NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 623 of 2020

[Arising out of Impugned Final Order/Judgment dated 29 June 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in Company Petition (IB) No. 554/7/NCLT/AHM/2018]

IN THE MATTER OF:

HemanshuJamnadasDomadia
Shareholder & Director of
M/s Silver Proteins Pvt Ltd
(Company under CIRP Process)
Having his address at:
Palash, 22 Ketam Society
Park Colony, Motor House
Jamnagar, Gujarat – 361008 **...Appellant**

Versus

1. **Central Bank of India**
   Having its office address at:
   Mandvi Tower Road
   Central Bank Building, Jamnagar – 361001 **...Respondent No.1**

2. **Shalabh Kumar Daga**
   Interim Resolution Professional
   Reg. No. IBBI/IPA-001/
   IP-P00071/2017-18/10157 of
   M/s Silver Proteins Pvt Ltd
   Having his office address at:

405, Atlantis Enclave,
Opp. Maruti Row House
Nr. SubhashChowkGurukul
Ahmedabad – 380052 **...Respondent No.2**

Present:

For Appellant : Mr Keith Varghese and Mr Mohit Gupta, Advocates.

For Respondent : Mr KunalTandon and Ms RichaSandilya, Advocates for R-1.

CORAM:

Hon'ble Mr Justice Jarat Kumar Jain, Member (J)

Hon'ble Mr V P Singh, Member (T)

J U D G M E N T

[Per; V. P. Singh, Member (T)]

1. This Appeal emanates from the Impugned Order dated 29 June 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in Company Petition (IB) No. 554/7/NCLT/AHM/2018, whereby the Adjudicating Authority has admitted the Petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code') against the Appellant /Corporate Debtor M/s Silver Proteins Pvt Ltd.

The Parties original status in the company petition represents them in this Appeal for the sake of convenience.

2. **Brief Facts**

The brief facts of the case are as follows:

2.1 The Appellant is the Ex Director and Shareholder of M/s Silver Proteins Pvt Ltd (from now on referred to as 'Corporate Debtor'), being aggrieved by the Impugned Order dated 29.06.2020 passed by the Learned Adjudicating Authority, National Company Law Tribunal, Ahmedabad

Bench, in CP (IB) No. 554/7/NCLT/AHM/2018 against the order of admission of an Application filed under Section 7 of the Insolvency & Bankruptcy Code, 2016.

2.2 The Corporate Debtor M/s Silver Proteins Pvt Ltd. had availed credit facilities worth Rs. 19,12,50,000/- from the Respondent Bank for many years, and it was lastly renewed on 01March 2015. However, the Corporate Debtor was facing a liquidity crunch and had defaulted to repay the loan amount. Consequently, the Respondent Bank classified the account of the corporate debtor as 'Non-Performing Asset' (from now on referred to as NPA') on 01.07.2015 and filed a petition under S.7 of the I & B Code ,2016.

3. **Appellants Submission**

3.1 The Corporate Debtor resisted the Application primarily on two grounds: (i) the Application filed by the Respondent Bank is barred by limitation, and (ii) the Application is not filed by a duly authorised person of the Respondent Bank hence not maintainable.

3.2 The Appellant/Corporate Debtor had contended that the date of default mentioned in the Application is 01 July 2015, while the Application was filed on 22 October 2018. Thus, the Application was filed after the prescribed limitation period, i.e. three years, under Article 137 of the Limitation Act, 1963. Therefore, the Application was hopelessly time-barred.

3.3 The Appellant contends that the Adjudicating Authority has given the benefit of Section 19 of the Limitation Act based on the last payment made by the Corporate Debtor, i.e. on 30 December 2015. Therefore, the Adjudicating Authority has found that the Application is filed within the prescribed period of limitation.

a. Appellant submits that the credit entry of 30 December 2015 for Rs.5,99,760 is on account of payment by one' Dynamic Extractor'. It

is contended that the said payment is neither made by the Appellant nor the Appellant's agent.

b. A payment may extend the period of limitation as per Section19 of the Limitation Act. However, for Section 19 Limitation Act to apply, it is necessary to make the payment by the Appellant or the Appellant's agent. (Pg. 10)

c. However, herein the payment is made by a completely unrelated party. Hence, the limitation period cannot extend u/S. 19 of Limitation Act since the conditions thereof are not fulfilled.

d. Even the said payment by Dynamic Extractor was wrongfully made, and it was returned by the Appellant.

