent Directors in the Board of Directors of the first respondent company within three weeks for approval of this Tribunal. Independent Director must be having experience in management of company affairs with special knowledge in seeds business.
- III. Interim Administrator Hon'ble Justice Mr.K.K. Lahoti shall, within one month, after appointment of two Independent Directors shall conduct meeting of the Board of Directors of the 1st respondent company following the provisions of the Companies Act, 2013 and Articles of Association of KSPL with the following agenda:
 - (a) Appointment of independent Chartered Accountant firm to assess the fair market value of the shares of the first respondent company as on the date of filing of Company Petition No. 17 of 2014 and to fix the remuneration of Chartered Accountant so appointed.
 - (b) Appointment of Special Auditors team to audit accounts of the first respondent company for the financial year 2013-14 to 2016-17 and to fix remuneration of the Chartered

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Accountants.

- IV. Agenda of all kinds of meetings of KSPL shall be approved by Interim Administrator before notice of meeting is given.
- V. **All meetings shall be conducted in accordance with interim orders in force and the directions given in this order, in the presence and as per the instruction of Interim Administrator.**
- VII. Sale of **Akola Properties of KSPL** by the first respondent company shall be according to the order of the Company Law Board dated 25.04.2014 and under the supervision of Interim Administrator and as per the resolutions of the Board of Directors of KSPL.
- VIII. The resolution that had already been passed which are sub-judice in the Company Petition shall not be taken up in the Board Meetings of KSPL.
- IX. There shall not be any resolution which goes against the resolutions passed on 26.03.2016 and 01.04.2016 and the resolutions passed on the basis of Akola Properties were sold, since they are sub-judice in Company Petition No. (17 of 2014) (TP No. 62 of 2016) and this Tribunal has to take final decision on it.
- X. Respondent No.3 shall not exercise the authority given to him under Section 113 of the Companies Act, in the meeting of Board of Directors held on 01.04.2016, till further orders by this Tribunal.
- XI. All interim orders that are in force shall be followed.
- XII. The proceedings of all the meetings of KSPL shall be recorded by video and audio and send the same to this Tribunal.
- XIII. Interim Administrator Hon'ble Justice K.K. Lahoti shall file a report in respect of each meeting conducted separately before this Tribunal.

- XIV. Interim Administrator Hon'ble Justice Mr.K.K. Lahoti shall see that all the statutory obligations that are required to be carried out as per the provisions of the Companies Act and other acts and Articles of Association, shall be carried out within the period prescribed under the relevant Acts and Articles of Association.
- XV. Interim Administrator Hon'ble Justice K.K. Lahoti is at liberty to seek further instruction(s) in case of any controversy in respect of which he feels the order of the Tribunal is necessary.
- XVI. Interim Administrator Hon'ble Justice K.K. Lahoti is entitled for a remuneration of Rs.1.00 lac (Rupees one lac only) for each meeting subject to maximum of Rs.3.0 lac (Rupees three lac only) per months besides all facilities to which he is entitled as judge of High Court in respect of transport, accommodation and ministerial assistance as and when meetings of KSPL are called for/or conducted. Interim Administrator Hon'ble Justice K.K. Lahoti shall continue to act in that capacity till disposal of TP No. 62 of 2016.
- XVII. Remuneration of Independent directors shall be fixed by Interim administrator.
- VXIII. Expenditure incurred in respect of remuneration of Interim Administrator, Independent Auditor appointed for determination of fair market value of the shares of the first respondent company (KSPL) and special audit team appointed to audit the accounts of the first respondent company (KSPL) and remuneration of Independent Directors shall be borne by KSPL for the time being and it is subject to final order passed in TP No. 62 of 2016.
- XIX. Interim Administrator and Interim Directors appointed were given immunity from all Civil, Criminal and other regulatory actions under the laws applicable in the conduct of affairs of KSPL.
- XX. In view of the above directions all the pending applications, i.e.

TP 62 A/ 16, TP 62 B/ 16, TP 62 C/ 16, TP 62 D/ 16, TP 62 E/ 16 corresponding to CA Nos. 67 of 2015, 77 of 2015, 195 of 2015, 1 of 2016, 54 of 2016 and IA 4 of 2016 shall stand disposed of. However, both the parties are entitled to make use of the pleadings and documents filed in the applications for final disposal of TP No. 62 of 2016.

