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NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 1790 (ND)/2019

In the matter of:

UCO BANK
Reg. Office: 10, BTM Sarani,
Kolkata-700001

Also at
Branch Office: Assets Management Branch, 5,
Sansad Marg, UCO bank Building, New Delhi,
[Through its Asstt. General Manager Nemi Chand]

.....Financial Creditor

Vs.

M/S.SASI POWER PVT. LTD.
Regd. Office at: A-60, Okhla Industrial Area,
Phase-II, New Delhi

.....Corporate Debtor

SECTION: U/S 7 of IBC, 2016

Order delivered on: 29.01.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

For the Petitioner/Financial Creditor: Mr. Manish Paliwal, Mr. Vikas
Kumar, Mr. Archit Katlana

For the Respondent/ Corporate Debtor: Ms. Purvi Marwaha, Ms. Henna
George, Ms. Divya Kumar



27.01.20

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its financial debt.

2. As per averments made in the petition, in the year 2006, the Corporate Debtor through its Authorised Representative approached the Applicant Bank/Financial Creditor and requested for financial assistance in the shape of Term Loan. The Financial Creditor on request of the Corporate Debtor agreed for the Credit Facility of Rs. 12,80,45,000/- to the Corporate Debtor on the terms and conditions as laid down in the Sanction Letter dated 20.12.2006 for the Credit Facility and accordingly, the Corporate Debtor executed various loan and security documents for the said credit facilities.

A formal Term Loan agreement was signed on 03.01.2007 between Corporate Debtor and Financial Creditor for a total amount of Loan of Rs. 12,80,45,000/- which was repayable in 87 monthly instalments. That the terms and conditions for the repayment of loan was duly agreed in the agreement and the same was as follows:-



Repayment Schedule:

Entire Term Loan is repayable in 87 monthly instalments of Rs. 10,84,000.00 plus interest after 18 months of construction and gestation period or 6 months after start up of the project; whichever is earlier. Interest is to be serviced on "as and when applied basis" for moratorium as well as repayment period.

Further, Sh. Ajay Kumar Choudhary, Sh. Kapil Choudhary and Sh. Mukund Choudhary also offered their personal guarantee in their individual/personal capacities, in favour of the applicant/Financial Creditor. The Authorised Signatory of the sanctioned Credit facilities of an amount of Rs. 12,80,45,000/- and attended the Office of the Applicant Bank/Financial Creditor and executed the following necessary document amongst other as per norms:-

1. Letter of Guarantee dated 03.01.2007.
2. Hypothecation documents dated 03.01.2007.
3. Mortgage by deposit of Title Deeds dated 10.02.2007.

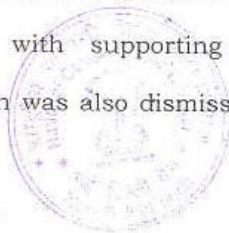
Further, it was duly agreed that in case of any default in the payment of the instalment either of the principal or interest mentioned above, the Applicant Bank will be entitled to charge

interest at the rate of 1.00% above the Bank Prime Lending Rate subject to the minimum of 13% per annum.

The account of Corporate Debtor was classified as "Non Performing Asset" on 31.12.2014. The Applicant Bank on 14.02.2015 sent the notices under S. 13(2) of SARFAESI Act, 2002 to the Corporate Debtor as well as the Directors in respect to the assets given as security interest in favour of the bank.

The Respondent/Corporate Debtor paid some amount in parts towards the said Credit Facilities from time to time and lastly a part payment was made on 10.06.2015 as shown in the statement of account and the Respondent agreed to repay the outstanding of the Bank but thereafter there is no payment since 10.06.2015.