e. It is further contended that the Respondent never set up this case before the Adjudicating Authority. The Ld. Adjudicating Authority made out this incorrect case for the Respondent on its own accord. Moreover, since this issue was neither raised nor argued by the Respondent, the Appellant never had an opportunity to rebut these contentions.

f. The Respondent has raised a new issue that credit entry of 31.12.2015 for Rs. 87,57,769/- will also extend the limitation period. It is pertinent to note that the said entry is not a payment but an INCA (Interest Not Collected Account) reversal. The said term is an accounting method adopted by the banks for NPA accounts, as per the Income Recognition and Assets Classification (IRAC) Norms. As per INCA reversal - the unrealised interest in an NPA account is reversed, and this is done monthly. Hence, it is not a payment by any party but an accounting method of the banks to balance the book of NPA accounts. Therefore, such tallying methods in no manner can attract Section 19 of the Limitation Act.

g. Further, this Hon'ble Tribunal in the case of Jagdish Prasad Sarada versus Allahabad Bank Company Appeal No. 183 of 2020 Judgment 28 August 2020 (Paras 10-11) has categorically held that the date of default will be the date of declaration of NPA and it would not shift.

h. The Gujarat High Court in HiralalChhotalal Shah versus Central Bank of India &Ors 1980 SCC Online Guj 53 Paras 11 to 18 and 35 have held that even if - a debtor makes part payment to a creditor, it will not extend the limitation for enforcement of creditor's remedy against surety u/S. 19 Limitation Act since payment is not done by the surety.

i. In the instant case, the limitation will not extend because of the last credit entry of 30 December 2015 since the payment was made by an unrelated party. Even this payment was by mistake, which was returned by the Appellant.

3.4 The Appellant further contends that Acknowledgment in Balance sheets will not extend the limitation period u/S. 18 Limitation Act

a. The Ld. Adjudicating Authority in the Impugned Order has extended the limitation period for a credit entry and not on acknowledgement in balance sheets. However, the Respondent herein has raised a ground that there is an acknowledgement in the balance sheet; hence, the limitation period ought to extend.

b. However, this issue is no longer res Integra, and the Hon'ble Supreme Court and this Hon'ble Tribunal have laid this controversy to rest by deciding that acknowledgement in a balance sheet will not extend the limitation period u/S 18 Limitation Act for IBC proceedings.

c. The Hon'ble Supreme Court in BabulalVardhariGurjar versus Gurjar Aluminium Industries Pvt Ltd. 2020 SCC Online SC 547 Para 91-93 has held explicitly that Section 18 Limitation Act will not apply to IBC proceedings.

d. Further, this Hon'ble Tribunal in V Padmakumar versus Stressed Assets Stabilisation Fund 2020 SCC Online NCLAT 417 Para 20-22 and BishalJaiswal versus Asset Reconstruction Company (India) Ltd. Company Appeal No. 385 of 2020 Judgment dated 22 December 2020 Para 13-14 has held that acknowledgement in balance sheets will not extend limitation period u/S. 18 of the Limitation Act for IBC proceedings.

3.5 Hence, the instant Appeal ought to be allowed since the Section 7 Application filed by the Respondent was time-barred.

3.6 We have heard the argument of the Learned Counsels for the parties and perused the record. Following issues arise for deciding this Appeal;

a) Whether the Application/petition is filed by a person having proper authorisation?
b) Whether the Application/Petition is barred by limitation?

4. **Analysis**

Whether the Application/Petition is filed by an Authorised Person?

4.1 Hon'ble Supreme Court in the case of RajendraNarottamdasSheth and Another (supra)has clarified the legal position regarding the issue of Maintainability of the Application when filed by a power of attorney holder under Section 7 of the Code.In this case,Hon'ble Supreme Court has held that;

"***Maintainability of the Application under Section 7 when filed by a power of attorney holder***

7. *Mr Rana Mukherjee, learned Senior Counsel appearing for the Appellants, submitted that the Application filed on behalf of the Financial Creditor under Section 7 of the Code was on the basis of a power of attorney. He relied upon a judgment of the NCLAT in Palogix Infrastructure Private Limited v. ICICI Bank Limited*[1] *in which it was held that an 'authorised person', distinct from a 'power of attorney holder', can file an application under Section 7 and that a 'power of attorney holder' is not competent to file an application on behalf of a financial creditor. According to Mr. Mukherjee, the defect in filing of the Application by an unauthorised person is not curable. Assuming it is curable, the Financial Creditor failed to rectify the defect within the time stipulated under Section 7(5) of the Code, in spite of an order passed by the Adjudicating Authority on 22.01.2020 granting time to the Financial Creditor. He submitted that the person who filed the Application under Section 7 of the Code is not the authorised representative of the Financial Creditor and therefore, the Application was liable to be dismissed.*