- XXI. In case the Arbitral Award is confirmed and implemented, this Tribunal is of the view that there is no need to give findings on alleged acts of oppression and mismanagement in the conduct of the affair of the first respondent company.
- XXII. **TP No. 62 of 2016 is kept pending till Arbitral award reach finality for the purpose of passing orders on the aspects of alleged acts of oppression and mismanagement taking into consideration the special audit report and the share valuation report of KSPL.**
- XXIII. List TP No. 62 of 2016 on 26.10.2017 for approval of names of Independent Directors proposed by the Interim Administrator.
- XXIV. **Order regarding costs will be passed at the time of final disposal of TP No. 62 of 2016.**
- XXV. Communicate a copy of this order to Hon'ble Shri Justice K.K. Lahoti (Retd.) with a request to act as Interim Administrator of KSPL. "

Copy of the order dated 12.09.2017 passed by this Tribunal in IA 4/2016, TP No. 62 of 2016, TP 62A/16 annexed, as Annexure-III.

- g) I state that the said petition is pending final adjudication and is now scheduled to be listed for hearing on 12.03.2019. In view of the aforesaid, the order dated 12.09.2017 passed by this Hon'ble Tribunal was in force at the time of filing of the present application as well as till date.



Copy of the order dated 08.01.2019 passed by this Tribunal in IA 4/2016, TP No. 62 of 2016, TP 62A/16 annexed, as Annexure-IV.

5. With respect to the contents of Part I, it is denied that Shri Jaynarayan Karwa is authorized on behalf of the applicant to prefer and maintain the present application. That, it is mandatory to provide a copy of the document evidencing authorization of the person preferring the application on behalf of the applicant. It is alleged that Shri Jaynarayan Karwa has intentionally preferred and said application without any document evidencing authorization since the said person is not authorized to file the present application and it may be put strict proof thereof.
6. xxxxx
7. With respect to the contentions of Part IV, I state that the amount depicted as purportedly outstanding is admittedly not a financial debt. I further state that the **application is conspicuously silent about the date of default since** it is borne from the documents in support of the application itself that **the purported debt is time barred and thus the present application is barred by limitation.**
8. It is denied that an amount of Rs.17,26,19,414.81 or any part thereof constitutes as financial debt much less is outstanding or even in default. The particulars of purported financial debt are not correct as it admittedly includes sale of material and other receivables which allegedly arises from provision of goods and services. The applicant has, thus, consciously filed the present application without providing any working computation as mandated to establish the quantum of principle amount, interest, due date and default thereof.
9. It is alleged by the respondent that the present application has been preferred by suppressing material facts expedient

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for the purpose of effective adjudication of the present proceedings is preferred with malicious intent solely for the purpose of frustrating the proceedings bearing **CP. No. 17 of 2014 filed under the provisions of Sections 397 read with 398 of the Companies Act, 1956** which is pending before this Hon'ble Tribunal as outlined herein above. I humbly submit that the present application is in absolute contravention to the object, intent and purpose of the Code, 2016 and in flagrant violation settled proposition of law by judicial precedents of law by judicial precedents of the Hon'ble Supreme Court, the Hon'ble National Company Law Tribunal and this Hon'ble Tribunal.

Copies of Balance Sheet of the corporate debtor for the financial year 2010-2011 and reply dated 11.8.2015 issued by the Corporate Debtor in response to the Notice dated 05.08.2015 issued by the applicant, as Annexure-V.

10. Considering the aforementioned facts and contentions, I state that the present application deserves to be summarily dismissed with cost.

13. Following are the relevant paragraphs of the written submission filed by the respondent-corporate debtor:-

- 1) xxxx
- 2) The Respondents submits that on account of various act of **mismanagement** at the hand of **Jaynarayan P. Karwa** and group, Mr. Mukund Karwa was constrained to initiate proceedings before Company Law Board, Mumbai, bearing CP No.17 of 2014. Wherein erstwhile Company Law Board pleased to grant interim relief and appointed **Hon'ble**

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Justice Mr.K.K. Lahoti as the Observer cum Facilitator of the **Krishidhan Seeds Private Limited** by way of order dated 25.04.2014. A copy of the order dated 25.04.2014 has been attached as Annexure-II to the affidavit in reply.

