NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 848 of 2019

[Arising out of Order dated 16th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P. (IB) No.167/BB/2018]

IN THE MATTER OF:

Deepakk Kumar,
Director of M/s Sovereign Developers
and Infrastructure Ltd.
No.16, 2nd Floor, Jaladarshini Layout,
New BEL Road, Bengaluru – 560 054. ....Appellant

Vs

1. M/s Phoenix ARC Pvt. Ltd.
(Trustee of Phoenix Trust FY 16-15 Scheme B)
5th Floor, Dani Corporate Park 158
CST Road, Kalina, Santacruz (East),
Mumbai – 400098.

2. M/s. Sovereign Developers and
Infrastructure Ltd.
Through Shri Guruprasad Makam,
'Interim Resolution Professional'
(Registration No.IBBI/IPA-001/
IP-P00932/2017-18-11550
No.16, 2nd Floor, Jaladarshini Layout,
New BEL Road, Bengaluru – 560 054. ....Respondents

Present:

For Appellant: **Mr. Dilip Singh, Advocate.**

For Respondents: **Mr. Suresh Dutt Dobhal and Ms. Sonaakshi Dhiman, Advocates for R-1.**

Mr. Goutham Shivshankar, Advocate for RP.

J U D G M E N T

Venugopal M., J:

The Appellant (Promoter/ Developer and Shareholder) of the Sovereign Developers and Infrastructure Ltd. ('Corporate Debtor') has preferred the instant Appeal ('As an Aggrieved person') as against the impugned order dated 16th July, 2019 passed by the Adjudicating Authority (National

Company Law Tribunal), Bengaluru Bench in admitting the Section 7 Application filed by the 1st Respondent/ Applicant/ 'Financial Creditor'.

2. The Adjudicating Authority (National Company Law Tribunal), Bengaluru bench while passing the impugned order on 16th July, 2019 at paragraph 9 to 11 had observed the following: -

> *"9. ....., the Karnataka Bank Ltd. (hereinafter referred to as the "Assignor Bank") has granted Loan amounting to a sum of Rs.25,00,00,000/- along with interest at the prime Lending rate compounded monthly, along with further interest at the rate of 2% p.a. in case of non-payment of the Loan amount by the due date. Accordingly, the 'Corporate Debtor' has to repay the loan in instalments commencing from November, 2012 until May, 2014 along with interest and other charges thereon. However, the Corporate Debtor failed to pay outstanding instalments resulting to classify the account of Corporate Debtor as a Non-Performing Asset ("NPA") on 16.08.2013, in accordance with the RBI directives and guidelines. The Bank has also issued a Demand Notice to the Corporate Debtor U/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI ACT"), calling upon them to repay the amount due, as on 15.02.2014, amounting to a sum of Rs.19,32,25,988.22/- along with further interest and other charges, within sixty (60) days of their receipt of the notice. However, the Corporate Debtor failed to repay the amount. Therefore, the Assignor bank assigned the debt*

arising under the Loan agreement to the applicant herein, namely Phoenix ARC Private Limited (in its capacity as Trustee of Phoenix Trust FY 16-15 scheme B) together with all the underlying securities, vide an Assignment agreement dated 29th March, 2016.

10. *….., the assignment of the loan by the Bank to petitioner is not only accepted by the Respondent but it also obtained additional funding of Rs.5,00,00,000/- Accordingly new loan agreement dated 09.06.2016 was executed by the parties and also furnished personal guarantees for the loan. The Corporate debtor failed to pay the outstanding amount even after repeated demands made to the Corporate Debtor for total amount of Rs.35,33,34,286/- towards the dues of the Assigned Debt as well as the New Loan as on 16th August, 2017, which became Rs.42,80,92,640/- along with interest as on 02.09.2018. The assigned debt and additional loan in question and subsequent debt and default are not in dispute. The Petitioner has also given a sufficient opportunity to the Respondent to pay the outstanding amount and also issued a Legal Notice dated 26th June, 2017, by inter alia stating that they have sanctioned additional loan of Rs.5,00,00,000/- in the larger interest of the purchasers of the apartments to complete Phase-I works. However, it is alleged that the Corporate Debtor failed to complete Phase-I works, even though the additional funding was granted for the said purpose and due to the failure to complete*

Phase –I Works, the customers, who had intended to purchase the apartments did not deposit the amounts towards BWSSB and BESCOM charges. As a result, the amount due was not paid, and they have also denied the allegations that they have charged interest at 42% p.a. by clarifying that they have charged interest at 14% p.a. compounded monthly. The Respondent also addressed letters to the Prime Minister's office, Finance Minister and Reserve Bank of India.

