National Company Law Appellate Tribunal, New Delhi

COMPANY APPEAL (AT) (Insolvency) NO. 1491 OF 2019

(Arising out of Order dated 8th Nov, 2019 passed by National Company Law Tribunal, Hyderabad Bench in Company Petition 26/7/HDB/2018)

IN THE MATTER OF:

M/s. Gradient Nirman Private Limited
Represented by Mr. G. Inna Reddy
Villa No. 286 XIII Phase
Indu Fortune Fields KPHB Colony
Kukatpally
Hyderabad TG 500072

Mr. I. Karnunakar Reddy, ...Appellant(s)
Director of ITZ
Office at Indu Fortune Fields 1009,
13th Phase, Kukatpalli, Hyderabad,
Telangana - 500072

Versus

1. M/s. IFCI Ltd. Respondent No.1
Regd. Office at IFCI Tower,
61 Nehru Place, New Delhi – 110019
Southzone Office at 8th Floor,
Taramandal Complex 5-9-13,
P.B. Saifabad, Hyderabad – 500004

2. M/s. Indu Techzone Private Ltd. Respondent No. 2
Indu Fortune Fields 1009,
13th Phase, Kukatpalli, Hyderabad,
Telangana – 500072

3. M/s. Indu Projects Limited Respondent No. 3
Indu Fortune Fields 1009,
13th Phase, Kukatpalli, Hyderabad,
Telangana - 500072

4. The Joint Director Respondent No. 4
Directorate of Enforcement,
Government of India,
Ministry of Finance, Dept. of Revenue
3rd Floor, Shankar Bhavan,
Basheer Bagh, Hyderabad - 500004

For Appellant: Mr. R.V. Yogesh and Ms. Snigdha Singh, Advocates
For Respondents: Mr. Mithun Shashank, Advocate for R-2.
Mr. P.B.A. Srinivasan, Mr. Avinash Mohapatra and Mr. Parth D. Tandon, Advocates for R-1.

J U D G E M E N T

(22nd May, 2020)

Shreesha Merla, T. :

1. Aggrieved by the Order passed by the Adjudicating Authority (NCLT) Hyderabad Bench in CP (IB) No.26/7/HDB/2018, the 1st Appellant, the Shareholder of the Corporate Debtor, and the 2nd Appellant, the Director of the Corporate Debtor preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016. By the impugned order dated 08.11.2019, the Adjudicating Authority admitted the Application under Section 7 of the Code.

2. Succinctly put, the facts relevant to the case are that the 1st Respondent/Corporate Debtor is a Special Purpose Vehicle incorporated to develop end to end facilities to the Information Technology Sector and was sanctioned by the first respondent, M/s IFCI LTD, a term loan of upto Rs.60,00,00,000/-,out of which an amount of Rs.9,90,00,000/- was disbursed by 21.05.2009 and the balance loan of Rs.50,10,00,000/- was cancelled vide letter dated 31.03.2011on account of non-payment of installments of the loan already disbursed. It is averred that the project could not be completed on account of reasons beyond their control;that in 2011 ED had attached 150 acres of the project land and TSIIC issued a notice for cancellation of the land allotment and resumption of SEZ on 24.09.2015 and hence the project had come to a standstill.

3. The Adjudicating Authority while admitting the Application observed as follows:

> *"32. Keeping in view the above facts, it is clear that the Corporate Debtor has acknowledged the debt in writing as late as on 20.03.2018 and therefore provisions of section 18 of the Limitation Act will apply. As such, the provisions of Limitation Act will not come to the assistance of the Corporate Debtor in the instant proceedings and the challenge to the instant CP on account of limitation also fails.*
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> *33. On the other hand, the Financial Creditor has been able to establish that there exists a 'financial debt' and there has been 'default' on the part of the Corporate Debtor. It has been held by the Hon'ble Supreme Court in INNOVENTIVE INDUSTRIES LTD. Vs. ICICI BANK & ANR., in Civil Appeal Nos. 8337-8338 of 2017, held as under that:*
> *".....The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."*
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> *34. Further, in the instant Petition, the Petitioner has proved its case by placing documentary evidence viz., Copies of Facility Agreements and sanction letter, date and details of all disbursements of the facilities etc., and copies of entries in Bankers Book in accordance with the Bankers Books Evidence Act, 1891 (18 of 1891) which proves that a default has occurred for which the present Corporate Debtor was liable to pay. Thus, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/ Financial Creditor regarding existence of 'financial debt' and occurrence of 'default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has also proposed the name of IRP after obtaining his written consent in*

Form-2. In view of the above, this Adjudicating Authority is inclined to admit the petition."