- 3) The Respondent further submits that the CP No. 17 of 2014 came to be transferred to this Hon'ble Tribunal after the Constitution of National Company Law Tribunal and this Hon'ble Tribunal by way of order dated 12.09.2017 was pleased to appoint Hon'ble Justice Mr. K.K. Lahoti as Interim Administrator of Krishidhan Seeds Private Limited. A copy of order dated 12.09.2017 has been attached as Annexure-III to the Affidavit in reply.
- 4) The Respondent further submits that the said petition is pending adjudication and scheduled to be listed on 06.03.2020. A copy of order dated 18.01.2019 has been attached as Annexure-IV to the Affidavit in Reply.
- 5) The Respondent however submits that the present application has been preferred by suppressing material facts and with malicious intent solely for the purpose of frustrating the proceedings bearing C.P.No.17 of 2014. The respondent further submits that the said application deserves to be dismissed with exemplary cost on the following grounds:

A No requisite authority to file present application

1. The Respondent submits that the present application is filed by **Shri Jaynarayan Karwa, purportedly claiming to be authorized to file the present application. The Respondents submits that, no document has been placed on record evidencing the authorization of the**

same. **The Respondent states that it is an established law that to initiate any legal proceedings or for filing a petition under Section 7 of the Code the Board Resolution authorizing the person on behalf of the Company filing petition shall be attached with the Application.** A copy of affidavit has been attached in support of the present application at page no.5 with the present application, however the same cannot be considered as valid as it is not supported by any resolution of Company.

2. The Respondent further states and submits that according to the Order dated 12.09.2017 passed by the Hon'ble Company Law Tribunal, Ahmedabad it is clear that the Interim Administrator shall conduct the Board Meetings and before the notice of meetings is given, the agenda of the meeting to be first approved by the Interim Administrator i.e. Hon'ble Justice Mr. K.K. Lahoti. It is further submitted that it is apparent on the face of the record that **no meeting was conducted and no resolution was passed by the Board authorizing Mr. Jaynarayan Karwa to file the CP (IB) No. 405/7/NCLT/AHM/2018 and no agenda for such authorization was approved by the Interim Administrator.**
3. The Respondent state and submits that it is pertinent to note that present application is filed without authority and therefore, liable to be dismissed as the said defect cannot be cured. The respondent submits that the **Hon'ble National Company Law Appellate Tribunal in Shriram EPC Limited vs. Rio Glass Solar SA**, Company Appeal No.113 of 2017 held that, "10. The question whether a 'Power of Attorney Holder' can file an application for initiation of 'Corporate Insolvency Resolution Process' fell for consideration before this Appellate Tribunal in "Palogix Infrastructure

Limited vs. ICICI Bank Limited". Company Appeal (AT) (Insol.) No.30 of 2017. Therein this Appellate Tribunal by judgment dated 20th September, 2017 held:

"32. The 'I & B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

11. In the present case, as the application under Section 9 has been signed and filed by 'Power of Attorney holders' for the said reason also, we hold that the application under Section 9 preferred by the Respondent 'Operational Creditor' was not maintainable.

16. In view of the finding recorded above, we set aside the impugned order dated 10th August, 2017 passed by learned Adjudicating Authority in CP/537/(IB)/CB/2017".

The Respondent begs to annex a copy of the Judgment passed by Hon'ble National Company Law Tribunal in Shriram EPC Limited vs. Rio Glass Solar SA, Company Appeal No. 133 of 2017 as Annexure-A to the present Written Submission.

B. No proper form and Format

4. The respondent humbly submits that the present application filed by the applicant is not in proper form and format as prescribed under Section 7 of the Code,

2016 read with Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

5. It is submitted that an application under Section 7 is in lieu with financial debts whereas the present case a joint application is filed by the applicant declaring a purported debt that comprises of operational debt as well as financial debt is not contemplated as well as not permitted under the provisions of IBC, 2016. The Respondent further submits that the National Company Law Tribunal, Mumbai Bench, in **Sanaya Tea Private Limited v/s. Vinergy International Pvt. Ltd.** held that:

12. Initially the Petitioner filed petition u/s. 7, IBC claiming himself to be a Financial Creditor, but on perusal of the record it appears that the Petitioner has given notice u/s 9, IBC pretending himself to be an Operational Creditor. The Petitioner has not filed any document to substantiate its claim of being a Financial Creditor and debt as Financial Debt. Petitioner's claim is totally based on the oral submission that he has given a credit to the Corporate Debtor, which is evident from the statement of account of Financial Creditor, from which amount has been transferred to the Operational Creditor's account. It is pertinent to mention that only by transferring amount to the account of the Corporate Debtor; a person cannot claim to be a Financial Creditor. There are no documents to prove a financial debt.