11. The Petitioner has also filed a Certificate Under Section 2A(a) of the Banker's Book of Evidence Act, 1891 (as amended), by certifying that the statement of account obtained from the Assignor Bank by virtue of the Assignment Agreement executed and all such data/ entries are stored in the Safe Custody in the ordinary course of Business of Phoenix."

and resultantly admitted the 'Application' filed by the 1st Respondent/ 'Financial Creditor' by appointing 'Mr. Guruprasad Makam as an Interim Resolution Professional' to carry out the functions as per I&B code etc.

3. Assailing the validity, correctness and legality of the impugned order dated 16th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), the Learned Counsel for the Appellant submits that the impugned order is a perverse one and in fact the Adjudicating Authority had overlooked the hardships faced by the Appellant which were beyond control.

4. The Learned Counsel for the Appellant comes out with a plea that Karnataka Bank had acted in an unprofessional fashion and in a manner that exhibit total disregard for the 'Regulations and circulars' issued by the Reserve Bank of India.

5. The Learned Counsel for the Appellant forcefully takes a plea that the Adjudicating Authority had overlooked the fact that the 'Company' is still a solvent one and has impending cash flow from several avenues and because of the non-cooperative attitude of the 1st Respondent, failed to grant the 'No Objection Certificate' and once the same is given, the customers shall be entitled to the amounts sanctioned by the Financial Institutions etc.

6. The learned Counsel for the Appellant brings it to the notice of this Tribunal that the 1st Respondent had informed about the Loan Assignment Agreement signed between 'Karnataka Bank' and the ARC. Furthermore, on 24.08.2016, the Respondent/ARC further disbursed a loan of Rs.5 crores to the 'Corporate Debtor' with an interest of 24% compounding monthly and penal interest @ 6% per annum. Moreover, this was a fresh loan on different terms and conditions and this loan was treated separately and a substantial loan was repaid. In respect of this fresh/new loan, the rate of interest was charged @ 33% per annum.

7. It is represented on behalf of the Appellant that on 24.08.2017, ARC issued a 'Recall notice' of loan facility to the 'Corporate Debtor' and proceeded for the recovery of a sum of Rs.35,33,34,286/- towards the dues of the assigned date. Further, a case was filed by ARC – Asset Reconstruction Company (under Section 19 of the RDBA Act, 1993) before the Debts Recovery Tribunal, Bangalore on 13.09.2017. During the pendency of the

proceedings before the Debts Recovery Tribunal, the 1st Respondent filed an Application under Section 7 of the I&B Code on 06.09.2018.

8. The Learned Counsel for the Appellant proceeds to point out that in the present case in Form-1, the date of default is shown as 01.11.2012 and that the Application was filed under Section 7 of the 'Insolvency and Bankruptcy Code' on 06.09.2018. In this connection, the Learned Counsel for the Appellant projects a legal argument as per decision of the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Anr. – Civil Appeal No.4952 of 2019"***, the period of Limitation is to commence from the day of default and hence the Application under Section 7 of the I&B Code was to be filed within three years. Besides this, it is the contention of the Appellant that the limitation period for filing an 'Application' is three years from the date of default, i.e. November 2012 as per Form No.1 and the period of limitation expired on November 2015. But the Application under Sec 7 of the Code was filed on 06.09.2018, which is more than two years and nine months later and as such, the said Application is barred by limitation. In fact, the learned Counsel for the Appellant contends that Article 137 of the Limitation Act, 1963 clearly applies to the facts of the present case.

9. The Learned Counsel for the Appellant submits that there are two parts of the Loan – (1) the Loan granted by the Karnataka Bank is beyond the period of limitation; and (2) New Loan was granted by the Asset Reconstruction Company and that the Appellant is ready to pay the remaining sum of Rs.2,70,00,000/- in a short notice.

10. According to the Learned Counsel for the Appellant, the 'Corporate Debtor' M/s Sovereign Developers and Infrastructure Ltd. ('SDIL') commenced the construction of phase I of the project 'Sovereign Unnathi' in May 2010 and it obtained the phase II and phase III of the project in March 2011 and due to increase in cost of construction, the project cost went up to more than Rs.330 crores and by that time, the 'Corporate Debtor' had already spent an amount of Rs.240 crores on the project, whereas only Rs.190 crores was collected from the customers. Therefore, the 'Corporate Debtor' raised an additional demand from its customers during August 2013 in terms of Clause 3(1) of the Sale Agreement and some customers had agreed to pay the additional demand and some had challenged the same before the consumer Forums.