8. *On the other hand, the Financial Creditor contended that the power of attorney was executed in favour of Mr. Praveen Kumar Gupta, which was perused by both the Adjudicating Authority and the NCLAT to conclude that the Application was filed by the authorised person. Mr. Alok Kumar, the learned Counsel appearing for the Financial Creditor, also relied upon the judgment in Palogix Infrastructure (supra) and argued that a person authorised by way of a power of attorney can file an application under Section 7 of the Code.*

9. *Initiation of the corporate insolvency resolution process by a financial creditor is dealt with under Section 7 of the Code. Section 7(2) provides that the financial creditor shall make an application in such form and manner and accompanied with such fee as may be prescribed. As per Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter, 'the 2016 Rules'), the financial creditor is required to make an application for initiating the corporate insolvency resolution process against the corporate debtor under Section 7 of the Code in Form 1, accompanied with documents and records required therein. Form 1 is in*

a tabular form and the financial creditor has to give particulars of the details sought. Further, the Form is required to be signed by the "person authorised to act on behalf of the financial creditor".

***10.** The authorisation, in terms of the power of attorney, given by the Financial Creditor to Mr. Praveen Kumar Gupta who has filed the Application under Section 7 of the Code has been placed on record. Pursuant to the resolution passed by the board of directors of the Bank on 06.12.2008, the power of attorney was executed by the general managers in 2011. By way of the said power of attorney, Mr. Praveen Kumar Gupta was appointed by the Bank to act as its constituted attorney with respect to "all the business and affairs of the Bank and to conduct and manage and to assist in the conduct and management of all such businesses and affairs of the Bank, both within and outside India and to do all acts, deeds and things necessary or proper for carrying on the business and affairs of the Bank". Further, Mr. Praveen Kumar Gupta has also been authorised to "commence, prosecute, endorse, defend, answer and/or oppose any suit or other legal proceedings including any civil or criminal proceedings in any Court or Tribunals and any demand touching any matters in which the Bank may or may hereafter be interested or concerned and also, … compromise, refer to arbitration, abandon, submit to judgement or become non-suited, in any such suits or proceedings, to appoint advocate, solicitors and pleaders as occasion shall require and to make sign, execute, present and file all applications, plaints, petitions, written statements, vakalatnamas or any other papers expedient or necessary … to be made, signed, executed, presented or filed".*

***11.** The NCLAT, in its judgment in Palogix Infrastructure (supra), held that a 'power of attorney holder is not competent to file an application under Section 7 on behalf of the financial creditor. However, the NCLAT made certain further observations, as reproduced below:*

*"**41.** In so far as the present case is concerned, the 'Financial Creditor'- Bank has pleaded that by Board's Resolutions dated 30May, 2002 and 30October, 2009, the Bank authorised its officers to do needful in the legal*

proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor'/'Operational Creditor'/'Corporate Applicant' in favour of its officer, mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and for all purposes it is to be treated as an 'authorisation' by the 'Financial Creditor'/'Operational Creditor'/'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I &B Code'."

12. *The NCLAT was of the opinion that general authorisation given to an officer of the financial creditor by means of a power of attorney, would not disentitle such officer to act as the authorised representative of the financial creditor while filing an application under Section 7 of the Code, merely because the authorisation was granted through a power of attorney. Moreover, the NCLAT in Palogix Infrastructure (supra) has held that if the officer was authorised to sanction loans and had done so, the Application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment. We approve the view taken by the NCLAT in Palogix Infrastructure (supra).*

13. In the present case, Mr. Praveen Kumar Gupta has been given general authorisation by the Bank with respect to all the business and affairs of the Bank, including commencement of legal proceedings before any court or tribunal with respect to any demand and filing of all necessary applications in this regard. Such authorisation, having been granted by way of a power of attorney pursuant to a resolution passed by the Bank's board of

directors on 06.12.2008, does not impair Mr. Gupta's authority to file an application under Section 7 of the Code. It is therefore clear that the Application has been filed by an authorised person on behalf of the Financial Creditor and the objection of the Appellants on the maintainability of the Application on this ground is untenable."

