NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INS) NO. 24/2021

(Against the order dated 26.05.2020 passed by the National Company Law Tribunal, Mumbai (Division) Bench in CP (IB) No.2176(MB) of 2019)

In the matter of:

Dinesh G Jaiswal,
Ex-Director
M/s J-Marks Exim (India) Pvt Ltd,
A/203, 204, Mahavir Darshan,
Veer Santaji Marg,
Near Peninsula Corporate Park,
Lower Parel,
Mumbai 400013 Appellant

Vs

1. Punjab National Bank,
   Asset Recovery Management Branch,
   Pragati Tower,
   1st Floor,
   C-9, G-Block,
   BKC Complex,
   Bandra €, Mumbai 400051

2. J Marks Exim (India) Pvt Ltd,
   58 & 59, 1st floor,
   Nakshatra Cine Shoppe,
   Ranade Road,
   Dadar (W),
   Mumbai 400028
   Through RP
   Mr Mukesh Verma' Flat No.112, C Wing,
   Manish Rose CHS, Bldg No.29,
   Manish Nagar, Andheri (W)
   Mumbai 400053 Respondent

For Appellant: Mr Varun Singh, Ms Archana Singh, Advocates.

For Respondent: Mr. Yasartha Gupta, Advocate for R1.

Mr Mukesh Verma, Advocate for R2.

JUDGEMENT

(22nd September, 2022)

Justice Rakesh Kumar, Member (Judicial)

The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the "Code") by Mr. Dinesh G Jaiswal, ex Director of M/s J.-Marks Exim (India) Pvt Ltd (Corporate Debtor) against an order dated 26.05.2020 passed by National Company Law Tribunal, Mumbai (Division Bench) (hereinafter referred to as the 'Adjudicating Authority') in CP(IB) No.2176/MB/C-IV/2019. By the impugned order the Adjudicating Authority has admitted an application filed under Section 7 of the Code and thereby Corporate Insolvency Resolution Process (CIRP) has been initiated. The application before the Adjudicating Authority was filed by the Financial

Creditor, Punjab National Bank, Assets Recovery Management, Mumbai.

2. Short fact of the case is that on 10.06.2019 an application was filed by the Punjab National Bank, which has been arrayed as Respondent No.1 in the present application (Financial creditor) due to the reason that Corporate Debtor i.e. Respondent No.2 failed to make payment of the debt to the tune of Rs.1,45,42,74,724.16 (Rupees One hundred forty five crores forty two lakhs seventy four thousand and seven hundred twenty four and Paise sixteen only) which was inclusive of principal amount plus interest as well as penal interest @ 2%. The credit facilities provided to Corporate Debtor was given in detail in a chart before the Adjudicating authority which is reproduced hereinbelow:

Sr. No.	Nature of Credit facility	Principal outstanding as on 31.05.2019	Normal Interest from 01.10.2014 to 31.05.2019 p.a.	Other debits less other credit	Penal interest @ 2% simple	Total claim amount
	1	2	3	4	5	(2+3+4+5)
1	Cast Credit A/c No.05464008701738041	35,01,06,230.47	68,26,31,758.38	32,09,10,740.11	9,25,60,238.43	1,44,62,08,967.39

2	Term Loan (Car Loan) A/c No. 056400NG00053639	20,96,656.00	18,76,404.40	-	3,19,387.98	42,92,448.38
3	Term Loan (Car Loan) A/c No.056400NG00053648	22,47,802.00	16,41,305.28	(3,95,170.00)	2,79,371.11	37,73,308.39
	Grand Total	35,44,50,688.00	68,61,49,468.06	32,05,15,030.11	9,31,58,997.52	1,45,42,74,724.16

3. As per application filed under Section 7 of the Code date of declaring account of the Corporate Debtor as Non-Performing Assets (hereinafter referred to as 'NPA') was shown as 30.09.2013. At the time of availing various credit facilities on 17.02.2012 a deed of guarantee was executed by Mr Dinesh G Jaiswal (appellant) his wife Ms Sunita D Jaiswal, as personal guarantors, D.J. Exim (India) Pvt Ltd as Corporate Guarantor in favour of Punjab National Bank and another deed of guarantee dated 17.2.2012 was executed by the same party in favour of the Punjab National Bank and deed of hypothecation dated 17.02.2012 between the Corporate Debtor and the Financial Creditor and a joint deed of hypothecation between the Corporate Debtor and Financial Creditor and IDBI Bank Limited was executed.

4. Initially the Corporate Debtor regularly made payment towards the credit facilities. However, from the month of June, 2013 the Corporate Debtor started defaulting in making payment of the debt and as such according to the guidelines of RBI, on 30.09.2013 Corporate Debtor's account was declared as NPA. Subsequently on 25.10.2013 the Financial Creditor issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act. The Corporate Debtor thereafter on 16.04.2014 submitted Balance and Security confirmation letter to the Financial Creditor. On 03.05.2019 Commercial Credit Information Report was taken from CIBIL. Statement of accounts alongwith certificate under Section 2A of Banker's Books Evidence Act, 1891 was also obtained.

5. In the meanwhile in the SARFAESI proceeding secured immovable properties were sold between 27.12.2018 and 30.04.2019. After filing of the application under Section 7 of the Code, the Corporate Debtor appeared before the Adjudicating Authority and

filed affidavit in reply. In the reply regarding debt no dispute was raised but only dispute was raised on the ground of limitation. In sum and substance it was pleaded on behalf of the Corporate Debtor before the Adjudicating Authority that the application filed by the Financial Creditor was barred by limitation under Section 137 of the Limitation Act. It was pleaded that admittedly in the present case date of default was to be considered from the date of declaring the account of the Corporate Debtor as NPA which was declared on 30.09.2013. Thereafter affidavit in rejoinder was also filed by the Financial Creditor wherein details were given as to on which date the debt was acknowledged by the Corporate Debtor and also date on which OTS was offered by the Corporate Debtor which was subsequently not accepted by the Financial Creditor. The Learned Adjudicating Authority after considering the facts disclosed in the application filed under Section 7, reply affidavit filed by the Corporate Debtor and also affidavit in rejoinder, finally decided that it was not barred by

limitation and by order dated 26.05.2020 admitted the application and CIRP proceeding was initiated.

6. Aggrieved with the impugned order the Corporate Debtor has preferred the present appeal which was registered as Company Appeal (AT)(Ins) No.24/2021 on 20.01.2021. While directing issuance of Notice to Respondent No.1 and considering the facts disclosed in IA No.62/2021 wherein it was stated that Committee of Creditors was already constituted, a Bench of this Tribunal directed that the CIRP may continue but the Adjudicating Authority shall not take any decision in regard to approval of the Resolution Plan till next date of hearing. After appearance of all the parties and completion of pleading, the appeal was finally heard on 22.07.2022 and Judgement was reserved.