13. There are prima facie contradictions in the petition as the petitioner has sent a demand notice treating the debt in question as operational debt as well as a letter treating it as financial debt.

14. Instead of opposing the contradictions, the Corporate Debtor has admitted the liability to pay. On perusal of the record, it appears that the petition is

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collusive.

15. Accordingly, the Petition is dismissed”.

The respondent annexed a copy of the aforesaid Judgement passed by the Hon'ble NCLT, Mumbai Bench, Annexure-B.

- 6 The Respondent further submits that there exists no debt to the amount of Rs.17,26,19,414/-. Nor any part thereof constitutes as Financial Debt. It is further stated and submitted that particulars of alleged financial debt are incorrect as it admittedly includes sale of material and other receivables which arises from provision of goods and services. The same is evident from Page No.3 Part-IV of the Form I filed by the applicant.
7. The respondent submits that the application is filed consciously without providing any working computation for the alleged amount of debt, quantum of principle of amount, interest, due date and default thereof.

C. Claim is time barred

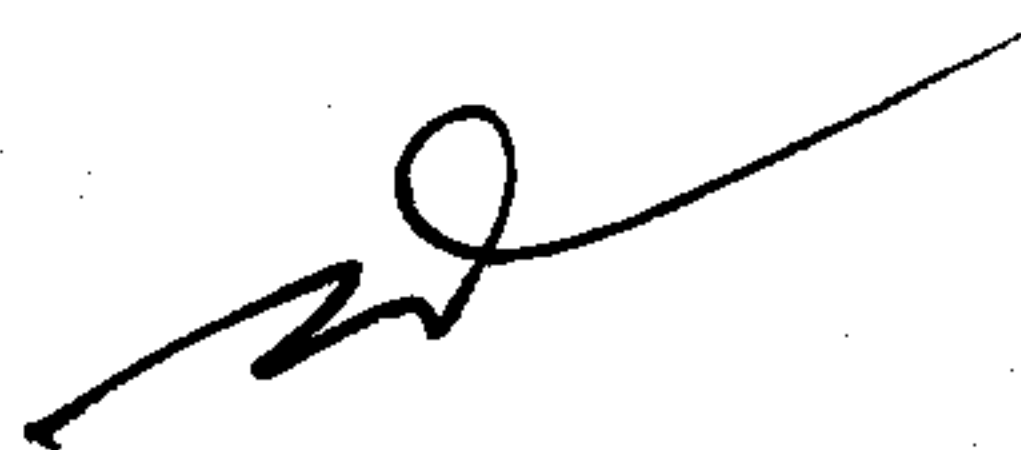
8. xxxx

9. The application so filed is silent on the Date of Default since it is borne from the documents in support of the application itself, the purported debt is time barred and thus the present application is barred by limitation. The respondent emphasis on letter dated 5/08/2015 herein annexed as Annexure-B at page 8 of the petition, provides the date of debt to be 28.07.2015. The present application is filed on 7/08/2018, thus exceeding the time limit of 3 years, rendering the application to be time barred.

A copy of the letter dated 5/08/2015 addressed to the respondent by the applicant has been annexed as Annexure-C.

10. The Respondent submits that the Hon'ble Supreme Court

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in Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. and Ors. Civil Appeal No. 4952 of 2019 has held as under:

7. Having heard the learned Counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under section, would fall only within the residuary Article 137. As rightly pointed out by learned Counsel appearing on behalf of the Appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr.Banerjee’s reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the **intent of the Code could not have been to give a new lease of life to debts which already time barred.**

Respondent annexed a copy of the aforesaid judgment, as Annexure-C.

