NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 177 of 2019 &
Interlocutory Application Nos.3392 & 3542 of 2019

[Arising out of Order dated 29th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in M.A. No.1013 of 2018 and in C.P.No.1458/BC/NCLT/MB/MAH/2017]

IN THE MATTER OF:

1. Mr. Sagar Sharma
   1401, Silver Spring, Sherly Rajan Road,
   Bandra (West), Mumbai – 400050.

2. Mr. Vishal Sharma
   1401, Silver Spring, Sherly Rajan Road,
   Bandra (West), Mumbai – 400050. ....Appellants

Vs

1. Phoenix ARC Private Limited
   Having its registered office at:
   5th Floor, Dani Corporate Park,
   158, CST Road, Kalina,
   Santa Cruz (E), Mumbai – 400098.

2. Hotel Horizon Private Limited
   Interim Resolution Professional of
   Hotel Horizon Private Limited
   Having office at:
   Juris Corp, 902, Tower 2,
   India Bulls Finance Centre,
   Senapati Bapat Marg,
   Elphinstone Road (West)
   Mumbai-400013.

3. Mr. Jayesh H. Shah,
   Juris Corp, 902, Tower 2,
   India Bulls Finance Centre,
   Senapati Bapat Marg,
   Elphinstone Road (West)
   Mumbai-400013. ....Respondents

Present:

For Appellants: **Mr. Sudipto Sarkar, Senior Advocate with Mr. Mahesh Agarwal, Mr. Abhijeet Sinha, Mr. Rajeev Kumar, Mr. Arshit Anand, Mr. Himanshu Satija and Mr. Shadab, Advocates.**

Mr. Aaditya A. Pande, Advocate for IRP.

For Respondents: **Mr. Ramji Srinivasan, Senior Advocate with Mr. Suresh Dobhal and Ms. Sonaakshi Dhiman, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Phoenix ARC Private Limited ('Financial Creditor') moved an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'I&B Code'**) against Hotel Horizon Private Limited- ('Corporate Debtor'), which was admitted by Adjudicating Authority (National Company Law Tribunal), Mumbai Bench on 29th January, 2019.

2. The Appeal was earlier heard by this Appellate Tribunal and on hearing the Appeal, this Appellate Tribunal by judgment dated 5th September, 2019 held: -

> *"12. It is not in dispute that the Limitation Act, 1963 is applicable to the applications filed under the 'I&B Code'. For filing the application under Section 7 of the 'I&B Code', Part II – 'Other Applications' of Third Division of schedule of Limitation Act is applicable as quoted below:*
>
> PART II – OTHER APPLICATIONS

Description of application	*Period of limitation*	*Time from which period being to run*
137. Any other application for which no period of limitation is provided elsewhere in this division.	*Three years*	*When the right to apply accrues"*

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

14. The next question is whether the claim of the Appellant is barred by the limitation. If it is barred by limitation then the 'Corporate Debtor' has right to take plea that the 'debt' is not payable. In the present case, we find that the immovable property of the 'Corporate Debtor' was mortgaged in favour of the 'Financial Creditor' by 'Deed of Mortgage' and a further charge was made on 27th November, 2009 by the 'Corporate Debtor' in favour of 'IDFC Ltd.'. Thereafter by 'assignment agreement' debt payable by 'Corporate Debtor' to IDFC was assigned on 11th September, 2014.

15. The 'Financial Creditor' has right to get immovable property mortgaged and thereafter may transfer the mortgage assets for a valuable consideration for which 12 years of limitation has been prescribed for filing a suit relating to immovable property under Article 61 of Part V of the First Division of the Schedule of Limitation Act. Therefore, we hold that the claim of the 1st Respondent is not barred by limitation.

16. As the appeal is devoid of merit, no relief can be granted. It is accordingly dismissed. No costs."

3. The Hon'ble Supreme Court has set-aside the aforesaid judgment and remitted the matter and made the following observations by judgment dated 30th September, 2019 in Civil Appeal No.7673 of 2019: -

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

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

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

5) The appeal is allowed in the aforesaid terms.

6) The NCLT order dated 29.01.2019 shall remain stayed until further orders from the NCLAT.