7. Mr. Varun Singh, learned counsel appearing on behalf of the appellant assailing the impugned order has taken a stand that the Adjudicating Authority has miserably failed to appreciate that in the application filed by the Financial Creditor was barred by limitation since the date of default was shown as 30.09.2013 on

which date the account of the Corporate Debtor was declared as NPA. According to the Learned counsel for the appellant it was an admitted case that application under Section 7 of the code was filed on 10.06.2019 and as such it was much beyond the time of limitation as prescribed under Section 137 of the Limitation Act. He submits that as per Limitation Act within three years from the date of default an application was to be filed before the Adjudicating Authority, but in the present case application was filed on 10.06.2019 for a debt which was declared as NPA on 30.09.2013 as date of default. Learned counsel for the appellant has specifically drawn our attention to affidavit in reply filed by the Corporate Debtor at running page 558 in Volume III para 4 which is reproduced hereinbelow:

> *"4. In the present matter the default is said to have been made on 30th September, 2013 and the Respondent was declared NPA with effect from 30th September, 2013. Notice under SARFAESI Act was issued on 30th October, 2013 for recovery of the dues and pursuant to that few properties of the Respondent were sold for recovery. Therefore, in our humble submission, as soon as the default occurred, and the Respondent was declared as NPA, the limitation started ticking from such date i.e. 30th September, 2013. Issuance of Notice u/s 13(2)*

of SARFAESI Act on 30th October, 2013 and the sale of properties for recovery is another event making the injury complete. In any case, by virtue of Article 137 of the Limitation Act, the claims in the present petition have become time barred from September and/or October, 2016. The present petition seems to have been filed sometime in June, 2019. Therefore, it is apparently clear that the claims in the present petition are time barred and the present petition is prima facie barred by the Limitation Act."

8. In the present proceeding besides making oral submissions on behalf of the Appellant two notes of written submission have been filed, one was filed on 25.03.2021 and another was filed on 29.10.2021. However, factually there is no much difference in two notes of written submission. However, in last written submission which was filed on 29.10.2021, besides submission, the appellant has brought on record two judgement passed by the Hon'ble Supreme Court of India one reported in ***2021 SCC OnLine SC 543 Dena Bank (Bank of Baroda) Vs C Shivakumar Reddy & anr*** and ***Asset Reconstruction Company (I) Ltd Vs Bishal Jaiswal and Another 2021 SCC OnLine SC 321.*** In the written submission dated 25.03.2021 and

dated 29.10.2021 of the appellant the following facts have been stated:-

> *"**Written submission dated 25.03.2021***
>
> *1.The Application u/S. 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') filed by Respondent No. 1 is barred by limitation as:-*
>
> *a.It is undisputed that the Application was filed on 10.06.2019 and the date of NPA and date of default is shown as 30.09.2013. In the said Application there was no mention of any OTS proposal or acknowledgement of debt. The Application was filed after more than 3 years from default and/or declaration of NPA and is filed beyond the period prescribed in Article 137 of the Limitation Act.*
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> *b.The Corporate Debtor filed its reply to the Application and took the ground of limitation.*
>
> *c.Respondent No. 1 developed its case in the Rejoinder where it mentioned the dates about the acknowledgement of debt by the Corporate Debtor. It also mentioned therein that the cause of action is a continuing one. The case of the Respondent No. 1 is that by the Offer of settlement dated 23.02.2017 and the acknowledgment of debt in the balance sheet for FY 2015-2016 of Corporate Debtor, the cause of action stood extended and that the cause of action is continuing one.*
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> *2.The Adjudicating Authority in the impugned judgment despite observing the judgment of Supreme Court, in para 17 erroneously observed that the said judgment has no applicability as there is an acknowledgement of debt and S. 23 of the Limitation Act would apply. On the aspect of acknowledgement of liability, the Adjudicating Authority observed the judgments in para 18-20, 23-*

24 to erroneously hold that the acknowledgment of debt in balance sheet and in OTS proposal would amount to acknowledgment of liability within the meaning of S. 18 of Limitation Act and further held that the Application filed by the Respondent No. 1 is within limitation (para 22, 26-28 of the impugned order) and thereafter admitted the said Application.

3.The judgments observed by the Adjudicating Authority in paras 18-20, 23-24 of the impugned judgment are not related to or pertaining to the Code. Furthermore, the Adjudicating Authority in para 25 of the impugned judgment relied on a judgement of this Hon'ble Appellate Tribunal which is set aside by the Hon'ble Supreme Court in Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd & Anr. [(2020) 15 SCC 1].

4.It is submitted that the facts in Babulal Vardharji (Supra) are analogous to the present case. The facts of the said case are mentioned in paras 7.1, 7.2, 7.3, 11.5,11.6, 12 and 17. In the said case, there was acknowledgement of debt in balance sheet of Corporate Debtor therein and the Corporate Debtor therein has given a OTS offer to the Financial Creditor therein. Therefore, the law laid down by the Hon'ble Supreme Court in in Babulal Vardharji (Supra) squarely applies to the present case. In the light of above, the below mentioned exposition of law is relevant for the present case.

5.The Hon'ble Supreme Court in Swiss Ribbons Private Limited and Another Vs Union of India And Others [(2019) 4 Supreme Court Cases 17] in para 64 held that 'Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default".' (Also observed in Babulal Vardharji (Supra) at para 20.3.2)

6.In B.K. Educational Services Private Limited Vs. Parag Gupta And Associates [(2019) 11 Supreme Court Cases 633] held that the Code does not give a

new lease of life to debts which are time barred. Furthermore, it was held that the Limitation Act is applicable to the applications filed under the Code and Article 137 of the Limitation Act is applicable to such applications. It was held that 'the right to sue' accrues when default occurs'. If the default occurs over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act unless S. 5 of the Limitation Act is applied to condone the delay in filing such application. (Observed in Babulal Vardharji (Supra) para 24, pg. 40 and 24.1, pg 41).

7.In K. Sashidhar Vs Indian Overseas Bank and Others [(2019) 12 Supreme Court Cases 150, para 78] it is held that right to sue accrues on the date when default occurs and if the default occurred even three years prior to the date of filing of the application, the same cannot be treated as "debt that is due and payable" or "debt" due."(observed in Babulal Vardharji (Supra) at para 26, pg. 42).

8.In Jignesh Shah And Another Vs. Union of India and Another [(2019) 10 Supreme Court Cases 750, para 12, 21 & 28] held that 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 u/S. 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. [Also observed in Babulal Vardharji (Supra) at para 27.1 (for facts), 27.2, 27.3 & 27.4 (for law laid down by the Hon'ble Supreme Court)]

9.In Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Limited and Another [(2019) 10 Supreme Court Cases 572] held that the (in para 3) that the date of default is the date of declaration of the Corporate Debtor as NPA. It was also held (in paras 3 to 6) that the Article 62 which applies on the money suit pertaining to mortgage or any charge on the immoveable property and would only apply to suits and not applications under the Code. The applications filed under the Code would fall only within the residuary Article 137. Furthermore, (in para 7) it was held it is not for the Courts 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. (Also observed in Babulal Vardharji (Supra) at para 30). Also see Sagar Sharma And Another Vs. Phoenix Arc Private Limited and Another [(2019) 10 Supreme Court Cases 353, para 2 & 3] (Also observed in Babulal Vardharji (Supra) at para 31)

10.The Hon'ble Supreme Court after observing aforesaid judgments in Babulal Vardharji (Supra) at para 32 held that:-

"(a) ……..
(c) that intention of the Code is not to give a new lease of life to debts which are time-barred;
(d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;
(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;
(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and (h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application." Emphasis supplied

11.The exception as held by the Hon'ble Supreme Court in Babulal Vardharji (Supra) in aforesaid sub-para h of para 32 does not apply in the present case as no application for condonation of delay in filing application u/S. 7 of the Code was filed by Financial Creditor. Furthermore, there is no other exception postulated by the Hon'ble Supreme Court to make application u/S. 7 of the Code fall within limitation under the Limitation Act when it is filed after 3 years from the date of default.