The Bank/Financial Creditor initiated proceedings under Section 19 of the Recovery of Debts due to Banks and Financial Institution Act 1993 before Ld. DRT, New Delhi on 28.04.2015. The Company/Corporate Debtor filed its reply on 14.10.2015 and raised a preliminary objection that the loan amount of Rs. 72,00,000/- has been paid and the Bank has issued a certificate that there is no overdue amount. The Corporate Debtor filed an I.A. before the Ld. DRT to decide the preliminary objections, however, the Ld. DRT, New Delhi dismissed the said IA ("I.A. No. 386/16") of the Corporate Debtor on 29.06.2016. The Corporate Debtor filed another I.A. being I.A. No. 751/2016 to take on record the detailed Written Statement along with supporting documents. After hearing, the said application was also dismissed by Ld. DRT vide

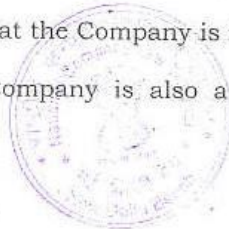


its order dated 01.09.2017. The Corporate Debtor/ Respondent filed the Appeal against the said dismissal before the Ld. DRAT, New Delhi under Section 20 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 which was also dismissed by the Ld. DRAT. The Corporate Debtor filed a Writ Petition before Hon'ble High Court of Delhi which was allowed and the matter was remanded back to Ld. DRT. The matter is still pending before Ld. DRT, New Delhi.

However, as the Corporate Debtor has failed to pay the outstanding amount of the loan and the interest accrued thereon, the Applicant/Financial Creditor has filed the present petition before the Hon'ble Tribunal, claiming Rs 2,83,49,880.36/- (Principal Amount: Rs. 1,51,03,976.12/- and Interest Amount: Rs. 1,32,45,904.24/- (Till 22.07.2019 @13.5% Per Annum as agreed between the parties).

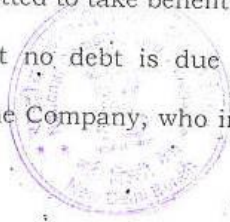
3. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:

- i. The petition is not maintainable/no case is prima facie made out under Section 7 of the Code. The mandate of Sections 65 and 75 of the Code read with Section 7 is that apart from 'default' and the application being 'complete', the Petitioner has to demonstrate and this Hon'ble Adjudicating Authority has to be 'satisfied' that the Company is insolvent in the long term. Further, the Company is also a net worth positive



entity, therefore, both on the principles of commercial viability and balance sheet test, the Company is not insolvent.

- ii. The Company and its promoters fulfilled all their obligations and also made payments of Rs. 72 lakhs in spite of being in stress, however, despite several requests, the Applicant bank failed to release its portion of balance loan amount as per the sanction letter, due to which, the company could not implement its project and suffered huge losses. Out of Rs. 12.80 crores of the sanctioned amount, the Bank disbursed only an amount of Rs. 2.27 crores. Due to omission on the part of the Bank, all the movable/immovable assets that were to be used during the course of the project have been lying idle on the site and failed to generate any revenue due to the reluctance and non-disbursement of further tranche of loan by the Applicant Bank leading to zero income for all the parties involved. Therefore, insolvency petition is liable to be rejected. Refer *Gujarat State Financial Corporation V Lotus Hotels Pvt. Ltd.* [(1983) 3 SCC 379] and *Radha Kohli & Ors. Vs M/s Logical Jewellers Pvt. Ltd.* [Judgement dated 02.01.2019 passed by the Principal Bench, New Delhi]. The bank has been indulging in vexatious and frivolous litigation and cannot be permitted to take benefit of its own wrongs.
- iii. It is submitted that no debt is due and payable by the Company, in fact, the Company, who immensely suffered at



the hands of the Bank, has to recover more than the claim amount from the Bank i.e. Rs. 33,47,58,000/- (Page 10 of the Reply). Accordingly the Corporate Debtor Company has legitimate Counter Claim/Set Off against the Bank in this matter, as the Bank failed to fulfil reciprocal promises as required under Section 39 of the Indian Contract Act read with Explanation b, which entitles the Corporate Debtor to a legitimate defense of loss of profits, damages and compensation well recognized in law.