11. The Learned Counsel for the Appellant contends that the National Green Tribunal, Bangalore, issued a stay order on construction of the projects in Karnataka on account of the distance from local 'nullah' and the stay was vacated by the Hon'ble Supreme Court in Civil Appeal No.5016/2016 in March 2019. Also it is the version of the Appellant that the Appellant had appointed a sum of Rs.11 crores by selling an Asset of the 'Corporate Debtor' and the same is available for completion of the pending works in Block A, B & C and that 300 flats are ready for registration in Block A & B, which can be registered. Already 84 flats registered after obtaining NOC from the 1st Respondent/ Phoenix ARC and approximately 27 families are living in the project and with the beginning of the of registration, the fund will start flowing to the Company and, therefore, the Company will meet its liability. Apart from this, the Company will share its receipt with ARC in

60:40 ratio and that 60% of the receipts will go to the 1st Respondent/ ARC till its principle with 8% of interest is returned back and that the 'Corporate Debtor' will also refund the deposited amount with simple interest at the rate of SBI lending rate + 1% as per 'RERA' to the customers who want refund of money.

12. The learned Counsel for the Appellant submits that the time required for completion of Block-A is 30-45 days and that the time period required for finishing the incomplete work in Tower-B is 45-60 days and the time period required for completion of Block-C is 60 to 90 days and for Block-D is 90 to 120 days and that the Appellant will try to complete the project in 180 days.

13. The Learned Counsel for the Appellant contends that there are total 1563 flats in the 'Sovereign Unnathi' and the share of land owner is 332 flats and it is the 'Corporate Debtor' who has to complete the whole project including the flats to be given to the land owners, who have shared their lands.

14. Lastly, it is the submission of the Learned Counsel for the Appellant that in Raheja Builder's case, this Tribunal held that the delay in completion of the project was due to external factors beyond the control of Builders and closed the resolution process.

15. Countering the submission of the Learned Counsel for the Appellant, the Learned Counsel for the 1st Respondent/ 'Financial Creditor' submits that the 1st Respondent is an 'Asset Reconstruction Company' registered under Section 3 of the SARFAESI Act, 2002. Further, it is the plea of the 1st Respondent that the 'Corporate Debtor'/ SDIL requested the Karnataka Bank Limited/ Assignor Bank for grant of certain facilities/ loan for the purpose of

construction of 'Residential Apartments' and that the Karnataka Bank/ Assignor Bank granted a Term Loan of Rs.25 crores. In terms of the 'Loan Agreement', the aforesaid Term Loan was to be repaid by the 'Corporate Debtor' in instalments commencing from November 2012 till May 2014 together with future interest and other charges thereon. The 'Corporate Debtor'/ SDIL had failed to repay the said credit facilities as per terms and conditions adumbrated in the Loan Agreement executed among other things by the 'Corporate Debtor'.

16. The Learned Counsel for the 1st Respondent points out that the 'Corporate Debtor's' account was classified as Non-Performing Asset ('NPA') as per RBI directives and guidelines. Further, the Assignor Bank issued a Demand Notice dated 17.02.2014, as per Section 13(2) of the SARFAESI Act, 2002 to the 'Corporate Debtor' to repay a sum of Rs.19,32,25,988.22/- (due and payable as on 15.02.2014) together with interest and other charges within sixty days.

17. As a matter of fact, by virtue of the Assignment Deed dated 29.03.2016, Karnataka Bank/ Assignor Bank assigned its Non-Performing Asset in regard to the credit facility granted to the 'Corporate Debtor' to the 1st Respondent/ Phoenix ARC Private Limited (in its capacity as Trustee of Phoenix Trust FY 16-15 Scheme-B) together with all the underlying securities. Therefore, it is the contention of the 1st Respondent that it has stepped into the shoes of the Assignor Bank and as such is entitled to receive the repayments and enforce payment of all 'Debts' under the Loan Agreements.