12.In Babulal Vardharji (Supra) (in paras 34-34.2) it is also held that Section 18 of the Limitation Act does not apply to the Applications under the Code. It is submitted that the Hon'ble Supreme Court in para 34.1 has held that:-

> *"….this Court rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the Code….) Emphasis supplied*

13.In Babulal Vardharji (Supra) (in paras 35-35.1), the Hon'ble Supreme Court adverted to the pleadings and the facts of the case in question and answered that even if S.18 of the Limitation Act would have been applicable even then the Application u/S.7 was barred by limitation on the ground of absence of proper pleadings. It is submitted that firstly, the application does not mention any fact of acknowledgment of liability by Corporate Debtor and secondly, the acknowledgment of liability does not make the

application u/S. 7 filed by Respondent No. 1 to be within limitation. It is apparent from the bare reading of paras 35-35.1 of Babulal Vardharji (Supra) that the said findings are in alternative and without prejudice to the finding of the Hon'ble Supreme Court in para 34-.4.2 that S. 18 of the Limitation Act is not applicable to the Applications under the Code.

14.In view of foregoing law laid down by the Hon'ble Supreme Court it is apparent that the application u/S. 7 filed by Respondent No. 1 is barred by limitation. The OTS proposal or acknowledgement of debt in the balance sheet of the Corporate Debtor or continuing cause of action or S. 18 or S. 23 would not be applicable on the Application u/S. 7 of the Code and the limitation when commenced from the date of default would cannot be stopped or altered, subjected to the exception carved out in sub-para h of para 32 in Babulal Vardharji (Supra).

III. The Respondent No. 1 and Respondent No. 2 are collusively against the Corporate Debtor

17.As the Respondent No. 1 (Financial Creditor) and Respondent No. 2 (Resolution Professional) have engaged same advocates the independence of Resolution Professional is highly doubted and is against the ethics of the Code.

*"**Written submission dated 29.10.2021***

1.It is undisputed that Application u/S. 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') was filed by Respondent No. 1 on 10.06.2019 and the date of NPA and date of default is shown as 30.09.2013 of the impugned order -. In the said Application, either in Part-IV or Part V thereof or anywhere else, there was no mention of any OTS proposal or acknowledgement of debt. Furthermore,

there is no mention of any document which goes to show any acknowledgement of debt by the Corporate Debtor. The Application was filed after more than 3 years from default and/or declaration of NPA and is filed beyond the period prescribed in Article 137 of the Limitation Act.

2. It is also matter of fact that apart from 30.09.2013 there is no other date of default is mentioned in the Application. Therefore, the said Application as it was presented before the Adjudicating Authority ought to be rejected on the threshold being barred by limitation.

1.The Corporate Debtor filed its reply to the Application and took the ground of limitation. Thereafter, Respondent No. 1 developed its case in the Rejoinder where it mentioned the dates about the acknowledgement of debt by the Corporate Debtor. It also mentioned therein that the cause of action is a continuing one). The case of the Respondent No. 1 is that by the Offer of settlement dated 23.02.2017 and the acknowledgment of debt in the balance sheet for FY 2015-2016 of Corporate Debtor the cause of action to file the S. 7 Application under the Code is a continuing one. It is submitted that the even the purported balance sheets do not extend the limitation to file the said Application as it was executed more than 3 years prior to filing the said application.

3.It is pertinent to mention that despite clearly highlighting the aspect that the Application u/S.7 filed by the Respondent No. 1 is barred by limitation and Respondent No. 1 coming up with new facts, the Respondent No. 1 utterly failed to amend its pleadings in its Application u/S. 7 to bring forth the pleading of acknowledgement of debt in the said Application. It is settled law that the Rejoinder is not a part of pleadings.

4.It is submitted that the facts in Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd & Anr. [(2020) 15 SCC 1 are analogous to the present case. The facts of the said case are mentioned in paras 7.1, 7.2, table in para 7.3, and 17. In the said case, there was acknowledgement of debt in balance sheet of Corporate Debtor therein and the Corporate Debtor therein has given a OTS offer to the Financial Creditor therein. Therefore, the law laid down by the Hon'ble Supreme Court in in Babulal Vardharji (Supra) squarely applies to the present case. In the light of above, the below mentioned exposition of law is relevant for the present case.

5.In Babulal Vardharji (Supra), the Hon'ble Supreme Court adverted to the pleadings and the facts of the case in question and answered that even if S.18 of the Limitation Act would have been applicable even then the Application u/S.7 was barred by limitation on the ground of absence of proper pleadings. It is held there in that:-

"i.In the Application no other date of default other than 08.07.2011 was mentioned. There was no mention of any acknowledgment of debt anywhere in the Application.

ii.Financial Creditor cannot be permitted to develop new submissions at later stage.

iii.It also held in para 35.1 that " In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement." (Emphasis supplied)

6.Therefore, the law laid down in Babulal Vardharji (Supra) applies to the present case and no benefit of

S. 18 could be given to the Financial Creditor/Respondent No.1.

7.The aforesaid view held in Babulal Vardharji (Supra) is also further affirmed by the Hon'ble Supreme Court in the recent judgment of Dena 2 Bank (Now Bank of Baroda) VS C Shivakumar Reddy & Anr. [2021 SCC OnLine SC 543 in paras 53, 54, 106-108, 111, 134 & 144]. In the Dena Bank (Supra), the Supreme Court allowed the Application u/S. 7 of a Financial Creditor as an amendment to the said Application was incorporated before the passing of the final order by Adjudicating Authority. Dena Bank (Supra) also held that the Application u/S. 7 could be amended before the passing of the final order by Adjudicating Authority.

8.It is submitted that the pleadings in the Application u/S. 7 qua the acknowledgment of debt are indispensable to take benefit of S. 18 of the Limitation Act. However, in the present case there is no such pleading in the Application and no amendment to that effect was brought forth in the said Application. It is further submitted that the Hon'ble Supreme Court in Asset Reconstruction Company (India) Limited Vs Bishal Jaiswal and Another [2021 SCC OnLine SC 321] after holding that S. 18 of Limitation Act is applicable to the proceedings under the Code have remanded the matters, which lack the basic pleadings in the Application, back to the Tribunals below to amend the Application.

9.It is submitted that in the present matter no amendment to the Application u/S. 7 could be brought forth at the present stage and the said Application is lacking the basic pleadings regarding the acknowledgment of debt. Therefore, no benefit of Section 18 or 23 of the Limitation Act could be given to the Financial Creditor/ Respondent No. 1 and the present Appeal is liable to be allowed."