4. It is observed from the Order dated 02.01.2020 that this Tribunal had intended to hear the Directorate of Enforcement Telangana and allowed the Appellant to implead the Assistant Director, Directorate of Enforcement Telangana as Respondent No. 4. Subsequently they have been arrayed as the 4th Respondent and notice was issued which was also served, but none appeared on their behalf on the date of hearing. A perusal of the written submissions filed by the Enforcement Directorate (ED) before the Adjudicating Authority and enclosed herewith by the Appellant, shows that the ED prayed not to consider the property of the Corporate Developer for liquidation during Insolvency Process as the same has been attached and taken possession by them under Section 8 (5) PMLA, 2002, by the PMLA Special Court.

5. Learned Counsel appearing on behalf of the Appellant contended that the Application under Section 7 is barred by limitation, the date of default being 15.10.2013; there is no "Acknowledgment Of Debt" to take benefit under Section 18 of the Limitation Act 1963; the letter dated 20.03.2018 offering OTS is beyond the limitation period of three years; there is no proper authorization under which the letter was issued; the first Respondent had made several claims for the same debt and that it was only on 16.12.2019

that the first Respondent had expressed its intention to withdraw from the CIRP of Respondent No. 3.

6. Learned Counsel appearing for the 1st Respondent submitted that though initially they had filed a claim in the CIRP of the 3rd Respondent that is M/s. Indu Projects Limited,the Corporate Guaranteer of the Principal Borrower, M/s. Indu Techzone Private Ltd., the said Claim was withdrawn vide letter dated 16.12.2019 and that the 3rd Respondent is no longer a part of the COC.

7. A perusal of the letter dated 16.12.2019, evidences that the 1st Respondent has withdrawn from the COC and therefore the contention of the Learned Counsel appearing for the Appellant that "***Vishnu Kumar Agarwal Vs. Parimal Enterprises Ltd.2019 SCC Online NCLAT 542"*** applies to the facts of this case, is unsustainable, as the material on record establishes that the same debt was not being pursued in two different Insolvency Proceedings.

8. Learned Counsel appearing for the Respondent vehemently contended that the loan amount was declared NPA on 30.06.2014; the recall notice was given on 02.07.2014; the Creditor took steps to initiate proceedings under DRT on 14.11.2014 and later under the SARFAESI Act, 2002 and that the Creditor is entitled for the exclusion of time period under Section 14 of the Limitation Act, 1963.

9. He further submitted that the Adjudicating Authority has rightly dealt with the issue of limitation and that 'Acknowledgment Of Debt' has to be seen from the 'Default cum Outstanding Statement' for the period 01.04.2017 to 20.09.2017. He further contended that an offer of OTS by the 2nd Respondent proves continuity of debt and relied on the Judgement of this Tribunal in **"Sesh Nath Singh and another Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd and another"**in Company Appeal (AT) (Insolvency) No. 672 of 2019 and submitted that if the Financial Creditor has bonafidely persecuted within limitation under the SARFAESI ACT, 2002, they are entitled for exclusion of time period under Section 14 (2) of the Limitation Act 1963.

10. After hearing both sides, we are of the view that at the outset, the issue of limitation is to be addressed to, keeping in view the ratio laid down by the Hon'ble Supreme Court in ***"Gaurav Hargovind bhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572","Jignesh Shah and another V/s. Union of India and another – (2019) 10 SCC 750" and in "B.K. Education Services Private Limited V/s. Parag Gupta and Associates –(2019) 11 SCC 633"***.

11. In ***B.K. Education Services Private Limited (Supra)*** the Hon'ble Supreme Court has laid down that Limitation Act is applicable to Applications filed under Section 7 and 9 of the

Code from the inception of the Code and that Article 137 of the Limitation Act, getsattracted. The "right to sue" therefore accrues when a default occurs. If the default has occurred over 3years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act, 1973.