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

4. Learned Counsel appearing on behalf of the Appellants referred to Form-1 to suggest that the Loan Agreement was reached on 20th November, 2009 for Rs.22,00,00,000/-. As per Form-1, a sum of Rs.17,10,20,020/- was repaid. Another Loan Agreement was reached on 24th May, 2012 for Rs.216,00,00,000/-, out of which Rs.46,00,00,000/- was the committed lending of Assignor. For the purpose of record, following details are shown:-

"S.No.	*Date*	*Particulars*
LOAN 2 (Rs.22,00,00,000)		
1.	*20.11.2009*	*Loan Agreement executed between Assignor and Corporate Debtor*
2.	*24.12.2009*	*Disbursement Dates of amounts under Loan 2 aggregating to Rs.22,00,00,000/- as per Form 1*
3.	*17.05.2010*	
4.	*30.09.2010*	
5.	*29.03.2011*	
6.	*30.06.2011*	
7.	*24.11.2011*	
8.	*30.11.2011*	
9.	*13.07.2012*	*Payments Dates of amounts towards Loan 2 aggregating to Rs.17,10,20,020/- as per Form 1*
10.	*09.08.2012*	
11.	*03.09.2012*	
12.	*29.12.2012*	
13.	*14.02.2014 to 14.06.2014*	*Default by Corporate Debtor (Account was classified as SMA-1 as on 14.08.2014 i.e. after 61 to 180 days of default as per RBI Circular dated 21st March 2014)*
14.	*14.08.2014*	*Loan account classified as SMA-2 by IDFC*

15.	*09.09.2014*	*Rs.5,15,70,000/- due and payable as per Form 1 and Certificate under Bankers Book Evidence Act*
16.	*11.09.2014*	*Loan 2 assigned to Financial Creditor under Deed of Assignment*
17.	*15.03.2015*	*Loan account declared NPA by Assignee ARC*
18.	*29.09.2017*	*Application under Section 7 filed by the Financial Creditor against Corporate Debtor*
LOAN 3 (Rs.46,00,00,000)		
1.	*24.05.2012*	*Loan Agreement executed between Assignor and Corporate Debtor*
2.	*09.08.2012*	*Disbursement Dates of amounts under Loan 3 by Assignor aggregating to Rs.46,00,00,000/- as per Form 1*
3.	*30.08.2013*	
4.	*29.10.2013*	
5.	*10.03.2014*	
6.	*14.02.2014 to 14.06.2014*	*Default by Corporate Debtor (Account was classified as SMA-2 as on 14.08.2014 i.e. after 61 to 180 days of default as per RBI Circular dated 21st March 2014)*
7.	*14.08.2014*	*Loan account classified as SMA-2 by IDFC*
8.	*09.09.214*	*Rs.48,75,50,000/- due and payable as per Form 1 and Certificate under Bankers Book Evidence Act.*
9.	*11.09.2014*	*Loan 1 assigned to Financial Creditor under Deed of Assignment*
10.	*15.03.2015*	*Loan account declared NPA by Assignee ARC/ Financial Creditor*
11.	*29.09.2017*	*Application under Section 7 filed by the Financial Creditor against Corporate Debtor"*

5. Learned Counsel for the Appellants submitted that the 'Financial Creditor' has admitted that all sum under the Loan Agreement granted to the 'Corporate Debtor' was due and payable prior to assignment dated 11th September, 2017. The Loan Agreements reveal that all sums under Loan Nos.2 and 3 granted to the 'Corporate Debtor' were due and payable before

9th September, 2014. Therefore, according to him, the Application under Section 7 of the I&B Code was barred by limitation.

6. Reliance has been placed on affidavit in rejoinder to the reply filed by the 'Financial Creditor', wherein it is stated that the opening balance in the statement of accounts annexed to the petition was arrived at on the basis of the amounts due and payable by the Respondent to IDFC immediately prior to the assignment of debt by IDFC to the Petitioner. Therefore, according to the Appellants, the application to initiate 'Corporate Insolvency Resolution Process' by the 'Financial Creditor' under Section 7 of the I&B Code with regard to the claimed amount pursuant to Loan Nos.2 and 3 was barred by limitation as it was filed on 29th September, 2017, i.e. after the cut-off period of three years, which expired much prior to 9th September, 2017.