9. Besides the aforesaid written submissions the appellant has also filed rejoinder to the reply filed by the Financial Creditor. Learned counsel for the appellant while referring to para 72 of the judgement of the Hon'ble Supreme Court of India reported in (2020) 15 SCC 1 **Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd & Another** submits that the present case is squarely covered since after the declaration of account as NPA the Financial Creditor in the present case also had issued Notice under SARFAESI Act. Since learned counsel for the appellant heavily placed reliance of para 7.2 it is necessary to reproduce the same as follows:-

> *"7.2.The corporate debtor having defaulted in payment of the amount due against such loans, advances and facilities, its account with Corporation Bank was classified as Non-Performing Asset on 08.07.2011 and that with Indian Overseas Bank was classified as NPA on 05.08.2011. Then, on 15.11.2011, demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial*

Assets and Enforcement of Securities Interest Act, 2002 was issued by Indian Overseas Bank to the corporate debtor and its guarantors. These steps were followed up with recovery proceedings against the corporate debtor by the consortium of lenders and respondent No. 2 in OA No. 172/2013 before the Debts Recovery Tribunal, Aurangabad under Section 19 of the Recovery of Debts Due to the Banks and Financial Institution Act, 1993.".

10. He has also referred to para 17 of the same judgement i.e. **Babulal Vardharji Gurjar (Supra)** which is as follows:-

"17. In distillation of what has been noticed hereinabove, it is apparent that while not disputing the basics on the applicability of law of limitation to the application in question, the main plank of submissions of the learned counsel for respondents has been that the applicability of Section 18 of the Limitation Act, providing for extension of the period of limitation upon making of acknowledgment by the party against whom a right is claimed, is not taken away and, for such acknowledgments (of liability) having been consistently and continuously made in the balance sheets and annual reports by the corporate debtor as also in its offer for OTS, the fresh period of limitation would be available from the date of every such acknowledgment. Hence, with heavy reliance on the principles relating to "acknowledgment" under Section 18 of the

Limitation Act, the learned counsel for the respondents would assert that the application in question is not barred by limitation. On the other hand, the gravamen of submissions on behalf of the appellant has been that looking to the scheme of the Code and the decisions of this Court, the application in question is governed by Article 137 of the Limitation Act; that three years' time period prescribed therein commences from the date of default; and that acknowledgment of debt in the balance sheet or annual report does not give any fresh period of limitation because default occurs only once and does not furnish a continuing right to apply."

11. While referring to Additional Written Submission filed on 29.10.2021 on behalf of the Appellant, learned counsel for the appellant has placed heavy reliance on the cases reported in ***2021 SCC OnLine SC 543 Dena Bank (Bank of Baroda) Vs C Shivakumar Reddy & anr.*** It has been argued that in the application filed by the Financial Creditor for initiation of CIRP under Section 7 it was not disclosed that the debt was acknowledged by the Corporate Debtor or there was offer of OTS. It was a serious defect and on this defect itself the application was fit to be rejected as it was barred by limitation. To elaborate this submission learned counsel for the appellant has referred to para 53 and 54

of ***2021 SCC OnLine SC 543 Dena Bank (Bank of Baroda) Vs C Shivakumar Reddy & anr. He has also referred para 106, 107, 134, 144*** which are as follows:-

> *"106. There can be no dispute with the proposition of law laid down in Babulal Vardharji Gurjar (supra) that limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period, the relevant facts are required to be pleaded and requisite evidence is required to be adduced.*
>
> *107. The judgment of this Court in Babulal Vardharji Gurjar (supra) was rendered in the facts of the aforesaid case, where the date of default had been mentioned as 8.7.2011 being the date of N.P.A. and it remained undisputed that there had neither been any other date of default stated in the application nor had any suggestion about any acknowledgement been made.*
>
> *xxx*
>
> *134. It is true that, when the petition under Section 7 of IBC was filed, the date of default was mentioned as 30th September 2013 and 31st December 2013 was stated to be the date of declaration of the Account of the Corporate Debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings.*
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> *xxxx*

144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal."

12. Learned counsel for the appellant has also referred to para 49 and 54 of the Judgement of Hon'ble Supreme Court reported in **Asset Reconstruction Company (I) Ltd vs Bishal Jaiswal and Another 2021 SCC OnLine SC 321.** However, we consider that such observation has got no relevance in the facts and circumstances of the present case. In sum and substance learned counsel for the appellant has argued that the application filed by Financial Creditor under Section 7 was fit to be rejected

on the ground of limitation itself and as such he requests for setting aside the impugned order.

13. In the present case a detailed reply has been filed by the Respondent No.1. Besides filing affidavit in reply the Respondent No.1 has also filed written submission on 29.10.2021. In this case one another written submission has also been filed on behalf of Respondent No.1 on 08.07.2022. In both the written submission filed on behalf of Respondent No.1 there is similarity in the submission. Mr. Yasartha Gupta, learned counsel appearing on behalf of Respondent No.1/Financial Creditor has argued that neither before the Adjudicating Authority nor before this Appellate Tribunal the Corporate Debtor has raised any dispute on the debt amount. He submits that the appellant/corporate debtor has only raised an issue of limitation. According to him there was no substance on the objection raised by the corporate debtor raising dispute of limitation. He submits that admittedly the corporate debtor defaulted to pay the debt and as such its account was declared NPA on 30.09.2013. Thereafter under the SARFAESI

Act notice was issued and proceeding was also initiated. In the SARFAESI proceeding some of the immovable assets of corporate debtor were sold but it was much lesser amount to the recoverable amount. He submits that before the Adjudicating Authority the Financial Creditor had brought on record number of documents to show that the case was not barred by limitation. He submits that after the account of corporate debtor was declared NPA, Notice under Section 13(2) of the SARFAESI Act was issued by the Financial Creditor and thereafter on 16.04.2014 the corporate debtor submitted balance and security confirmation letter for credit facilities. The Financial Creditor has also brought to the notice of Adjudicating Authority with the liability acknowledgement towards the financial creditor by the corporate debtor for the financial year 2014-15 and financial year 2015-16 which were submitted by the corporate debtor before the Ministry of Corporate Affairs.

14 Thereafter the corporate debtor through its letter dated 23.02.2017 submitted a proposal for OTS of dues of Financial Creditor, IDBI Bank Ltd. Another such

letter with the revised OTS was submitted on 15.09.2018. However, since it was not acceptable to the Financial Creditor the same was informed to the corporate debtor. Subsequent thereto on 22.10.2018 a joint lenders meeting was held to discuss the revised proposal. However, the revised proposal was rejected.

15. In SARFAESI proceeding secured immovable properties were sold between 27.12.2018 and 30.04.2019. Three secured assets, one immovable property at Charni Road and two cars were still available with the Financial Creditor against their claims but the claim was much greater than the value of those remaining secured assets. Learned Counsel for the Financial Creditor has also placed heavy reliance on a judgement of Hon'ble Supreme Court in **Bishal Jaiswal (Supra).** He submits that in view of Section 18 of the Limitation Act the initial period of limitation was already covered by way of acknowledgement by the corporate debtor in its balance sheet for the year 2014-15 and 2015-16. Subsequently, thereafter the debt was also admitted by the corporate debtor when he approached

for One Time Settlement. According to the learned counsel for the Financial Creditor since debt has not been disputed on the flimsy ground of limitation there is no reason to interfere with the impugned order.

16. During hearing of the present appeal, Mr. Mukesh Verma, RP appeared in person. He submitted that in compliance with the earlier order he had already submitted the status report but the said status report was submitted on 25.03.2021. According to status report Committee of Creditors was already constituted and at least till 12.02.2021, 11 COC Meeting was convened for discussing the plans received and for negotiation with the Resolution Applicants. He also supports the impugned order.