- iv. It is thus submitted that the insolvency petition suffers from the suppression of material facts and the Bank has initiated malafide proceedings which are barred under Section 65 of the Code. (Refer: *Swiss Urban Land and Infrastructure Limited & Anr. V. Union of India* [2019 SCC Online SC 73] and *Pioneer Urban Land and Infrastructure Limited & Another V Union of India* [Supreme Court of India in WP (Civil) 43/2019 and *S.P. Chengalvaraya Naidu (Dead) V Jagannath (Dead)* [1994] 1 SCC 1].
- v. It may also be noted that the petition is grossly barred by limitation since the default (which default is denied in entirety) has allegedly occurred in the year 2014. (Refer: Judgment dated 18/09/2019 passed by the Hon'ble Supreme Court in the matter of *Gaurav Hargovindbhai Dave Versus Asset Reconstruction Company (India) Ltd. & Anr.* and

Judgment dated 02.09.2019 in the matter of *Vashdeo R. Bhojwani Vs. Abhydaya Co-operative Bank Ltd.*).

4. The Petitioner/Financial Creditor has filed its rejoinder and has asserted the following contentions:

- i. That the default was continuing and it occurred again when the Applicant Bank initiated the Recovery Proceedings before DRT, Delhi and the Respondent failed to repay the outstanding amount. The Respondent approached the Applicant Bank in September, 2018 with an OTS proposal dated 15.09.2018 to settle in matter. It is respectfully submitted that the amount was due and payable by the Respondent, therefore, the Respondent approached the Bank for settlement. However, the proposal was not satisfactory and therefore, the same was not accepted. The Respondent also made the revised OTS proposals on 05.10.2018 and 15.02.2019. However, none of the proposal was in accordance with the Bank Policy and therefore, the same were rejected by the Bank.
- ii. That the Respondent has alleged in its reply that the Applicant Bank is liable to pay an amount of Rs. 33,47,58,000/- to the Respondent and accordingly, the Respondent made a counter claim for the said amount. It is respectfully submitted that the Respondent had also alleged the same before the DRT. The Respondent had filed the

application for taking on record the counter claim. The said application was dismissed by the DRT, Delhi and thereafter the Respondent filed an Appeal before the DRAT, Delhi and the same was dismissed by the DRAT Delhi vide the order dated 13.11.2018. The Respondent had challenged the order dated 13.11.2018 before the Hon'ble High Court of Delhi by way of filing WP(C) 13387/2018 & CM No. 52136/2018 and the same was decided the Hon'ble Delhi High Court on 12.12.2018 wherein the Hon'ble High Court remanded back the matter to DRT, Delhi. It is further submitted that the Respondent has appeared as per the direction of the Hon'ble High Court and DRT had dismissed the application for taking the counter claim as detailed Written statement vide order dated 10.04.2019.

- iii. That there is clear debt and default on part of the Respondent, the Hon'ble NCLT, Ahmedabad Bench in case of *V.R. Polyfab Pvt. Ltd. Versus Sadhubhav Enterprise Pvt. Ltd.* [C.P. No. (IB) No. 115/7/NCLT/AHM/2017], on the question of counter claim has observed that even assuming that the Corporate Debtor is entitled for certain amount from the Financial Creditor, the same can only be treated as a set off of counter claim and therefore, it cannot be treated as a 'dispute' relating to financial debt due to the financial creditor from the Corporate Debtor. Further, it is observed that though Corporate Debtor has pleaded counter-claim or



set-off, but it cannot be said that there is no default in repayment of financial debt by Corporate Debtor.

- iv. That the outstanding amount is due and there is a clear default on part of the Respondent as the Respondent failed to repay the amount as per the agreed terms. The Account of the Respondent was never upgraded as the total outstanding was of Rs. 2,16,36,155.90/- as on 30.12.2014, out of which only an amount of Rs. 72,00,000/- was made by the Corporate Debtor and the remaining amount was outstanding. Therefore, in view of the provisions of the IBC and various judicial pronouncements, the present petition needs to be admitted.
5. We have gone through the application, reply and rejoinder and the documents filed by both the parties and heard the arguments and perused written submissions made by both the parties.
6. In course of arguments, Ld. Counsel appearing for the Financial Creditor submitted that by filing reply the Corporate Debtor admits this fact that the loan has been sanctioned and still it has not been repaid by the Corporate Debtor. The only contention of the Corporate Debtor is that he has filed the counter claim proceeding which is pending before the DRT. He further submitted that such objection of the respondent was dismissed by the DRT, against which the Corporate Debtor filed an appeal