7. The aforesaid contention is also corroborated by Form No.CHG-1 dated 11th September, 2014 enclosed with the Interlocutory Application No.3392 of 2019 filed by the Assignor and the 'Financial Creditor' to modify the charge pursuant to assignment of debt. The said Form, at paragraph 17, explicitly records that the total outstanding of the 'Corporate Debtor' as on 9th September 2014 was Rs.53,91,20,000/-, which corresponds to the sum/ aggregate of respective opening balances in the Statements of Accounts of Loan No.2 and 3. Learned Counsel for the Appellants referred to Form 1 annexed to show the reference, which is quoted below: -

14.02.2014 to 14.06.2014	*Default (Account was classified as SMA-2 on 14.08.2014 after 61 to 180 days of default as per RBI Circular dated 21st March 2014)*

14.08.2014	*SMA – 2 declared by Assignor as per RBI Circular after 61 – 180 days of default*
11th March 2015	*NPA declared by Financial Creditor as per Form 1*
14.02.2017 to 14.06.2017	*Cut-off period of three years for filing application under Section 7 of the code.*
29.09.2017	*Date of filing application under Section 7 before the Adjudicating Authority.*

8. It is further submitted that the default is not a continuing one and not continuing wrong as was held by the Hon'ble Supreme Court in ***"Vashdev Bhojwani vs. Abhyudaya Coop. Bank Ltd. – 2019 9 SCC 158***. The Section 22 of the Limitation Act, 1963 is not applicable to the proceedings under the I&B Code.

9. Learned Counsel appearing on behalf of the Phoenix ARC Private Limited - 1st Respondent ('Financial Creditor') submitted that IDFC Limited (Assignor Bank), granted a Rupee Term Loan of Rs.22,00,00,000/- to the 'Corporate Debtor'/ Hotel Horizon Private Limited, which was secured vide a Rupee Loan Agreement dated 20.11.2009. The said Loan Agreement provided certain terms and conditions, as follows: -

> *"a. Amortisation Schedule shall mean Schedule-III hereto being he schedule of repayment of the principal amount of the Loan to the Lender.*
>
> *b. 2.9 Repayment (i) The Borrower shall repay the principal amount of the Loan in 29 structured, quarterly installments commencing from July 15, 2012 as per the Amortisation Schedule.*

c. *8.1 Event of Default – The following events shall constitute an "Event of Default" under the Agreement:*

(a) *Default by the Borrowers in the payment of any installment of the principal amount under the Loan on due date.*

(b) *Default by the Borrowers in the payment of any installment of interest on the Loan on any Interest Payment date.*

d. *Consequence of Default*

…

(a) *Declare the entire loan or part thereof and all amounts payable by the Borrower in respect of the loan and under the Transaction Documents to be due and payable immediately.*

e. *Schedule-III*

Amortisation Schedule

No.	*Date*	*Repayment Amount (Rs.)*
…		
9.	*15-Jul-2014*	*6,600,000*
10.	*15-Oct-2014*	*6,600,000*
11.	*15-Jan-2015*	*6,600,000*
12	*15-Apr-2015*	*7,150,000*
…		
29.	*15-Jul-2019*	*16,500,000"*

10. It was submitted that as per above clauses the 'Corporate Debtor' was liable to pay to Assignor Bank the installments, on their respective due dates, in accordance with the amortization/ repayment schedule. On each and every due date, on account of non-payment of the installments (every

installment is much more than Rs.1 lakh), a default occurred for the purpose of I&B Code.

11. It was further submitted that the 'Corporate Debtor' also availed certain credit facilities from a consortium of Banks. Out of the said credit facilities, IDFC Limited granted a Term Loan of Rs.46,00,00,000/- (Term Loan-III) to Corporate Debtor/ Hotel Horizon Private Limited. The said loan was secured vide Facility Agreement (Secured Term Loan Agreement) dated 24.05.2012, executed by the 'Corporate Debtor'. The said Loan Agreement provided the following terms and conditions:

> *"a. Due Date in respect of-*
>
> *i) An installment of principle amount of the Facility – the date on which the installment falls due as stipulated in Schedule IV thereof.*
>
> *ii) Interest – the date on which the interest falls due as stipulated hereof*
>
> *b. "12. Events of Default – Each of the following events shall constitute an "Event of Default" under the Agreement:*
>
> *(a) Default by the Borrower in the payment of any installment of the principal amount under the Facilities on the Due Date.*
>
> *(b) Default by the Borrower in payment of any installment of interest on the Facilities on any Interest Payment Date.*
>
> *c. 12.2 Consequences of Default*

On occurrence of an Event of Default, the Lenders shall have the right in their sole discretion exercise one or more of the following rights:

(a) declare the entire loan or part thereof and all amounts payable by the Borrower in respect of the loan and under the Transaction Documents to be due and payable immediately.