17. Besides hearing learned counsel for the parties we have minutely examined the material available on record and particularly the impugned order. The order impugned itself reflects that the plea of limitation raised by the appellant/corporate debtor is not sustainable and is required to be rejected at threshold. It would be appropriate to reproduce the impugned order passed by

the National Company Law Tribunal, Mumbai Bench as follows:-

"1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Punjab National Bank (Financial Creditor), a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, duly represented by Mr. Binod Kumar Sharma, Chief Manager, on the basis of a Power of Attorney dated 02.06.1986 (Exhibit 'A' to the petition at pp.16-21), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against J-Marks Exim (India) Private Limited [CIN: U51311MH2007PTC168736] (Corporate Debtor).

2. The Corporate Debtor is a Private Company limited by shares and incorporated on 14.03.2007 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U51311MH2007PTC168736. Its registered office is at Nos. 58 & 59, 1st Floor, Nakshatra Cine Shoppe,

Ranade Road, Dadar (W), Mumbai- 400028 within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

3. The present petition was filed on 10.06.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹1,45,42,74,724.16 (Rupees one hundred and forty-five crore forty-two lakh seventy-four thousand seven hundred and twenty-four and paise sixteen only) as the total claim amount, comprising inter alia of a sum of ₹35,44,50,688.47 (Rupees thirty-five crore forty-four lakh fifty thousand six hundred and eighty-eight and paise forty seven only) as principal, ₹68,61,49,468.06 (Rupees sixty eight crore sixty-one lakh forty-nine thousand four hundred and sixtyeight and paise six only) as interest and ₹9,31,58,997.52 (Rupees nine crore thirty-one lakh fifty-eight thousand nine hundred and ninetyseven and paise fifty-two only) as penal interest at the rate of 2% p.a., as stated at pp.7-8 of

the Petition. The date of default is 30.09.2013, as stated at p.7 of the petition.

4. The Financial Creditor has granted various credit facilities to the Corporate Debtor aggregating to an amount of ₹37,67,28,000/- (Rupees thirty-seven crore sixty-seven lakh and twenty-eight thousand only) (at page 7 of the Petition). Details of claim as per Exhibit 'V' at pp.479.481 are as follows:

Sr. No.	*Nature of Credit facility*	*Principal outstanding as on 31.05.2019*	*Normal Interest from 01.10.2014 to 31.05.2019 p.a.*	*Other debits less other credit*	*Penal interest @ 2% simple*	*Total claim amount*
	1	*2*	*3*	*4*	*5*	*(2+3+4+5)*
1	*Cast Credit A/c No.05464008701738041*	*35,01,06,230.47*	*68,26,31,758.38*	*32,09,10,740.11*	*9,25,60,238.43*	*1,44,62,08,967.39*
2	*Term Loan (Car Loan) A/c No. 056400NG00053639*	*20,96,656.00*	*18,76,404.40*	*-*	*3,19,387.98*	*42,92,448.38*
3	*Term Loan (Car Loan) A/c No.056400NG00053648*	*22,47,802.00*	*16,41,305.28*	*(3,95,170.00)*	*2,79,371.11*	*37,73,308.39*
	Grand Total	*35,44,50,688.00*	*68,61,49,468.06*	*32,05,15,030.11*	*9,31,58,997.52*	*1,45,42,74,724.16*

5. The Financial Creditor submitted the particulars of Financial Debt at pp.8-9 of the Petition as follows:

i) The Financial Creditor had sanctioned Cash Credit Facilities as Working Capital Limit of ₹35 crore by providing first pari passu charge by way of hypothecation of the Corporate Debtor's stocks of imported/indigenous raw materials, consumables, spares, stock in process, finished goods, packing materials, book debts, etc. and term loan of ₹2.20 crore by providing first charge on land and building and plant and machinery created out of the said term loan vide sanction letter dated 27.12.2011 which is placed as Exhibit-B at pp.22-33. The aforesaid Working Capital Limit was granted under consortium arrangement dated 17.02.2012 with IDBI Bank Limited, a copy of which is placed as Exhibit E at pp 67-107. The Term Loan Agreement dated 17.02.2012 sanctioned by the Financial Creditor individually is placed as Exhibit D at pp.36-66 of the petition. The undertakings dated 12.01.2012 and 17.02.2012 for the above credit facilities availed by the Corporate Debtor are placed as Exhibit F (Colly) at pp.108-114. Further an Inter

Se Agreement between the Financial Creditor and IDBI Bank Limited was executed on 17.02.2012 and the same is placed as Exhibit G at pp.115-134.

ii) A Deed of Guarantee dated 17.02.2012 between Mr. Dinesh G. Jaiswal, director of Corporate Debtor, Ms. Sunita D. Jaiswal, wife of director of the Corporate Debtor, as Personal Guarantors, D.J. Exim (India) Private Limited as Corporate Guarantor in favour of Punjab National Bank (Lead Bank of the Consortium) is placed as Exhibit I at pp.137-153 of the petition. Further a Deed of Guarantee dated 17.02.2012 between Mr. Dinesh G. Jaiswal, director of Corporate Debtor, Ms. Sunita D. Jaiswal, wife of director of the Corporate Debtor, as Personal Guarantors, D.J. Exim (India) Private Limited as Corporate Guarantor in favour of Punjab National Bank as security for the Term Loan is placed at pp.154-167 of the Petition.

iii) A Deed of Hypothecation dated 17.02.2012 between the Corporate Debtor and the Financial Creditor and a Joint Deed of Hypothecation between

the Corporate Debtor and Financial Creditor and IDBI Bank Limited are placed as Exhibit J (Colly) at pp.168-228.

iv) On 31.07.2012 the Financial Creditor sanctioned two more Term Loan (Car Loan) facilities of ₹24,69,000/- and ₹22,59,000/-. To secure the aforesaid Term Loan (Car Loan) facilities the Corporate Debtor executed Letter of Hypothecation for both Term Loans on 31.07.2012. Further the Directors of the Corporate Debtor namely Mr. Dinesh Jaiswal and Mrs. Sunita Jaiswal also executed Agreement of Guarantee 31.07.2012 for the Term Loans (Car Loan). All of these are placed as Exhibit R (Colly) and Exhibit S (Colly) at pp.419-439 of the petition.

v) Further the Corporate Debtor, being in need of additional credit limits, approached Bank of India who sanctioned fresh credit facilities amounting to ₹25 crore and Term Loan of ₹5 crore. In pursuance of sanctioning the aforesaid additional credit limits by Bank of India, a First Supplement Joint Deed of

Hypothecation, a First Supplement Working Capital Consortium Agreement, a First Supplement Inter Se Agreement, a First Supplement Deed of Guarantee, a Memorandum of Deposit of the Title Deeds, a letter of Authority to Lead Bank and an undertaking dated 23.11.2012 were executed adding Bank of India as a party, copies of the same are placed as Exhibit K-Q at pp.229-418 of the petition.

vi) Initially the Corporate Debtor was regularly making payment towards the credit facilities. However, around June 2013, it started defaulting in making the payment and according to the guidelines of the Reserve Bank of India, it was considered as a Non-Performing Asset (NPA) on 30.09.2013. The letter declaring NPA is attached at p.482B of the petition.

vii) On 25.10.2013, the Financial Creditor issued notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. (Exhibit X pp.484-489 of the petition)

viii) On 16.04.2014 the Corporate Debtor submitted Balance and Security Confirmation Letters to the Financial Creditor. (Exhibit T (Colly) pp.440-443)

ix) Commercial Credit Information Report taken from CIBIL as on 03.05.2019 is also attached to the petition stating the credit facilities taken by the Corporate debtor as Exhibit U at pp.444- 455.

x) Further statement of accounts along with Certificate under section 2A of Bankers' Books Evidence Act, 1891 is placed as Exhibit V (Colly) at pp.456-482F.

xi) Further, in pursuance of the action initiated by the Financial Creditor under the SARFAESI Act, secured immovable properties were sold between 27.12.2018 and 30.04.2019. Sale Certificates regarding the same are placed as Exhibit Y (Colly) at pp.490-494.