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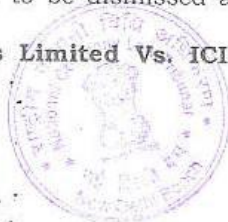


before the DRAT and DRAT has also confirmed the order passed by the DRT and against that order the Corporate Debtor had filed a writ before the Hon'ble Delhi High Court being Writ No. WP (c) 13387/2018 and CM No: 521136/2018 and the Hon'ble Delhi High Court by order dated 12.12.2018 remanded back the matter to the Hon'ble DRT and the application was again dismissed by the DRT vide order dated 10.04.2019 and now there is no counter claim pending. He further submitted that even to trigger the proceeding under Section 7 of IBC, it is not necessary to consider whether any dispute is pending or not rather the Financial Creditor has to establish two things i.e. there is a financial debt and there is default in the payment of financial debt in view of the decision of the Hon'ble Supreme Court in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407**. He further submitted that the Corporate Debtor has also filed an application for one time settlement on 15.09.2018, 15.10.2018 and lastly on 15.02.2019. He further submitted that since the matter was pending before the Court of competent jurisdiction, so the contention of the Corporate Debtor that it is barred by limitation is not liable to be admitted and the decision on which the Corporate Debtor has placed reliance is not applicable under the facts and circumstances in the case in hand and he also placed reliance up on the decision of the Hon'ble NCLAT passed in **Company Appeal (AT) Insolvency 549/2010 Babulal**



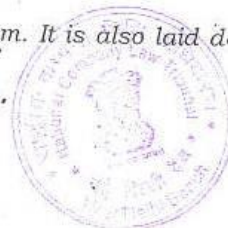
Vardhaji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd.

7. On the other hand, Ld. Counsel for the Corporate Debtor in course of her arguments submitted that the debt is barred by limitation, therefore, no debt is due and if it is not due then Section 7 of the IBC is not applicable and she placed reliance on **Gaurav Hargovindbhai Dave Vs Asset Reconstruction Company (India) Ltd. & Anr.** and on **Vashdeo R. Bhojwani Vs. Abhydaya Co-operative Bank Ltd.** He further submitted that since the Financial Creditor has failed to pay his balance loan amount due to which the company could not implement its project and suffered huge losses, so it is due to the fault of Financial Creditor/ UCO Bank, project of the Corporate Debtor has not been started, which causes financial loss to the Corporate Debtor and for which the Corporate Debtor has filed a counter claim before the DRT, which is still pending. He further submitted that after the matter was remanded back by the Hon'ble Delhi High Court, the Corporate Debtor has filed an IA for modification of the order and same was also rejected by the Ld. DRT vide order dated 10.04.2019 and against that an appeal is pending before the Ld. DRAT therefore, the counter claim is in existence. He further submitted that if the debt is not due then the application on this ground is liable to be dismissed and placed reliance on **Innoventive Industries Limited Vs. ICICI Bank reported in**



2018 (1) SCC 407. He further submitted that if the Bank fails to fulfill its obligation, the insolvency proceeding is liable to be dismissed and in this regard, he placed reliance upon the decision reported in **Gujarat State Financial Corporation V Lotus Hotels Pvt. Ltd.** [(1983) 3 SCC 379] and also on the judgment dated 02.01.2019 passed by the Ld. Principal Bench, New Delhi in the case of **Radha Kohli & Anr. Vs. M/s Logical Jewellers Pvt. Ltd.** He further submitted that the petition filed by the Financial Creditor also suffers from the suppression of materials facts and therefore, the bank is liable to be prosecuted and the proceeding is barred under Section 65 of the Code and in this regard, he placed reliance upon a decision reported in 2019 SCC online SC 73 and 1994 SCC (1). He further submitted that in this regard, the company had recovered more than the amount financed by the company and the insolvency proceeding is not recovery petition, this is held by the Hon'ble Supreme Court in a Civil Appeal No. 9597 of 2018 on 23.10.2018 in the case of **Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited.** The relevant para is quoted below:

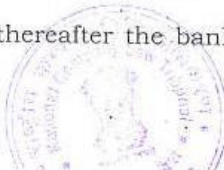
"15. In a recent judgment of this Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited¹, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever



there is existence of real dispute, the IBC provisions cannot be invoked."

The Corporate Debtor further submitted that without admitting the liability, the Corporate Debtor is always ready to settle the disputes amicably with the bank.

8. Now, in the light of submissions made on behalf of the parties, we shall consider the claim of the parties.
9. We have gone through the averments made in the petition, reply filed by the Corporate Debtor as well as averments made in the rejoinder to the reply filed by the Financial Creditor and the documents enclosed with the petition and on careful perusal of the same, we find that it is not in dispute that the Financial Creditor has sanctioned Rs. 12,80,45,000/- on 12.12.2006 and thereafter a loan agreement was signed on 03.01.2007 between the Financial Creditor and the Corporate Debtor of the aforesaid amount. We further find that out of aforesaid amount, the part payment of Rupees 2.27 Crores only was made but entire amount has not been repaid by the Corporate Debtor and that is the reason, the Financial Creditor in part 4, Column 2 mentioned the default of principal amount as Rs. 1,15,103,976.12/- and interest amount as Rs. 1,32,45,904.24/-. We further find that in part 4, column 2, the applicant bank has also mentioned the date of first default according to him was 31.12.2014, when the NPA was declared by the bank and thereafter the bank moved before the

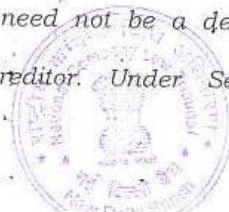


DRT, who disposed of the claim on 28.04.2015, thereafter the Corporate Debtor filed an appeal before the DRAT which was dismissed on 13.11.2018.

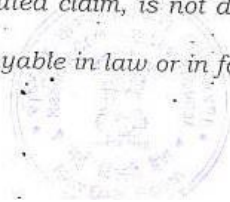
10. In course of arguments, Ld. Counsel for the Financial Creditor also informed that again after the dismissal of the order passed by the DRAT, the Corporate Debtor has filed an application before the Hon'ble Delhi High Court, which was dismissed vide order dated 12.12.2018 and remanded back the matter to the DRT and the same was again dismissed on 10.04.2019.

11. On the basis of aforesaid facts, now we shall consider whether the Financial Creditor is able to establish that there is a financial debt given by him to the Corporate Debtor and that debt is not paid by the Corporate Debtor and there is default. Since, both the parties have placed reliance upon a decision of Supreme Court in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407**. Therefore, we would like to refer these decisions and the relevant portion of the decision is quote below:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an

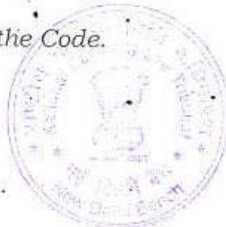


application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. 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.

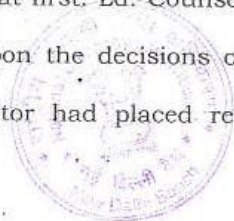
29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.



30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise".