11. Respondent submit that the **Hon’ble Supreme Court in Jignesh Shah & Ors. vs. Union of India (UOI) and Ors. Writ Petition No. 455 of 2019** has held as under:

“7. Having heard the learned Counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

28. Application of Limitation Act, 1963.

28.1 The question of applicability of the Limitation Act, 1963 (“Limitation Act”)to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary

exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time barred, and there appears to be no rationale to exclude the extension of this principle of law to the Code.

We therefore allow Civil Appeal (Diary No.16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be preceded with any further. Accordingly, **the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.**

Respondent has annexed a copy of the aforesaid judgment, as Annexure-D.

12. The Respondent submits that the Hon'ble Supreme Court in B.K. Educational Services (Pvt.) Ltd. vs. Parag Gupta & Associates in Civil Appeal Nos. 23988 of 2017 & 436, 439, 3137, 4979, 5819 and 7286 of 2018 observed as under:

"The limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the instant case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no

longer due as it is time-barred. [Para-12]”

A copy of the aforesaid judgment has been annexed with the written submission, as Annexure-E.

13. The Respondent further states that the Applicant’s petition is fraudulent and malicious, as Applicant has already tarnished Respondent’s reputation in the society, business circle, caste and creed and further trying to damage its business as well as harming the name of the Respondent Company by filing such fraudulent and malicious petition. It is stated that the Applicant has adopted fraudulent and wrongful trading by supplying goods by which Applicant is trying to earn fraudulently by making huge profits. The Respondent state and submit that applicant is misleading this Hon’ble Tribunal by filing false, fabricated and forged documents and thus, application is to be dismissed with cost.

14 In view of the aforesaid, the present application deserves to be dismissed by this Hon’ble Tribunal with cost and no order for initiation of Corporate Insolvency Resolution Process of Kirishidhan Vegetables Seeds India Pvt. Ltd. shall be passed by this Hon’ble Tribunal in the interest of justice.

14. We considered the above given facts of the present IB Petition and examined the merits and admissibility of the present IB Petition, under the discipline of the Insolvency and Bankruptcy Code as well as the Indian Limitation Act, so as to find it complete and to be filed within prescribed period of limitation.

15. The relevant provisions of Section 7 of the IB Code reads as under;

7. Initiation of Corporate Insolvency Resolution Process by Financial Creditor.

(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.—*For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

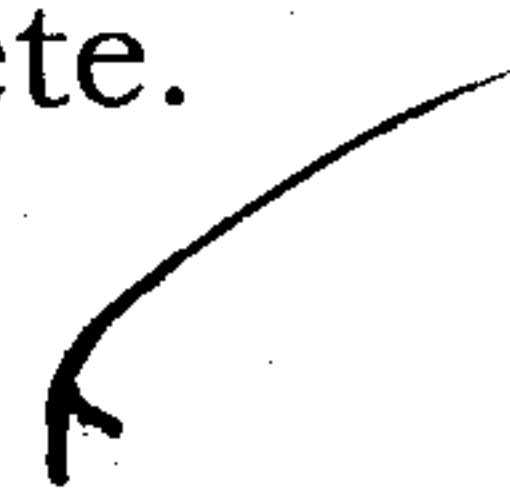

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.



16. We heard the rival submission made by the learned counsel for respective parties, namely, Mr. Kunal P. Vaishnav, for the petitioner and Ms. Natasha D. Shah, for the respondent-corporate debtor, on the maintainability and admissibility of the present IB Petition, based on above given facts and circumstances of the present IB Petition and in the light of the relevant provisions of I& B Code read with provisions of the Limitation Act.
17. It is noticed by careful perusal of the present IB Petition that the petitioner did not mention about the date of default in its application, i.e. in Column no.2 of Paragraph-IV, but it simply relied upon ledger copies and financial statements of the petitioner company. Further, it also made certain other claims in the present petition filed under Section 7 of the I & B Code to the extent of **Rs.1.07 crores** against sale of material, which cannot be treated as Financial Debts, because the present IB Petition is filed under the provisions of Section 7 of the I & B Code, the petitioner has claimed to be the Financial Creditor and not as Operational Creditor. Hence, there appears mismatch of the account for amount claimed, which is not properly quantified under the discipline of the I & B Code. Hence, the petition cannot be found complete.
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18. A perusal of the annexures made with the present IB Petition shows that the Chartered Accountant of the petition company has certified that the position of the Corporate Debtor company is **100% subsidiary** of the Petitioner-Financial Creditor and as per his report dated 28.07.2015 Unsecured Loan of Rs.16,19,15,000/- is reflected, i.e. fairly the unpaid unsecured loan has been shown in the company's account as on 28.07.2015. That apart, the petitioner wrote a letter on 05.08.2015 to the respondent-Corporate Debtor company for calling of AGM and for repayment of loan, which means the default was occurred prior to 05.08.2015. While, the present **IB Petition is filed before this Bench on 14th August 2018**, apparently it is filed beyond three years of the prescribed period of limitation and seems to be hit by limitation. Therefore, such issue needs to be dealt with first and if the present IB Petition can be disposed of on the issue of limitation, then there remains no need to deal with other issue nor to go into the other controversy and its merits to adjudicate the admissibility of the present IB Petition. Therefore, we duly considered the aspect of limitation in filing the present IB Petition in the light of latest decisions of the Honourable Supreme Court in the following cases. The relevant portion of the judgment may be quoted hereinbelow:

1 **B.K. Educational Services (P.) Ltd. Vs. Parag Gupta**

"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."

2 **Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. and Ors. (18.09.2019 - SC): MANU/SC/1301/2019)**

"1. In the present case, the Respondent No. 2 was declared **NPA on 21.07.2011**. At that point of time, the State Bank of India filed two O. As in the Debt Recovery Tribunal in 2012 in order to recover a total debt of 50 Crores of rupees. In the meanwhile, by an assignment dated 28.03.2014, the State Bank of India assigned the aforesaid debt to Respondent No. 1. The Debt Recovery Tribunal proceedings reached judgment on 10.06.2016, the Tribunal holding that the O. As filed before it were not maintainable for the reasons given therein.

2. As against the aforesaid judgment, Special Civil Application Nos. 10621-10622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a Special Leave Petition was dismissed on 25.03.2017.

3. An independent proceeding was then begun by **Respondent No. 1 on 03.10.2017** being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to **about 124 Crores of rupees**. In the Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. **21.07.2011** was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

| Description of suit | Period of limitation | Time from which period begins to run |
|---------------------|----------------------|--------------------------------------|
|---------------------|----------------------|--------------------------------------|

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| | | |
|--|--------------|-------------------------------------|
| To enforce payment of money secured by a mortgage or otherwise charged upon immovable property | Twelve years | When the money sued for becomes due |
|--|--------------|-------------------------------------|

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 01.12.2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr. Aditya Parolia, learned Counsel appearing on behalf of the Appellant has argued that Article 137 being a residuary Article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in *B.K. Educational Services Private Limited v. Parag Gupta and Associates*, MANU/SC/1160/2018 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr. Debal Banerjee, learned Senior Counsel, appearing on behalf of the Respondents, countered this by stressing, in particular, para 7 of the *B.K. Educational Services Private Limited* (supra) and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned Counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed Under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned Counsel appearing on

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

7. This being the case, we fail to see how this para could possibly help the case of the Respondents. **Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular Article gets attracted. It is well settled that there is no equity about limitation-judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.**

8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside."

3 **Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Ltd. and Ors. (02.09.2019 - SC): MANU/SC/1213/2019)**

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

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

3. Having heard learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in **B.K. Educational Services Private Limited v. Parag Gupta** and



Associates, MANU/SC/1160/2018 : 2018 (14) Scale 482, Para 27 of which reads as follows:

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

4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which limitation would be saved in the present case. This contention is effectively answered by a judgment of three learned Judges of this Court in **Balkrishna Savalram Pujari and Ors. v. Shree Dnyaneshwar Maharaj Sansthan and Ors.**, MANU/SC/0174/1959 : [1959] Supp. (2) S.C.R. 476. In this case, this Court held as follows:

... In dealing with this argument it is necessary to bear in mind that **Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the Appellants' rights though the damage caused by the said decree subsequently continued... (at page 496).**

Following this judgment, **it is clear that when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the Appellant's rights as a result of which**



limitation would have begun ticking.

5. This being the case, and the claim in the present suit being time barred, there is no doubt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. There will be no order as to costs."