(*emphasis supplied)*

4.2 In the instant case, the Application under section 7 of the Code was filed by the Assistant General Manager, who happens to be the principal officer of Respondent number 1 Bank. Accordingly, the said officer is duly authorised through a General Power of Attorney in his favour on 27 September 2011, which is still valid and effective.

4.3 Under the said Power of Attorney, the said officer of the bank is authorised to grant the loan, execute documents for and on behalf of the bank, recover loans, if necessary and further, entitled to initiate proceedings under the Insolvency and Bankruptcy Code. Additionally, Respondent number 1 Bank has also filed a copy of the permission letter dated 11 June 2018, which categorically allows the bank to file the present Application under section 7 of the Code. The signatory to the Application is well authorised to sign the Application given the law laid down by the Hon'ble Supreme Court in the case, RajendraNarottamdasSheth and Another (supra).

5. **Whether the Application/Petition filed u/s 7 of the I& B Code is barred by limitation?**

5.1 The Appellants claims that the account of the Corporate Debtor was classified as Non-Performing Assets on 01 July 2015. Therefore, the date of default, as mentioned in Section 7 petition, is 01 July 2015. Therefore, the limitation period for filing the Petition ended on 30 June 2018. However, the Application was filed on 22 October 2018. Thus, the Application/petition is filed much after the expiry of the limitation period.

5.2 The Appellants contention is mainly based on the premise that theAdjudicating Authority has wrongly considered the credit entry of 30 December 2015 for Rs.5,99,760/- from the Corporate Debtor. They are considering this entry as the last payment received from the Corporate Debtor. The Appellant submits that the said payment was made by a completely unrelated party, 'Dynamic Extractor'. The said payment is neither made by the Appellant nor its agent. Therefore, based on the credit entry dated 30 December 2015 limitation period cannot be extended under Section 19 of the Limitation Act, 1963. Appellant returned even the said payment made by 'Dynamic Extractor'.

5.3 Section 19 of the Limitation Act is quoted below for ready reference:

> *"**19. Effect of payment on account of debt or of interest on legacy**.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:*
>
> *Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment.*
>
> *(b) "debt" does not include money payable under a decree or order of a court.*

5.4 The Learned Counsel for the Appellant submits that to get the benefit of Section 19 of the Limitation Act, two conditions are essential; first, payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of payer himself or signed by him. It is the payment that extends the period of limitation. Still, payment has to be proved in a particular way, and a written or signed acknowledgement is the only proof of payment. Oral testimony is excluded unless there is acknowledgement in the required form (*Sant Lal Mahton v. Kamla Prasad A.I.R. 1951 S.C. 477)*.

5.5 In reply to the above, the Learned Counsel for the Respondent, Central Bank of India, submits that the financial facility was sanctioned under Sanction Letters dated 17 December 2003. The loan was renewed, revised, and enhanced on several occasions. It was lastly on 30 September 2013 that the loan amount was revised and sanctioned. Thereafter, on 30 December 2015, a sum of Rs.5,99,760/- and Rs.87,57,769/-(Page 94-95 of the Appeal) was deposited in the Bank by the Corporate Debtor and/or for and on behalf of the Corporate Debtor.

5.6 Further, the balance sheets as of 31 March 2017, 31 March 2018 and 31 March 2019, the amount due and payable to the Respondent No.1 Bank is recorded under long term borrowings (in respect of term loan) and short term borrowing in respect of cash credit) (Ref page no. 72, 74, 102 and 104 of the Reply). Further, in both the balance sheets, there is a note stating, "**loan from Central Bank of India towards packing credit is secured against hypothecation of stocks related to export and cash credit is secured against hypothecation of stocks and book debts and equitable mortgage of personal residential property of the director and factory land and building, belonging to MOCIL".** Hence, on both the counts above, there is a clear admission/acknowledgement that the amount is due and payable to Respondent No.1, i.e. Central Bank of India,

5.7 These balance sheets are also signed by the Appellant. Hence, the Application under Section 7, which was filed on 22 October 2018, is well within limitation. Further, through various demand promissory notes, the Corporate Debtor has acknowledged the loan disbursed by Respondent No.1 and has promised to pay on demand (Ref pg:155 to 133). Acknowledgement is also evident from the board resolution passed by the Corporate Debtor from time to time (Ref Pg-171-176).