12. In ***"Jignesh Shah and another vs. Union of India and another – (2019) 10 SCC 750"***, the Hon'ble Supreme Court taking into consideration the fact of filing of an Application under Sections 433 and 434 of the Companies Act, 2013 observed as follows:

> *"13. Dr Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding-up proceeding was concerned. Thus, in Hariom Firestock Ltd. v. Sunjal Engg. (P) Ltd., a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding-up petition being filed, opined:*
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> > *"8. … To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and dehors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that*

debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

14. Likewise, a Single Judge of the Patna High Court in Ferro Alloys Corpn. Ltd. v. Rajhans Steel Ltd. also held:

"12. … In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding up proceeding. The debt having become time barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under Section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of Opposite Party 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of Section 434. Therefore, since the debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt."

Finally, the Hon'ble Supreme Court after taking into consideration the date of default observed: -

"21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action

that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding.

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the

debt in any of the three situations mentioned in Section 434."

(Emphasis Supplied)

13. At this juncture, it is relevant to note that ***Sesh Nath Singh (supra)*** relied upon by the counsel for the Appellant was discussed in detail by a Larger Bench of this Tribunal in ***Ishrat Ali Vs. Cosmos Coooperative Bank Ltd. & Anr. (Company Appeal (AT) (Insolvency) NO. 1121 of 2019),***in which the majority concurred as follows:

> *"8. Similar issue fell for consideration before the Hon'ble Supreme Court in* ***"Gaurav Hargovind bhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572".*** *In the said case, the Hon'ble Supreme Court has noticed that the Respondent was declared NPA on 21st July, 2011. The Bank had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the total debt. Taking into consideration the facts, the Supreme Court held that the default having taken place and as the account was declared NPA on 21st July, 2011, the application under Section 7 was barred by limitation.*
> *For proper appreciation, it is better to note the facts of the judgment as follows: -*
> *"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6- 2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.*
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> *2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 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 27- 3-2017.*
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> *3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 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 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. 21-72011 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*
62. 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 1-12-2016 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 21-7-2011, 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 (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] 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 11 of B.K. Educational Services (P) Ltd. 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 the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7- 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 11 of B.K. Educational Services (P) Ltd., 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."

(Emphasis supplied)

9. In "Sagar Sharma & Anr. vs. Phoenix ARC Pvt. Ltd. & Anr. - Civil Appeal No.7673 of 2019 - (2019) 10 SCC 353", the Hon'ble Supreme Court vide its judgment dated 30th September, 2019, referring to the decision in B.K. Educational Services Private Limited (Supra) reminded this Appellate Tribunal that for application under Section 7 of the Code, Article 137 of the Limitation Act, 1963 will apply. Article 62, which relates to deed of mortgage executed between the parties, cannot be taken into consideration for counting the period of limitation. The Hon'ble Supreme Court specifically observed that Article 141 of the Constitution of India mandates that its judgments are followed in letter and spirit. The date of coming into force of IBC Code does not and cannot form a trigger point of limitation for application filed under the Code. Equally, since "applications" are petitions, which

are filed under the Code, it is Article 137 of the Limitation Act, 1963 which will apply to such applications.

10. This Appellate Tribunal also considered the same issue in "V Hotels Limited vs. Asset Reconstruction Company (India) Limited - Company Appeal (AT) (Insolvency) No.525 of 2019" decided on 11th December, 2019, by referring to the aforesaid judgment of the Hon'ble Supreme Court observed: -

> *"17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the Company Appeal (AT) (Insolvency) No. 1121 of 2019 13 'Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.*
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> *xxx xxx xxx*
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> *19. Section 13(2) of the 'SARFAESI Act, 2002' reads as follows:*
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> *"13. Enforcement of security interest.-- .....(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).*
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> *20. Admittedly, the 'Financial Creditor' took action under the 'SARFAESI Act, 2002' in the year 2013. Therefore, the second time it become NPA in the year 2013 when action under Section*

13(2) was taken." Referring to Section 18 of the Limitation Act, 1963, this Appellate Tribunal further observed: -

Company Appeal (AT) (Insolvency) No. 1121 of 2019 14 "22. The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed.