12. Now, in the light of the aforesaid decisions, we shall consider the case in hand and we have again gone through the averments made on behalf of the parties in the petition, reply & rejoinder and the documents filed with the application and the contention of the parties. Since, the Corporate Debtor claims that the application is barred by limitation and there is no debt payable and on this fact, he placed reliance on a decision passed in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407**. Therefore, at this juncture, we would like to discuss the issue of limitation at first. Ld. Counsels for both the parties had placed reliance upon the decisions on the point of limitation. The Corporate Debtor had placed reliance upon a

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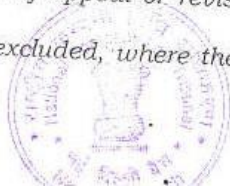
judgment dated 18.09.2019 passed by the Hon'ble Supreme Court in the matter of **Gaurav Hargovindbhai Dave Versus Asset Reconstruction Company (India) Ltd. &Anr.** and judgment dated 02.09.2019 in the matter of **Vashdeo R. Bhojwani Vs. Abhydaya Co-operative Bank Ltd.** and the Financial Creditor placed reliance upon a judgment passed by the Hon'ble NCLAT in the matter of **Babulal Vardhaji Gurjar vs Veer Gurjar Aluminium Industries Pvt. Ltd.** We have gone through the decisions on which the parties have placed reliance. So far the decision upon which the Financial Creditor has placed reliance is concerned that decision is in respect of applicability of Article 62 of the Limitation Act and the **Hon'ble Apex Court in a decision in Civil Appeal No. 4952/2019 Gaurav Hargovindbhai Dave Versus Asset Reconstruction Company (India) Ltd. &Anr.** held that:

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.

Therefore, in the light of the aforesaid decision, we are also of the considered view that the Article 62 of the Limitation Act is not applicable in this case. Now, we shall consider this aspect that the present application is barred under Article 137 of the Limitation Act or not. Admittedly, the loan was declared NPA on 31.12.2014 and thereafter, the matter was pending between the parties before the DRT, DRAT and the Hon'ble Delhi High Court till 12.12.2018 and thereafter remanded the matter back to the DRT, which was again dismissed on 10.04.2019, therefore, at this juncture, we would like to refer Section 14 of the Limitation Act and the same is Quoted below:

"14. 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

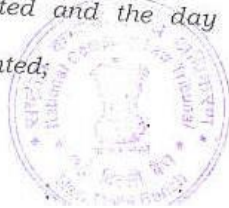


relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(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.

13. Mere plain reading of the provision shows that the period during which a party has been prosecuted with due diligence, another proceeding whether in a court of first motion or an appeal or revision against the party that period shall be excluded where the proceeding relates to the same matter in issue and therefore, when we placed reliance upon Section 14 of the Limitation Act, then we are of the considered view that the decision upon which the Ld. Counsel for the Corporate Debtor has placed reliance under the facts and circumstances of the case in hand is not applicable rather in view of the facts discussed by us in the aforementioned para, we are of the considered view that period spent in the proceeding pending before the DRT, DRAT and Hon'ble Delhi High Court is liable to be excluded while computing the period of limitation and when we shall exclude that period then we are of the considered view that application filed by the Financial Creditor is within time. At this juncture, we would also like to refer the decisions on Hon'ble NCLAT passed in case no. **Company Appeal No. (AT) 672/2019 Sesh Nath Singh and Ors.**



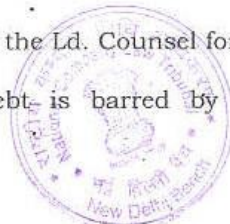
Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. and Ors., in
which the Hon'ble NCLAT held that:

"10. We have carefully examined the issue of limitation. The Respondent has bonafidely prosecuted within limitation period under SARFEASI Act. Therefore, the Respondent is entitled for the exclusion of time period under Section 14(2) of Limitation Act i.e. the period of 3 years and 6 months. After exclusion of this period the application filed under Section 7 of I&B Code is within limitation period.

11. In such circumstances we find that the application under Section 7 is within limitation and there is no force in the argument of Learned counsel for the Appellant that the application is time barred. No interference is called for. Hence the appeal is dismissed. No order as to costs."

Therefore, in the light is the decision quoted above, we find, no force in the contentions raised on behalf of the Ld. Counsel for the Corporate Debtor that the present proceeding is barred by limitation, accordingly, we find that it is well within time.