12. It is submitted that as per repayment schedule of the said credit facility Rs.161 Crores were payable to the Consortium Banks on or before 30.09.2013, and thereafter, Rs.55 Crores were to be repaid to the lenders (including IDFC/ Assignor Bank/ Now Phoenix) on pro-rata basis by way of four equal quarterly installments, starting from 01.07.2014 till 01.04.2021. Thereafter, the 'Corporate Debtor' requested for restructuring of the Term Loan-III. Accepting the request of the Corporate Debtor, vide Letter dated 06.03.2014, Term Loan for Rs.46,00,00,000/- (Term Loan III) was restructured by the Assignor Bank/ IDFC. This was specifically accepted by the Corporate Debtor. As per the term of the said letter, the 'Corporate Debtor' was required to pay Rs.44.70 Crores, by 28.02.2015. Further, under the Rupee Loan Agreement dated 20.11.2009 (Term Loan II) the next installment also became due and payable on various dates, inter-alia, on 15.04.2014, 15.07.2014. However, the Corporate Debtor defaulted in payments of the said installments under Term Loan-II. Further, as per the case of the Corporate Debtor, the account of the Corporate Debtor was SMA-2 on 14.08.2014. Since the account of the Corporate Debtor was SMA-2, as per Article 3.2 of Guidelines, dated 26.02.2014 issued by the Reserve Bank

of India (which provides for assignment of SMA-2 accounts by Banks to Securitisation Company/ Reconstruction Company), vide Assignment Agreement dated 11.09.2014, IDFC Bank/ Assignor Bank assigned the loans granted to Corporate Debtor in favour of Phoenix ARC Private Limited (as the Trustee of Phoenix Trust FY-15-13). Since the Assignor Bank Assigned an SMA-2 account to Phoenix, as per Guidelines, dated 01.07.2015, issued by the Reserve Bank of India, Phoenix had 180 days from the date of acquisition of the account of Corporate Debtor to declare such an account as a Non-Performing Asset.

13. It is submitted that the 'Corporate Debtor' also committed a default each and every time when 'Corporate Debtor' failed to make payment of the installments which became due and payable, under Rupee Loan Agreement, dated 20.11.2009 (Term Loan-II). As per the Letter dated 06.03.2014 [whereby, Assignor Bank (as per request of 'Corporate Debtor') had restructured Term Loan for Rs.46,00,00,000/- (Term Loan III), the 'Corporate Debtor' also committed a default on 28.02.2015, when the 'Corporate Debtor' failed to pay Rs.44.70 Crores as per the terms of restructuring.

14. The application of Article 137 of the Limitation Act, 1963 for moving application under Sections 7 or 9 of the I&B Code, fell for consideration before the Hon'ble Supreme Court and this Appellate Tribunal in number of cases. In ***"B.K. Educational Services Private Limited vs. Parag Gupta and Associates* – (2018) SCC Online SC 1921"**, the Hon'ble Supreme Court held that the Limitation Act, 1963 has in fact been applied from the inception of the Code.

15. In ***"Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Limited and another – (2019) 9 SCC 158"***, the Hon'ble Supreme Court referring to ***B.K. Education*** (Supra) observed: -

> *"**3.** Having heard the learned counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, para 42 of which reads as follows:*
>
> > *"42. 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."*

Dealing with Section 23 of the Limitation Act, 1963, the Hon'ble Supreme Court observed:

> *"xxx xxx xxx*
> *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"*

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

> *"13. Dr Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding-up proceeding was concerned. Thus, in Hariom Firestock Ltd. v. Sunjal Engg. (P) Ltd., a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding-up petition being filed, opined:*
>
> > *"8. … To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and dehors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the*

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

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

"12. … In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding-up proceeding. The debt having become time-barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under Section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of Opposite Party 1 after obtaining a decree from the

Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of Section 434. Therefore, since the debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt."

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

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

xxx xxx xxx

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section

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

17. Similar issue fell for consideration before the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company***

(India) Limited and another – (2019) 10 SCC 572". In the said case, the Hon'ble Supreme Court has noticed that the Respondent was declared NPA on 21st July, 2011. The Bank had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the total debt. Taking into consideration the facts, the Supreme Court held that the default having taken place and as the account was declared NPA on 21st July, 2011, the application under Section 7 was barred by limitation.