6. In its reply dated 17.09.2019, the Corporate Debtor has set up the following defence:

a) The present Petition is barred by the law of limitation. The cause of action arose on 30.09.2013, the day on which the Corporate Debtor was declared as Non-Performing Asset (NPA). The present petition was filed on 10.06.2019, hence the petition is time barred.

b) Further the Financial Creditor initiated a recovery action under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 by notice dated 25.10.2013. Pursuant to the initiation of action the Financial Creditor sold a few properties of the Corporate Debtor which were mortgaged as per 'para 1 and 2' at pp. 1-3 of the reply.

c) The Corporate Debtor has relied on section 238-A of Insolvency and Bankruptcy Code, 2016 along with the judgment of the Hon'ble Supreme Court in B. K. Education Services Private Limited V. Parag Gupta and Associates MANU/SC/1160/2018 (Exhibit A pp.6-59 of the reply) which clearly lays

down the application of Limitation Act to petition filed under IBC,2016 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."

d) Further the Corporate Debtor also submits that the default cannot be regarded as continuing wrong so as to invite the application of section 23 of the Limitation Act.

7. The Financial Creditor filed a rejoinder to the affidavit in reply on 25.09.2019 stating the following:

a) Credit facilities and term loans were sanctioned to the Corporate Debtor by the Financial Creditor between 27.11.2011 and 23.11.2012 through consortium arrangements with IDBI Bank Limited and Bank of India and through arrangements between the two parties on various dates. The Corporate Debtor defaulted in paying monthly instalments from June 2013 and hence was declared as a Non-Performing Asset (NPA) on 30.09.2013 as per guidelines of Reserve Bank of India.

b) After issue of notice under section 13(2) of the SARFAESI Act, 2002 by the Financial Creditor, the Corporate Debtor on 16.04.2014 submitted balance and security confirmations letters for the credit facilities taken.

c) Further the Corporate Debtor in its financials for the year FY 2014- 15 and FY 2015-16 submitted with the Ministry of Corporate Affairs acknowledged the liability towards the Financial Creditor. (Exhibit B pp.14-105 of the rejoinder)

d) Further the Corporate Debtor in its letter dated 23.02.2017 submitted a proposal for one time settlement of dues of the Financial Creditor, IDBI Bank Limited and Bank of India. Another letter regarding the same with a revised one time settlement value was submitted on 15.09.2018 (Exhibit C pp. 106-108 and Exhibit E pp. 110-113 of the rejoinder)

e) The Financial Creditor as a consortium leader informed the Corporate Debtor that the one time settlement was not acceptable by any party to the consortium. (Exhibit D p. 109 of the rejoinder). Further a Joint Lenders Meeting was held on 22.10.2018 to discuss about the revised proposal. Minutes of meeting rejecting the revised offer is placed as Exhibit F at pp. 114-116 of the rejoinder.

f) Further in pursuance of the action initiated by the Financial Creditor under the SARFAESI Act, secured immovable properties were sold between 27.12.2018 and 30.04.2019. Three secured assets, one immovable property at Charni Road and two

cars are still available with the Financial Creditor against their claims but the claim amount is much greater than the value of these remaining secured assets. Findings:

8. We have heard the arguments of both sides and perused the records. 9. The objection of the Ld. Counsel for the Corporate Debtor is on the ground of Limitation and defences raised can be classified as follows on the subject of limitation:

(a) Continuing wrong;

(b)Balance confirmation and acknowledgement of liability in the Balance Sheet;

(c) Settlement offers made.

10. The date of default is taken to be 30.09.2013, the day on which the Corporate Debtor was declared as a Non-Performing Asset (NPA) by the Financial Creditor as per the guidelines of Reserve Bank of India.

11. The Corporate Debtor on the point of limitation has relied on the judgment of the Hon'ble Supreme

Court in case of Gaurav Hargovindbhai Dave vs Asset Reconstruction Company (India) Limited & Anr (2019) 10 SCC 572 which reads as follows:

"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.... 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."

12. This principle of law was reinforced by the Hon'ble Supreme Court in the case of Jignesh Shah & Anr vs Union of India & Anr (2019) 10 SCC 750 which reads as follows:

"10…. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition…."

13. The Corporate Debtor further relied on the judgment of the Hon'ble Supreme Court in the case of Sagar Sharma & Anr vs Phoenix Arc Pvt. Ltd. &

Anr (2019) 10 SCC 353 which reiterated the same principle.

14. There is no quarrel with reference to the applicability of the Limitation Act to IBC proceedings. In considering this aspect, the defences raised by the Corporate Debtor are answered as follows:-

On the matter of 'default' not being a continuing wrong.

15. The Corporate Debtor submits a default cannot be regarded as continuing wrong so as to invite the application of section 23 of the Limitation Act.

16. The Corporate Debtor has relied on the judgement of the Hon'ble Supreme Court in the case of ***Vashdeo R Bhojwani V. Abhudaya Cooperative Bank Ltd & anr*** *79(IBC)10/2019 (Exhibit 'B' pp. 61-63 of the reply) by which it was clarified that a default cannot be regarded as a continuing wrong in para 4 as follows:*

"4. ….. 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 s.23 can be invoked….

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."

17. However, this exposition of law in regard to section 23 of the Limitation Act, 1963, has no applicability in so far as the case of the Corporate Debtor is concerned, inter alia for the reason that

there is acknowledgement of liability, as discussed in the subsequent paragraphs.

On the matter of Balance confirmation and acknowledgement of liability in the Balance Sheet

18. The Financial Creditor further submitted that the Hon'ble High Court of Andhra Pradesh in the matter of Vijaya Kumar Machinery & Electrical Stores Vs. Alaparthi Lakshmikanthamma MANU/AP/0150/1968 has clearly laid down in para 50 as follows:

"50. The Punjab High Court also took a similar view in Lahore Enamelling and Stamping Co. Ltd. v. A.K. Bhalla. In paragraph 37 it was laid down as follows:

> *"Debts due to creditors not mentioned by name but included in the item relating to 'loans (unsecured)' or as due to 'sundry creditors' mentioned in the balance-sheet amount to an acknowledgment within the provisions of*

Section 19 of the Indian Limitation Act, so as to extend the period of limitation with effect from the date of the signing of the acknowledgment."

(emphasis added)

19. The Hon'ble High Court of Delhi in the matter of Bhajan Singh Samra Vs. Wimpy International Limited MANU/DE/6688/2011 reinforced the same view.