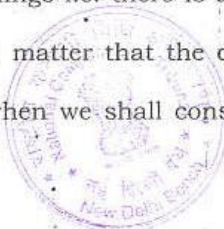
14. So far, the contention of the Ld. Counsel for the Corporate Debtor is concerned, since debt is barred by limitation, hence no



debt is due, for the reasons discussed above, it is not liable to be accepted. At this juncture, we would also like to refer Para 30 of the decision passed in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407** and the same is quoted below:

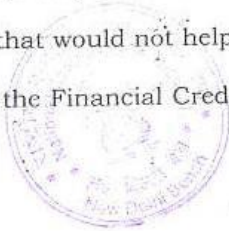
“30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due”. i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise”.

In view of the aforesaid decision, we are of the considered view that in order to trigger the proceeding under Section 7 of IBC, we have to see only two things i.e. there is a financial debt and the debt is due. It is of no matter that the debt is disputed. In the light of the decision, when we shall consider that case in hand



then we find, the documents and the pleading shows that the financial debt has been given by the applicant to the Corporate Debtor and that has not been repaid, which would also evident from the One Time Settlement Proposal dated 15.09.2018, 15.10.2018 & 15.02.2019, therefore, in our considered view, in the light of the decision of **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407**, the Financial Creditor has established this fact that there is a financial debt and that has not been paid and so there is default and he is legally entitled to get that amount.

15. Now, at this juncture, we would like to refer the submissions made on behalf of the Ld. Counsel for the Corporate Debtor that since the Bank fails to fulfill its obligations, therefore, in view of the decision **Gujarat State Financial Corporation V Lotus Hotels Pvt. Ltd. [(1983) 3 SCC 379]**, the application filed by the Financial Creditor is liable to be dismissed. As we have already discussed the decision of the in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407** and on the basis of that we held that in order to trigger Section 7 of the Code, we have to establish only two things, which I have mentioned in the aforesaid para, therefore, in our view, the decision, on which the Corporate Debtor has placed reliance is different from the fact of the case in hand and that would not help the Corporate Debtor to demolish the claim of the Financial Creditor. So we find, no force



in the contention raised on behalf of the Corporate Debtor that the debt is not payable and the application is liable to be dismissed.

16. It is seen that there is default in payment, there is a financial debt and the amount in default is more than Rs 1,00,000/- which is the minimum threshold limit fixed under IBC, 2016 and there are no disciplinary proceedings pending against the proposed IRP. Under the circumstances, this Adjudicating Authority is inclined to admit this petition and initiate CIRP of the Respondent. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith staying:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) 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 Act, 2002;



(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

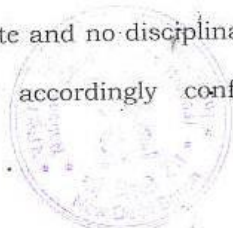
(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

17. The Financial Creditor has proposed the name of Mr. Pankaj Khetan as the IRP. His details are as registration no. IBBI/IPA-002/IP-N00010/2016-17/10014, email: pankaj.khetan@yahoo.com. The consent of the Mr. Pankaj Khetan is on record along with the copy of his certificate and no disciplinary proceedings are pending against him. We accordingly confirm his appointment as

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the IRP. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15,17 and 18 of the Code and file his report.

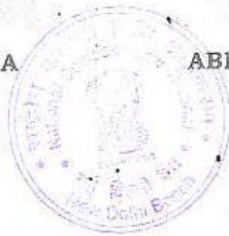
18. The Financial Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs.

19. Copy of the order be sent to both the parties as well as to the IRP.

20. To come up on for further consideration.

- Sd -
SUMITA PURKAYASTHA

Member (T)



- Sd -
ABNI RANJAN KUMAR SINHA

Member (J)

29.1.2020
↓
Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003

Pronounced today under Rule 151 of the NCLT Rules 2016 as Mrs. Sumita Purkayastha, Hon'ble Member (T) is sitting in Principal Bench today.

-Sd-
29.01.20



(PRABHAT KUMAR SHARMA)

COURT OFFICER

[Handwritten Signature] 29.1.2020

Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003