23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in writing by the 'Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgment of liability in respect of debt payable to the 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') signed by the 'Corporate Debtor' or its authorised signatory.

24. In "Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679", the Hon'ble Supreme Court observed that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgment, even after the completion of the period of limitation i.e. December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under

Section 7 is barred by limitation, the accounts Company Appeal (AT) (Insolvency) No. 1121 of 2019 15 of the 'Corporate Debtor' having declared NPA on 1st December, 2008.

11. The aforesaid decisions of the Hon'ble Supreme Court and this Appellate Tribunal make it clear that for the purpose of computing the period of limitation of application under Section 7, the date of default is 'NPA' and hence a crucial date.

12. In "Jignesh Shah and another vs. Union of India and another - (2019) 10 SCC 750", the Hon'ble Supreme Court noticed the decision of the Hon'ble Patna High Court in "Ferro Alloys Corpn. Ltd. v. Rajhans Steel Ltd.", wherein the Hon'ble Patna High Court held that simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding-up proceeding.

13. In the said case, Hon'ble Patna High Court further held that since the debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt.

14. Appreciating the aforesaid Judgment of the Hon'ble Patna High Court, the Hon'ble Supreme Court in "Jignesh Shah and another vs. Company Appeal (AT) (Insolvency) No. 1121 of 2019 16Union of India and another" (Supra) observed that the aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding.

Thus, while holding so, the Hon'ble Supreme Court says that the date of default is the date for the purpose of computing the period of limitation of application under Section 7. The same principle is applicable in the present case. Mere filing of a suit for recovery or a decree passed by a Court cannot be held to be deferment of default.

15. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. Decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.

16. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/ Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'."

14. The brief point for consideration for the instant case is to see whether the Application admitted under Section 7 by the Adjudicating Authority, is barred by limitation keeping in view the principle laid down in the aforenoted Judgments. In the instant case, the date of default as mentioned in part IV of the Application is 15.10.2013. It is the Respondent's case that the date of default is to be taken as 30.06.2014 as observed by the Adjudicating Authority.

15. We observe from the letter dated 02.07.2014, that the date of default is 30.06.2014 though the date of default mentioned in

Part IV of the Application, is 15.10.2013. In this case the 'right to sue' accrues on 30.06.2014 and 3 years limitation period ends on 29.06.2017, whereas the Application was filed on 08.11.2017.

16. Therefore, the contention of the Learned Counsel that the Financial Creditor has also initiated proceedings under DRT and under the SARFAESI Act 2002, and therefore this period should be excluded, cannot be sustained.

17. Now, we address ourselves to the contention of the Learned Counsel for the first Respondent that the Financial Creditor is covered by Section 14 of the Limitation Act, 1963 which reads as follows:

> ***"Exclusion of time of proceeding bona fide in court without jurisdiction.*** *–(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
> *(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the*

ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
Explanation – For the purposes of this section, - (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

18. While addressing this issue,*the majority view of the Larger Bench in* ***Ishrat Ali (Supra)*** is noted as hereunder:

"18. Section 14(2) of the Limitation Act, 1963 makes it clear that in computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

19. Therefore, to take advantage of Section 14(2), the Applicant must satisfy:

(i) That the applicant has been prosecuting with due diligence in another civil proceeding, whether in a court of first instance or of appeal or revision.

(ii) against the same party; and

(iii) for the same relief.

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20. Under the SARFAESI Act, 2002, once the account is declared as NPA, the 'Financial Creditor' can exercise its power under Section 13 of the SARFAESI Act, 2002

which is required to issue Demand Notice under Section 13(2) and reads as follows:

> *"13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).*
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> *(3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.*
>
> *Company Appeal (AT) (Insolvency) No. 1121 of 2019 20 (4) In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-*
>
> *(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;*

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt....."

21. An action taken by the 'Financial Creditor' under Section 13(2) or Section 13(4) of the 'SARFAESI Act, 2002' cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and the other forum. Therefore, action taken under Company Appeal (AT) (Insolvency) No. 1121 of 2019 21 Section 13(2) of the 'SARFAESI Act, 2002' cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.