For proper appreciation, it is better to note the facts of the judgment as follows: -

> *"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.*
>
> *2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.*
>
> *3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with*

interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-7-2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

"Description of suit	*Period of limitation*	*Time from which period begins to run*
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	*Twelve years*	*When the money sued for becomes due."*

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational

Services (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 11 of B.K. Educational Services (P) Ltd. and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of B.K. Educational Services (P) Ltd., suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular

article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.

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

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

"17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the 'Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.

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19. Section 13(2) of the 'SARFAESI Act, 2002' reads as follows:

*"**13. Enforcement of security interest**.— ……(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of*

notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

20. Admittedly, the 'Financial Creditor' took action under the 'SARFAESI Act, 2002' in the year 2013. Therefore, the second time it become NPA in the year 2013 when action under Section 13(2) was taken."

Referring to Section 18 of the Limitation Act, 1963, this Appellate Tribunal further observed: -

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

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

24. In ***"Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679"****, the Hon'ble Supreme Court observed that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account*

was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgment, even after the completion of the period of limitation i.e. December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under Section 7 is barred by limitation, the accounts of the 'Corporate Debtor' having declared NPA on 1st December, 2008.

19. It has been accepted by the Respondent that the record shows that the 'Corporate Debtor' defaulted making payment of the aforesaid Loan amount prior to 9th September, 2014. Both the Loan accounts as relied by the 'Financial Creditor' are maintained by the Assignor, which also makes it clear that the amounts under Loan Nos.2 and 3 were payable prior to the 21st September, 2014. As, the 'Corporate Debtor' having committed default prior to 9th September, 2014, i.e. much before the assignment of debt to Phoenix ARC Private Limited, we hold that the Application under Section 7 of the I&B Code was barred prior to 9th September, 2017.

20. The Application under Section 7 of the I&B Code was filed on 29th September, 2017, i.e., much after three years of the cut-off period of default, which was prior to 9th September, 2017.

21. There is nothing on the record to suggest that the Appellant acknowledged the debt to Phoenix ARC Private Limited prior to cut-off date of three years in terms of Section 18 of the Limitation Act, 1963 which reads as follows: -

18. Effect of acknowledgment in writing.—*(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

22. In fact, prior to the said date, Phoenix ARC Private Limited was not in picture and it was assigned with debt subsequently. The 1st Respondent has also failed to bring on record any such acknowledgement made by the 'Corporate Debtor' with the IDFC Bank or other Lenders prior to 9th September, 2017.

23. Section 22 of the Limitation Act, 1963 relates to 'breaches and torts', for the purpose of counting the fresh period of limitation. The said Section 22 of the Limitation Act, 1963 may be applicable to find out whether the claim is barred by limitation or not, but cannot be made applicable for counting the period of limitation for Application under Section 7 of the I&B Code, which is to be counted from the date of default/ NPA as held by the Hon'ble Supreme Court in terms of Section 7(5) of the I&B Code.

24. The aforesaid issue was not decided by this Appellate Tribunal in its earlier judgment, which has been noticed by the Hon'ble Supreme Court, which held that the decision in ***B.K. Educational Services Private Limited*** (supra) is law of the land under Article 141 of the Constitution of India and binding on all the Courts/ Tribunals. For the said reason, we have re-looked into the related facts and hold that the Application under Section 7 of the I&B Code filed by 1st Respondent Phoenix ARC Private Limited is barred by limitation.

25. In ***"Binani Industries Limited vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018"*** decided on 14th November, 2018, this Appellate Tribunal has held that 'Corporate Insolvency

Resolution Process' is not a recovery proceeding. It is not a 'litigation' nor it is an auction.

26. For the said reason, we set aside the impugned order of admission dated 29th January, 2019. The 'Corporate Debtor' is released from all the rigors of 'Corporate Insolvency Resolution Process'. The 'Interim Resolution Professional' will handover the assets and records of the 'Corporate Debtor' to the Promoters/ Board of Directors immediately. The case is remitted to the Adjudicating Authority (National Company Law Tribunal) for determination of fee and Corporate Insolvency Resolution cost payable to 'Interim Resolution Professional'/ 'Resolution Professional', which will be borne by Phoenix ARC Private Limited ('Financial Creditor').

The Appeal is allowed with aforesaid observations and directions. No costs. Interlocutory Application Nos.3392 & 3542 of 2019 are also disposed of as having become infructuous.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

7th February, 2020

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