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Sagar Sharma and Ors. vs. Phoenix ARC Pvt. Ltd. and Ors. (30.09.2019 - SC: MANU/SC/1357/2019)

"1. By our judgment dated 11.10.2018 in *B.K. Educational Services Private Limited v. Parag Gupta and Associates (MANU/SC/1160/2018)* we had made it clear that the Insolvency and Bankruptcy Code's coming into force on 01.12.2016 is wholly irrelevant to the triggering of any limitation period for the purposes of the Code. However, we find that in the impugned judgment the following statement is made:

"13. Admittedly, 'I & B Code' has come into force since 1st December, 2016, therefore, the right to apply accrued to 1st Respondent on 1st December, 2016. Therefore, we hold that the application Under Section 7 was not barred by limitation."

2. **We had also made it clear beyond any doubt that for applications that will be filed Under Section 7 of the Code, Article 137 of the Limitation Act will apply.** However, we find in the impugned judgment that Article 62 (erroneously stated to be Article 61) was stated to be attracted to the facts of the present case, considering that there was a deed of mortgage which was executed between the parties in this case. **We may point out that an application Under Section 7 of the Code does not purport to be an application to enforce any mortgage liability.** It is an application made by a financial creditor stating that a default, as defined under the Code, has been made, which default amounts to Rs. 1,00,000/- (one lakh) or more which then triggers the application of the Code on settled principles that have been laid down by several judgments of this Court.

3. **Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the IBC Code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.**

4. Accordingly, we set aside the judgment under appeal and direct that the matter be determined afresh. It will be open for both sides to argue the case on facts on the footing that Article 137 of the Limitation Act alone will apply.

5. The appeal is allowed in the aforesaid terms.

6. The NCLT order dated 29.01.2019 shall remain stayed until further

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orders from the NCLAT.

7. Mr. Rakesh Dwivedi, learned Senior Counsel, wishes to raise a plea based on Section 22 of the Limitation Act before the NCLAT. We record this statement."

19. By following the above stated decision of the Hon'ble Supreme Court on the issue of Limitation, it is well founded that the present IB Petition is hit by Limitation Act as the default had commenced prior to (although it was categorically not declared in the petition) 05.08.2015 or 28.07.2015 and not after this as per the Certificate of the Chartered Accountant. While the present IB Petition is filed on 14th August, 2018 before this Bench. The legal position, in the light of above referred decisions of the Honourable Supreme Court, has been well settled that the provisions of the I & B Code is not meant to recover a time barred debt, as per the decision of the Honourable Supreme Court in the matter of ***Jignesh Shah & Ors. vs. Union of India (UOI) and Ors. (Writ Petition No. 455 of 2019)*** wherein the Hon'ble Supreme Court has observed and held as under:

"7. Having heard the learned Counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

28. Application of Limitation Act, 1963.

28.1 The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT.

The existing jurisprudence on this subject indicates that if


a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the interest of the Code could not have been to give a new lease of life to debts which are time barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code.


We, therefore, allow Civil Appeal (Diary No.16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be preceded with any further. Accordingly, **the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.**

20. That apart, we cannot lose sight from such aspect of the present case that the Corporate Debtor is none other than 100% shareholding of the petitioner company itself and there are certain dispute pending among the directors of the Petitioner and the Corporate Debtor company, in a Company Petition filed before the Company Law Board and which came to be transferred to this Court (bearing C.P. No. 17 of 2014 under the provisions of Sections 397 read with 398 of the Companies Act, 1956) wherein **the then Company Law Board has pleased to appoint an Administrator-cum-Facilitator, Honourable Justice (Retd.) Mr. K.K. Lahoti, for smooth conduct of the affairs of the Petitioner company.** While the petitioner filed the present IB Petition by signing in his capacity as

Chairman of the company but **he has not shown/attached any authorization or resolution passed by the Company with a concurrence of the Administrator-cum-Facilitator**. Hence, such filing by the petitioner, claiming to be Chairman, cannot be treated as a proper filing on behalf of the petitioner company. Hence, on such count also the present IB Petition fails and is not maintainable under the provisions of the I&B Code and it is liable to be dismissed.

21. Accordingly, the present IB Petition, i.e. TP 114 of 2019 [CP (IB) No.405/7/NCLT/AHM/2018 is dismissed.
22. No order as to costs.


(Prasanta Kumar Mohanty)
Adjudicating Authority &
Member (Technical)


(Harihar Prakash Chaturvedi)
Adjudicating Authority &
Member (Judicial)