20. Further the Financial Creditor submits that the Hon'ble High Court of Kerala in the matter of Al-Ameen Limited Vs. K. P. Sethumadhavan MANU/KE/1189/2017 decided upon the date on which the acknowledgement in the Balance Sheet should be considered and the same reads as follows:

"7. The complex question is as to whether Ext.A1 balance sheet and the profit and loss account is an acknowledgment of liability for the period ending 31.3.1995 to which it relates or on 26.3.1997 when

it was signed. This assumes significance since the suit for money was filed on 3.1.2000 which is well beyond three years from 31.3.1995 though within three years from 26.3.1997. The period of limitation for filing a suit of the nature is three years from the acknowledgment and there is a cleavage in judicial opinion as to from which date the period will run…

*8. …****

9. Will not the signing of the balance sheet and the profit and loss account at best be an acknowledgment made by a director of a debt due to himself is the further question posed by the defendant. Reliance is placed on P. S. Thirumalai Iyengar v. Official Liquidator [AIR 1962 Madras 253(DB)] and A. C. K. Krishnaswami v. M/s. Stressed Concrete Constructions Pvt. Ltd. [AIR 1964 Madras 191]. But the precise question has been answered in Re Gee & Co's case (supra) as follows: 'It seems to me plain that an acknowledgment signed by the directors in relation to their own debt would be fully effective if sanctioned by every

member of the company.....The general meeting of the company at which the accounts were adopted and the state of the Eccles account confirmed was in fact a meeting attended by, or by the representative of, every member of the company.....In these circumstances, it seems to me plain that all the corporators must be taken to have agreed to the directors' written acknowledgment of the debt.'

Nobody has a case that Ext.A1 balance sheet and the profit and loss account was not placed in the annual general body meeting of the defendant and got approved by the board of directors as mandated by the Company Law. The irresistible conclusion therefore is that Ext.A1 balance sheet and the profit and loss account operates as an acknowledgment on 26.3.1997 of the liability on 31.3.1995."

21. The Corporate Debtor per contra, relied on a judgment of Hon'ble Calcutta High Court in case of Darjeeling Commercial Co. Ltd. vs Pandam Tea Co. Ltd MANU/WB/0117/1981 which reads as follows:

“16. Reference may also be made to a latest decision of the English court In Gee & Co. (Woolwich Ltd.), re [1974] 1 All ER 1149; 2 WLR 515(Ch.D), where the acknowledgment of the liability, of a company in its balance-sheet came up for consideration and after reviewing the relevant decisions including some of the decisions cited by Mr. S. B. Mukherjee on behalf of the company and summarising the relevant facts of the case which, in my view, are very similar to the present one, Brightman J. observed at page 1160 (p. 527 of 2 WLR) as follows:

"I shall accordingly decide this case on the footing that a balance sheet, if duly signed by the directors, is capable of being an effective acknowledgment of the state of indebtedness as at the date of the balancesheet; and that, in an appropriate case, the cause of action will be deemed to have accrued at the date of the balance-sheet, being the date to which the signature of the directors relates. It’s my judgment the balance-sheet of the company as at

31st December 1965, signed by the directors on 25th November, 1966, would have been an effective acknowledgment as at 31st December, 1965, of the liability of the company so as to take the matter out of the statute, if the acknowledgment had not been made by the directors in favour of one of themselves."

22. In view of the above enunciation of law by the Hon'ble High Courts of Andhra Pradesh, Delhi and Kerala, it is clear that an acknowledgement of liability in the balance sheet of the company constitutes an acknowledgment of liability within the meaning of section 18 of the Limitation Act, 1963, with attendant consequences. In the present case, there is acknowledgement in the balance sheet of the corporate debtor as at 31.03.2015 and 31.03.2016, and therefore, a fresh period of limitation began to run from that date. Further, the judgment of the Hon'ble Calcutta High Court recognises the fact that "in an appropriate case, the cause of action will be deemed to have accrued at

the date of the balance-sheet, being the date to which the signature of the directors relates." In view of the above judgments, it appears to us that the date of signatures of the directors be construed as the date of effective acknowledgement of the state of indebtedness of the company.

On the matter of Settlement Offers made:

23. The Financial Creditor has argued by relying on the judgment of the Hon'ble Supreme Court in the case of ITC Limited Vs Blue Coast Hotels Ltd. & Ors 2018 SCC OnLine SC 237 which reads as follows:

"Letter of Undertaking 'Without Prejudice'

35. Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart

from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's case as pointed out by Mr. Harish Salve, "as a rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure." It was argued in a subsequent case that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:

"But when a statement is used as acknowledgement for the purpose of s. 29 (5), it is

not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement." Therefore, the without prejudice rule could have no application."

24. In response to this, the Corporate Debtor has submitted the judgment of Shibcharan Das vs Firm Gulabchand Chhotey Lal AIR 1936 All 157 which states as follows:

"4. The defendant also called a Vakil, Pandit Behari Lal Sharma, who gave evidence corroborating that given by the defendant himself. In our judgment this witness's evidence was not admissible. Negotiations were being conducted with a view to settlement, and that being so, we are bound to hold that these negotiations were being conducted without prejudice." In such circumstances it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take

something less than what he later claims he is legally entitled, such must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement."

25. The Financial Creditor has further submitted an order of the National Company Law Appellate Tribunal (NCLAT) in the case of Babulal Vardhaji Gurjar vs Veer Gurjar Aluminium & Anr CP (IB)-488/I&BP/MB/2018 which reads as follows:

"12. The 'Financial Creditor' has also brought on record a letter dated 31st July 2018 issued by the appellant to the respondent - 'Financial Creditor' for one-time settlement. The aforesaid fact shows that there is a continuous cause of action under Section 19 filed by the respondent - 'Financial Creditor' which is pending before the DRT….

29. Part V (First Division) of Limitation Act relates to 'Suits relating to immovable property' to recover possession of the property mortgaged and afterwards transferred by the mortgagee for a valuable consideration. The period of limitation is 12

years since the transfer becomes known to the plaintiff [Article 61(b)].

30. In view of the aforesaid position of law, the property having mortgaged, we also hold that the claim is not barred by limitation as the period of limitation is 12 years with regard to mortgaged property and in terms of Section 5 (7) read with Section 5(8) as the property is mortgaged, Respondent No. 2 also comes within the meaning of 'Financial Creditor'."

26. In view of the law laid down by the Hon'ble Supreme Court in ITC Limited (supra), we hold that the offer of one Time Settlement (OTS) made by the Corporate Debtor to the Financial Creditor constitutes an acknowledgement of liability within the meaning of section 18 of the Limitation Act, 1963. The Judgment of the Hon'ble Allahabad High Court in Shibcharan Das (supra) must be held to be inapplicable in view of the judgment of the Hon'ble Supreme Court in ITC Limited. Further the order of the Hon'ble NCLAT discussed in previous paras

directly relates to this matter and can be a continuous cause of action as well. 27. In the light of the above discussion and the fact that the Corporate Debtor in its financial statements for the F.Y. 2014-15 and F.Y. 2015- 16 filed with the Ministry of Corporate Affairs acknowledges the liability towards the Financial Creditor; and also in its letter dated 23.02.2017 submitted a proposal for one time settlement of dues of the Financial Creditor, IDBI Bank Limited and Bank of India, which was also revised on 15.09.2018.