18. It is the case of the 1st Respondent that the 'Corporate Debtor' (SDIL) had approached the 1st Respondent for restructuring of its aforesaid debt/

loan and also sought additional funding of Rs.5 crores and that the 1st Respondent accepted the request of the 'Corporate Debtor'. Hence, the 'Corporate Debtor' had acceded to and executed Letter of Acceptance dated 09.06.2016 and that the credit facilities already availed by the 'Corporate Debtor' from the Assignor Bank (assigned debt) were rescheduled and in terms of the 'Repayment Reschedule' to the said Letter of Acceptance the first instalment of the loan was to commence on 31.10.2016 and subsequently the instalments fell due on 30.11.2016, 31.12.2016, 31.01.2017, 28.02.2017, 31.03.2017, 30.04.2017, 31.05.2017, 30.06.2017... going on until 31.03.2018.

19. The Learned Counsel for the 1st Respondent contends that in the said Letter of Acceptance dated 09.06.2016, the 'Corporate Debtor' among other things had specifically acknowledged the outstanding sum of Rs.28,09,60,407.22/- payable to the 1st Respondent as on 08.03.2016.

20. The Learned Counsel for the 1st Respondent submits that the 'Corporate Debtor' in respect of additional credit facilities of Rs.5 crores from the 1st Respondent had executed a New Loan Agreement dated 09.06.2016 together with other loan documents and that in terms of the Loan Agreements executed by the 'Corporate Debtor', the additional credit facility/ fresh loan, together with contractual interest was to be repaid by the 'Corporate Debtor' in installments beginning from 09.06.2016 and going up to 30.11.2016. In fact, the said credit facility, according to the 1st Respondent was also secured among other things by 'Guarantees and Mortgage'. Furthermore, the 'Corporate Debtor' after executing the New Loan Agreement for credit facility of Rs.5 crores and rescheduling of other credit

facilities had made various part-payments towards the interest and principal amount due and payable by it to the 1st Respondent. In this regard, the Learned Counsel points out that some of the part payments were made on 17.10.2016, 11.11.2016, 29.11.2016, 29.12.2016, 31.12.2016, 10.01.2017, 23.01.2017, 25.01.2017, 28.02.2017 and 31.05.2017 respectively.

21. It is the specific case of the 1st Respondent that post 31.05.2017 the 'Corporate Debtor' had defaulted and stopped making payments to the 1st Respondent/ Company and on 24.08.2017 the 1st Respondent issued a Recall Notice to the 'Corporate Debtor', whereby and whereunder the entire credit facilities were recalled and also a demand was made for the payment of Rs.35,33,34,286/- outstanding sum as on 16.08.2017 together with further interest at contractual rate from 17.08.2017 till the date of realisation.

22. The Learned Counsel for the 1st Respondent submits that the 'Corporate Debtor'/ SDIL as on 02.09.2018 was due and liable to pay to the 1st Respondent an amount of Rs.42,80,92,640/- to the 1st Respondent together with future interest at contractual rate and other charges.

23. At this stage, it is projected on the side of the 1st Respondent that the 1st Respondent filed O.A. No.1083 of 2017 before the Debts Recovery Tribunal, Bengaluru for recovering the sum of Rs.35,33,34,286/- being the outstanding amount as on 16.08.2017. Later, the 1st Respondent filed C.P.(IB)No.167/BB/2018 before the Adjudicating Authority (National Company Law Tribunal), Bengaluru under Section 7 of the I&B Code, for initiation of 'Corporate Insolvency Resolution Process' ('CIRP') against the 'Corporate Debtor'. Indeed, it is the stand of the 1st Respondent that the

'Corporate Debtor' had specifically admitted the fact of availing credit facilities and default in payment of the credit facilities. Finally, the Section 7 Application of the 1st Respondent was admitted and in fact, the Application filed by the 1st Respondent under Section 7 of the I&B Code is well within the period of limitation, in respect of both the loan/ financial facilities availed by the 'Corporate Debtor'.