In an application under Section 7 relief is sought for resolution of a 'Corporate Debtor' or liquidation on failure. It is not a money claim or suit. Therefore, no benefit can be given to any person under Section 14(2), till it is shown that the application under Section 7 was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction.

22. The decision rendered in "Sesh Nath Singh & Ors. v. Baidyabati Sheoraphuli Cooperative Bank Ltd." (Supra) thereby cannot be held to be a correct law laid down by the Bench."

(Emphasis Supplied)

19. In the instant case benefit under Section 14 (2) cannot be given to the Applicant as there is no material on record to show that the subject Application was being prosecuted with due diligence in a court of First Instance or of Appeal or Revision which has no jurisdiction. In a catena of judgments it has been observed that proceedings under IBC cannot be construed to be that of a recovery or a Money Suit.

Having regard to the fact that the decision rendered in **Sesh Nath Singh & Ors. (Supra)** was held to be not correct in law, by a majority view of a Larger Bench of this Tribunal in **Ishrat Ali (Supra),** the submission of the Learned Counsel that **Sesh Nath Singh (Supra)** is applicable to the facts of this case, is untenable.

20. It is the case of the first Respondent that the outstanding statement (Anx A5) in the Books of Account should be treated as an 'Acknowledgement of Debt' as stipulated in Section 18 of the Limitation Act, 1963. Section 18 provides as follows:

> *"The date of default can be forwarded to a future date only under Section 18 of the Limitation Act, 1963, which reads as follows: -*
> *18. Effect of acknowledgment in writing.— (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. (2) Where the writing containing the acknowledgment is undated, oral evidence may be*

given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 20 Company Appeal (AT) (Insolvency) No.57 of 2020 1872), oral evidence of its contents shall not be received. Explanation.—For the purposes of this section,— (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right; (b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed."

(Emphasis Supplied)

21. In the present case there is no evidence brought on record to establish that the provisions of Sec 18 have been complied with. A perusal of Annexure 5 relied upon by the counsel for the first respondent is neither signed by the concerned party against whom the right is claimed nor by any person through whom he derives his title or liability. Viewed from any angle, this statement does not construe 'Acknowledgement Of Debt' as mandated under Sec 18. While addressing this issue, the Adjudicating Authority has failed to consider that 'the Acknowledgment' relied upon by the Applicant and observed so in the Order, i.e. 20.03.2018 is beyond 3 years of the date of default. Further, in ***"Sampuran Singh and Ors. v.***

Niranjan Kaur and Ors.– (1999) 2 SCC 679", the Hon'ble Apex Court has observed that acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In this case, admittedly the date of NPA is 30.06.2014, the acknowledgement relied upon by the Financial Creditor is dated 30.09.2017 and hence does not come to the rescue of the Respondent/ Financial Creditor and therefore, we are of the view that this does not shift forward the period of limitation.

22. At the cost of repetition, based on the ratio laid down by the aforenoted judgments, we are of the considered view that suitfor recovery based upon a cause of action even if it is within limitation, it cannot in any manner impact the separate and independent remedy of a winding-up proceeding. A suit for recovery is a separate and independent proceeding distinct from the remedy of winding-up and therefore the contention of the Learned Counsel appearing for the Respondents/ Financial Creditor that the period spent while pursuing SARFAESI Proceedings should extend the period of limitation, cannot be sustained, as the intent of the Court is not to give a new lease of life to the debt which is already time barred. Placing reliance on ***Gaurav Hargovind bhai Dave (Supra), Jignesh Shah (Supra) and B.K Education Services (Supra)***, we are of the considered opinion that this Application under

Section 7 is barred by limitation. Hence, we allow this Appeal and set aside the Order passed by the Adjudicating Authority.

23. In effect, order(s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for Applications all such orders and actions are declared illegal and are set aside. The Application preferred by Respondent under Section 7 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect.

24. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and 'corporate insolvency resolution process cost' and 'M/s. Indu Techzone Pvt. Ltd.' will pay the fee of the 'Interim Resolution Professional' and 'Corporate Insolvency Resolution Process Cost', as may be determined.

25. The Appeal is allowed with the aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[V.P.Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

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