28. Therefore, we hold that the petition filed by the Financial Creditor is within limitation.

29. This Petition reveals that there is a debt as defined in section 3(11) of IBC; there is a default within the meaning of section 3(12) of IBC. Therefore, the Petition made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is more than minimum amount of one lakh rupees

stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

30. The Financial Creditor has proposed Mr. Mukesh Verma as Interim Resolution Professional (IRP) in the matter.

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

(a) The petition bearing CP(IB) 2176/MB/C-IV/2019 filed by Punjab National Bank, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against J- Marks Exim (India) Private Limited [CIN: U51311MH2007PTC168736], the Corporate Debtor, is admitted. (b) There shall be a moratorium under section 14 of the IBC, regarding the following:

(i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) Mr. Mukesh Verma, Registration No.IBBI/IPA-001/ IPP01665/ 2019-20/12522, residing at A 504, Manish Garden Cooperative Housing Society, Manish Nagar, J.P. Road, Andheri West, Mumbai-400058, is appointed as Interim Resolution Professional to carry out the functions as mentioned under IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP/ RP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest with the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week

from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of ₹3,00,000/- (Rupees three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) The IRP/RP shall submit periodical reports to this Adjudicating Authority indicating the progress of the CIRP.

(j) The Registry is directed to communicate this Order to the IRP, Financial Creditor, IRP and the Corporate Debtor by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

(k) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance

report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

18. On going through the aforesaid order there is no dispute that the account of corporate debtor was declared NPA on 30.09.2013 . It is also not in dispute that balance sheet for the year 2014-15, 2015-16 showing acknowledgement was brought to the notice of the Adjudicating Authority. It is also not in dispute that on 16.4.2014 the corporate debtor had submitted balance cum security letter acknowledging the debt. The said balance sheet of 2014-2015 and 2015-16 were uploaded by the corporate debtor on the portal of MCA website. Thereafter on 23.02.2017 the corporate debtor vide its letter dated 23.02.2017 submitted proposal for settlement of dues. The said letter was submitted with an offer of an amount of Rs.20 crore in settlement of dues of all the three banks i.e. PNB, IDBI, Edelweisse ARC (assignee of Bank of India). Thereafter on 15th September, 2018 the corporate debtor submitted revised offer for settlement of dues and offered Rs.27 crores. As

such on 22nd October, 2018 a joint lender meeting was held wherein the representative of corporate debtor was present. However, after discussions in the meeting revised OTS was also rejected. After rejection of OTS on 27.12.2018 in the Sarfaesi proceeding two secured immovable properties were sold. Since outstanding was much much higher than the amount recovered after sale on 10.06.2019 application under Section 7 of the Code was filed before the Adjudicating Authority. All the aforesaid facts were brought to the notice of the Adjudicating Authority and thereafter the Adjudicating Authority by impugned order admitted the application and initiated CIRP which is still pending.

19. On examination of aforesaid fact there is no reason to accept the plea of Learned Counsel for the appellant that the initiation of CIRP was barred by limitation. The question regarding acknowledgement has already been set at rest by three Judges Bench of Hon'ble Supreme Court which was passed on 15.4.2021 reported in 2021 6 SCC 366 in **Bishal Jaiswal (Supra).** Whatever points have been raised by the learned counsel for the

appellant in the present case, is squarely covered by the Hon'ble Supreme Court in Bishal Jaiswal (supra) case. As per judgement of the Hon'ble Supreme Court in a proceeding under the IBC, provisions of Limitation Act is applicable though Section 238A was inserted in the IBC w.e.f. 6.6.2018. It has been clarified by the Hon'ble Supreme Court that it was clarificatory in nature and it was having retrospective effect. The Hon'ble Supreme Court in **Bishal Jaiswal case (Supra)** has relied upon its own judgement passed in **Laxmi Pat Surana Vs Union Bank of India** and the same has been reproduced in para 12 of the Judgement in **Bishal Jaiswal case.** We may not do better than to reproduce the same:-

> *"12. Nearer home, in Laxmi Pat Surana v. Union Bank of India, Civil Appeal No. 2734 of 2020, a judgment delivered on 26.03.2021, this Court, after referring to various judgments of this Court, including the judgment in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1 ["Babulal"], then held:*
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> > *"41. The purport of such observation has been dealt with in the case of Babulal Vardharji Gurjar. Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case so warrants. Considering that the purport of Section 238A of the Code, as enacted, is*

clarificatory in nature and being a procedural law had been given retrospective effect; which included application of the provisions of the Limitation Act on case-to-case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case of giving new lease to time barred debts under the existing law (Limitation Act) as such.

42. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application under Section 7 of the Code would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:

"18. Effect of acknowledgement in writing.–

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement 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 acknowledgement was so signed.

(2) Where the writing containing the acknowledgement 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 1872), oral evidence of its contents shall not be received.

Explanation.–For the purposes of this section,–

(a) an acknowledgement 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."

20. So far as plea of Learned Counsel for the appellant that limitation should be counted from the date of declaration of the account of Corporate Debtor as NPA, it has also been dealt with in the same para by the Hon'ble Supreme Court and it has been clarified that ordinarily a declaration of the loan account/debt as NPA can be reckoned as date of default but it may not be

considered as the final date for calculation of the limitation. If we consider the application of Section 18 of the Limitation Act certainly if acknowledgement has been made within the period of three years from the date of declaring the account as NPA, the period of limitation shall be extended from the date of acknowledgement. In the present case the Financial Creditor has established that within the limitation period initially debt was acknowledged in 2014. Thereafter in view of acknowledgement made in balance sheet which has been obtained from the website of the MOCA which was for the year 2014-15 and 2015-16 the limitation was extended. Again when the appellant/corporate debtor approached the bank for OTS the date of limitation was further extended from the date of OTS and finally offer of OTS was given. On examination of the chain of events which we have elaborated hereinabove there is no difficulty in coming to the conclusion that the petition under Section 7 was filed within the period of limitation or within extended period of limitation. The Hon'ble Supreme Court in **Bishal Jaiswal case** has approved

and reproduced law laid down in Laxmi Pat Surana case (Supra) which has been incorporated in para 12 of the Judgement:-

> *"43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" - not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate*

guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgements, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgement in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of

limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgement must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code."

21. An entry made in the balance sheet of the corporate debtor as to whether amounts to acknowledgement of liability under Section 18 of the Limitation Act has been dealt with in detail in para 16 and 17 of **Bishal Jaiswal case (Supra)** which is quoted hereinbelow:-

> "*16. The next question that this Court must address is as to whether an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under Section 18 of the Limitation Act.*
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> *17. Several judgments of this Court have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act. Thus, in Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402, this Court held:*
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> > *"12. The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation*

Act, 1963 and extend the period of limitation for the discharge of the liability as debt. …"

22. In view of the law laid down by the Hon'ble Supreme Court and facts which we have discussed hereinabove we are satisfied that the application under Section 7 of the Code was filed by the Financial Creditor within the period of limitation. The appellant has never raised any dispute on the question of debt i.e. recoverable amount nor a dispute has been raised regarding endorsement in the balance sheet or offer of OTS. In such view of the matter there is no reason to interfere with the impugned order. The appeal in absence of any merit deserves to be rejected. Accordingly the appeal stands dismissed without cost.

23. In view of dismissal of the appeal, interim order passed earlier stands automatically vacated.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr.Ashok Kumar Mishra)
Member (Technical)

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