24. A perusal of Form-1 of the Section 7 Application shows that the 1st Respondent is the 'Financial Creditor' and that the 'Corporate Debtor' is Sovereign Developers and Infrastructure Limited. Part-IV of the Application mentions that the total amount of debt granted is INR 30 crores only and the Assigned Loan (Term Loan) sanctioned on 27.04.2010 for INR 25 crores. Further, a New Loan of Rs.5 crores was sanctioned on 09.06.2016 and the amount claimed to be in default as on date of filing of the original Application was mentioned as Rs.42,80,92,640/- being the cumulative claim for both the 'Assigned Debt' and the 'New Loan' together with further interest at contractual rate (interest at 14% per annum compounded monthly with penal interest at 4% per annum with Assigned Debt and interest at 24% per annum compounded monthly with penal interest at 6% per annum on New Loan). The amount claimed to be in default as on 02.09.2018 was due from November 2012. It comes to the fore that before the Adjudicating Authority, the 'Corporate Debtor' had filed detailed reply, *inter alia*, stating that Section 7 Application filed by the 'Financial Creditor' was a result of inaction on its part in not taking corrective measures and issuing NOCs and improper handling of Escrow account and further the Applicant / 'Financial Creditor' was unable to show that the default had occurred within the meaning of

Section 7 of the IBC and the same being caused at the hands of the 'Corporate Debtor' etc.

25. Also that the 'Corporate Debtor' before the Adjudicating Authority in its reply averred that it made payment of Rs.12 crores before execution of the Assignment to the Karnataka Bank in service of payment and the amounts which was due to the tune of Rs.25 crores, though it was different matter that out of Rs.25 crores, Rs.2.5 crores were never released and Rs.2.5 crores was simply moved across the ledger in an attempt to windowdress accounts and the said sum of Rs.2.5 crores were never realized to the 'Corporate Debtor', which was reflected in the account. Furthermore, these matters were not brought on record and accounts statement were also not produced, which amounted to willful suppression of material facts.

26. A cursory glance to the reply of the 'Corporate Debtor' before the Adjudicating Authority shows that the 'Corporate Debtor' at paragraph 2 and 3 had mentioned the following

> *"2. It is respectfully submitted that the petitioner is an Asset Reconstruction Company who took an assignment, a loan obtained by the Respondent from Karnataka Bank. The Karnataka Bank had sanctioned a total of Rs.25 crores as term loan. The sanction letter is being produced herewith as Annexure R-1. Though the Respondent had flagged several issued with the Karnataka Bank who had not disbursed the loan amounts as per terms of loan agreement and had not disbursed the entire loan amounts. Yet the Karnataka in a hurried and hastily manner assigned the loan to the Petitioner. The Respondent after assignment had brought to the notice of the petitioner herein that the*

project commissioned by the Respondent was fast approaching completion and as such, was in need of little funding in order to complete the project at the earliest.

3. It is submitted that the Respondent informed the Petitioner that it has built about 1192 flats which is exclusive of the share of the owners, out of which about 1077 have been sold to the various flat owners and the total receivables from the flat owners towards balance payment itself was around 106 crores. However, the same could only be realized at the time of execution of the sale deed, as such, additional funding was sought and though the Respondent had made out strong case for additional funding of about 90 crores, the petitioner did not consider the request and rather sanctioned a sum of Rs.5 crores only, despite the Respondent having sought for minimum of Rs.6 crores to be disbursed urgently. The letters for funding request are produced herewith as Annexure R-2."

27. It is not in dispute that the Karnataka Bank (Assignor Bank) had granted a loan of Rs.25 crores together with interest at a prime landing rate compounded monthly along with further interest @ 2% per annum in case of non-payment of the loan amount by the due date. Undoubtedly, the 'Corporate Debtor' was to repay the loan installments beginning from November 2012 till May 2014 along with interest and other charges and because of the 'Corporate Debtor's' failure to pay the outstanding installments, its account came to be classified as Non-Performing Asset on 16.08.2013. Even for the Demand Notice issued by the Bank in terms of Section 13(2) of the SARFAESI Act, 2002 the 'Corporate Debtor' had failed to

repay the amount of Rs.19.32,25,988.22/- together with interest etc. within 60 days from the date of receipt of the notice. Indeed, the Assignor Bank had Assigned the Debt to the 1st Respondent/ ARC Pvt. Ltd. along with all the underlying securities by means of Assignment Agreement dated 29.03.2016.

28. Not resting with the same, the 'Corporate Debtor' obtained an additional fund of Rs.5 crores by means of New Loan Agreement dated 09.06.2016 and personal guarantees were also provided and that the 'Corporate Debtor' had failed to pay the outstanding sum even after repeated demands made to it in respect of the sum of Rs.35,33,34,286/-, not only in respect of the Assigned Debt, but also in respect of the New Loan as on 16.08.2017, which came to Rs.42,80,92,640/- along with interest as on 02.09.2018. As seen from the letter dated 09.06.2016 of the 1st Respondent under the caption 'Settlement of Debt' of the 'Corporate Debtor'/ SDIL (At page 180 of Volume-I of the Paper Book of the Appellant), it is crystalline clear that the 1st Respondent was agreeable to the settlement/ re-schedulement and requested the 'Corporate Debtor' to kindly convey its acceptance in regard to the terms and conditions contained in the said Letter of Acceptance by signing and returning etc. In fact, the 'Corporate Debtor' had accepted the conditions and agreed to abide by the terms and conditions contained in the 'Letter of Acceptance'. On page 182 of the Paper Book (Vol I) on behalf of the Borrower Company (SDIL), its authorised signatory Mr. Prakash Kumar Singh had signed as 'Managing Director/ Guarantor I'. The Appellant had signed as 'Mortgagor/ Guarantor II' and one Mrs. Sareeta Singh had signed as 'Guarantor III'. In fact, the Letter of Acceptance (at Page 183 of the paper book, Volume-I) was executed by the 'Corporate Debtor' and

three other persons (Guarantor I, Guarantor II and Guarantor III) and the 5th party is mentioned as the 1st Respondent/ 'Financial Creditor'. Page 186, Volume-1 of the paper book unerringly point out to the execution of a New Loan Agreement by the 'Corporate Debtor' (SDIL) in favour of the 1st Respondent/ 'Financial Creditor' coupled with other loan agreements.

29. From the paper book of the 1st Respondent (Diary No.18975 dated 14.02.2020), it is evident from 'Schedule II' Repayment Schedule rates as under: -

"SCHEDULE II

Repayment Schedule

Date	Opening Balance	Interest	Principal Instalment	Instalment Payable	Closing Principal
9-Jun-16	50,000,000		-		50,000,000
30-Jun-16	50,000,000	690,411	-	690,411	50,000,000
31-Jul-16	50,000,000	1,019,178	-	1,019,178	50,000,000
31-Aug-16	50,000,000	1,019,178	-	1,019,178	50,000,000
30-Sep-16	50,000,000	986,301	-	986,301	50,000,000
31-Oct-16	50,000,000	1,019,178	31,461,713	32,480,981	18,538,287
30-Nov-16	18,538,287	365,687	18,538,287	18,903,974"	

30. It is the emphatic plea of the 1st Respondent/ 'Financial Creditor' that the credit facility in issue was also a secured one by means of 'Guarantees and Mortgages'.

31. The vital fact which is to be taken note of in the instant case is that after execution of the New Loan Agreement in respect of the credit facility of Rs.5 crores and re-scheduling of the other credit facilities, without any doubt, the 'Corporate Debtor' had made several part payments towards principal and interest sum due and payable by the 'Corporate Debtor' to the 1st

Respondent and some of the periodical payments were made on 17.10.2016, 11.11.2016, 29.11.2016, 29.12.2016, 31.12.2016, 10.01.2017, 23.01.2017, 25.01.2017, 28.02.2017, 31.05.2017. The grievance of the 1st Respondent/ 'Financial Creditor' is that the 'Corporate Debtor' defaulted and stopped making payments to it and it transpires that the 1st Respondent filed O.A. No.1083 of 2018 before the Debts Recovery Tribunal, Bengaluru for recovery of the amount of Rs.35,33,34,286/- being the outstanding sum as on 16.08.2017 and later on 05.09.2018 the 1st Respondent filed Section 7 Application before the Adjudicating Authority for commencement of CIRP.

32. It cannot be gainsaid that as per Section 18 of the Limitation Act, 1963, an 'acknowledgement' is not limited in respect of the debt only, but in relation to 'any property or right', which is the subject matter of 'LIS' between the parties. Needless for this Tribunal to point out that there has to be an 'acknowledgement', as per ingredients of Section 18 of the Limitation Act, 1963 and it must be an unqualified one and the same will create fresh cause of action to a party/ litigant to cement its claim on such 'acknowledgement'. The 'acknowledgement' must be an 'acknowledgement' of an existing liability. More importantly, an 'acknowledgement of debt' must relate to an admission of existing relationship of a Debtor and Creditor and then intention to continue it should also be evident, as per decision in Venkata vs. Parthasarathi, 16 Mad at page 220. An unequivocal and unqualified admission of the 'Debt' is to be established and simple admission of debt is sufficient in so far as the 'acknowledgement' is concerned.

33. An 'acknowledgement' is to be in writing, the same is to be within the period of limitation and is to be signed by a litigant party whom the property

or right is claimed. In the present case, the 1st Respondent/ Bank had provided adequate opportunity to the 'Corporate Debtor' to pay the balance amount and also admittedly issued a legal notice dated 26.06.2017 whereby and whereunder it was mentioned that they had sanctioned additional loan of Rs.5 crores in the larger interests of the purchasers of the apartments to complete 'Phase-I works'. The fact of the matter is that the 'Corporate Debtor' had failed to complete the Phase-I works, although additional fund was granted and because of the non-completion of the Phase-1 work, the persons who had thought of purchasing the apartments had not deposited the money in respect of BWSSB and BESCOM.

34. It is worthwhile to make a mention of the decision of the Hon'ble Supreme Court **Hiralal v. Badkulal AIR 1953 SC 225** wherein the decision of Privy Council **Maniram v. Seth Rupchand 33 Ind. Appeals 165 PC** was quoted with approval that 'an unconditional acknowledgment was enough to furnish a 'cause of action' for it implied a promise to pay'. Further, a part-payment is an acknowledgment of a particular fact and that the limitation period would be extended from the date of such payment. In **Dena Bank, Durg v. Chameli Bai AIR 2010 Chht 49,** it is held that by means of Sec 19 r/w Art 1 of the Limitation Act, 1963, a fresh extended limitation of three years is to be calculated from the close of the year in which last item admitted or proved as entered in the account established. It is also to be pointed out that an acknowledgment by a borrower shall bind the guarantors as well, as per decision **Om Prakash v Uco Bank AIR 2005 MP p. 234 (DB)**.

35. It must be borne in mind that when a plaintiff has concurrent remedies availed one remedy and remained unsuccessful, then, he cannot seek the

benefit under Sec 14 of the Limitation Act, when instituting an alternate remedy as per decision **Hasan Chand Sons v. Gaj Singh ILR 1961 11 Raj 365.** It is to be remembered that pendency of DRT proceedings is not a bar for commencement of 'Insolvency Resolution Process'. Further, time spent in insolvency proceedings is not to be excluded for filing an execution case based on money decree, secured against an insolvent, as per decision **Yashant v. Walchand AIR 1951 SC p. 116** As Art. 113 of the Limitation Act relates to 'suits', Art. 137 of the Limitation Act pertains to 'Applications'. In this connection, it is to be pointed out that in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates (Civil Appeal No.23988/2017)**, the Hon'ble Supreme Court held that 'the right to sue' accrues when a default occurs. If the delay had occasioned over three years before the date of filing of application, the application would be barred under Art. 137 of the Limitation Act.

36. It cannot be brushed aside that special provisions have been made in the Banker's Books Evidence Act for Banker's Book whereby certified copy of an entry in such a book is admissible in evidence. But mere entries in bank's books of account or mere copies thereof are not sufficient to charge a person with liability except where the person accepts the correctness of entries as per decision **Chandradhar v Guahati** as per decision of **Hon'ble Supreme Court AIR 1967 SC 1058 at page 1060.**

37. On a careful consideration of respective contentions and also this Tribunal taking note of the facts and circumstances of the instant case in an encircling manner comes to an irresistible conclusion that the 'Assigned Debt' and the 'New/ Fresh Loan' for additional funding were not in dispute,

and further that on 9.6.2016, the letter of acceptance was entered into between the parties in regard to the restructuring, settling, outstanding amount, in respect of the Assigned Debt as well as the New Loan, etc., in spite of this fact, the 'Corporate Debtor' was given an adequate opportunity to pay the outstanding balance amount, had not made the payments (some part payments were made by the Appellant as mentioned earlier in this judgment at paragraph 31), defaulted and also stopped making payments to the 1st Respondent after 31.05.2017. Hence, the impugned order dated 16th July, 2019 passed by the Adjudicating Authority (NCLT), Bengaluru Bench admitting Section 7 Application is free from any legal error. Also, the plea of the Appellant that Application under Section 7 of the IBC is barred by limitation is also negatived by this Tribunal because of the fact that the said Application was filed before the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench on 05.09.2018, well within time, from the date of defaulted and stopped payment from 31.5.2017. Consequently, looking at from any angle, the present Appeal is bereft of any merits and the same is dismissed without costs. I.A. 2579/2019 and I.A. 3512/2019 are closed.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
5th March, 2020
Ash