5.8 Hon'ble Supreme Court in a recent case; Dena Bank (now Bank of Baroda) Vs. After discussing most of the Hon'ble Supreme Court's judgments of the Hon'ble Supreme Court, C Shivkumar Reddy &Anr., 2021 SCC Online SC 543, has explained the law laid down by the Hon'ble Supreme Court different cases and summarises the law in this regard. In this case, Hon'ble Supreme Court has held that;

> *"113. As per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired.*
>
> *114. In SeshNath Singh v. BaidyabatiSheoraphuli Cooperative Bank Ltd. (supra) this Court, speaking through one of us (Indira Banerjee J.) held that the IBC does not exclude the Application of Section 14 or 18 or any other provision of the Limitation Act. There is therefore no reason to suppose that Sections 14 or 18 of the Limitation Act do not apply to proceedings under Section 7 or Section 9 of the IBC.*

115. In Laxmi Pat Surana v. Union Bank of India (supra) this Court speaking through Khanwilkar J. held that there was no reason to exclude the effect of Section 18 of the Limitation Act to proceedings initiated under the IBC.

116. In Asset Reconstruction Company (India) Limited. v. BishalJaiswal (supra) where this Court speaking through Nariman J. relied, inter alia, on SeshNath Singh (supra) and Laxmi Pat Surana (supra) and held that the question of applicability of Section 18 of the Limitation Act to proceedings under the IBC was no longer res integra.

117. In Khan Bahadur ShapoorFredoom Mazda v. Durga Prasad Chamaria17, this Court held:—

> *"6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not*

be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter."

118. It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Asset Reconstruction Company (India) Limited v. BishalJaiswall (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff,18 ["Bengal Silk Mills"] and in Re Pandem Tea Co. Ltd.19, the judgment of the Delhi High Court in South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana20 and the judgment of Karnataka High Court in HegdeGolay Ltd. v. State Bank of India21 and held that an

acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt.

119. In Bengal Silk Mills Co. (supra) the Calcutta High Court held:—

> *"9. ..... I am unable to agree with the reasoning of the Nagpur decision that a balance-sheet does not save limitation because it is drawn up under a duty to set out the claims made on the company and not with the intention of acknowledging liability. The balance-sheet contains admissions of liability; the agent of the company who makes and signs it intends to make those admissions. The admissions do not cease to be acknowledgements of liability merely on the ground that they were made in discharge of a statutory duty. I notice that in the Nagpur case the balance-sheet had been signed by a director and had not been passed either by the Board of Directors or by the company at its annual general meeting and it seems that the actual decision may be distinguished on the ground that the balance-sheet was not made or signed by a duly authorised agent of the company."*
>
> *.....*
>
> *11. To come under section 19 an acknowledgement of a debt need not be made to the creditor nor need it amount to a promise to pay the debt. In England it has been held that a balance-sheet of a company stating the amount of its indebtedness to the creditor is a sufficient acknowledgement in respect of a specialty debt under section 5 of the Civil Procedure Act, 1833 (3 and 4 Will — 4c. 42), see Re : Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd., [1928] Ch. 836....."*

120. In Re Pandem Tea Co. Ltd. (supra), SabyasachiMukharji J. held:

> *"4. Now the question is whether the statements, which are contained in the profits and loss accounts and the assets and liabilities side indicating the liability of the petitioning creditor along with the statement of the Directors made to the shareholders as Directors' report should be read together and if so whether reading these two statements together these amount to an acknowledgement as contemplated under Section 18 of the Limitation Act, 1963, or Section 19 of the Limitation Act, 1908. In my opinion, both these statements have to be read together. The balance-sheet is meant to be presented and passed by the shareholders and is generally accompanied by the Directors' report to the shareholders. Therefore in understanding the balance-sheets and in explaining the statements in the balance-sheets, the balance-sheets together with the Directors' report must be taken together to find out the true meaning and purport of the statements. Counsel appearing for petitioning creditor contended that under the statute the balance-sheet was a separate document and as such if there was unequivocal acknowledgement on the balance-sheet the statement of the Directors' report should not be taken into consideration. It is true the balance-sheet is a statutory document and perhaps is a separate document but the balance-sheet not confirmed or passed by the shareholders cannot be accepted as correct. Therefore, in order to validate the balance-sheet, it must be duly passed by the shareholders at the appropriate meeting and in order to do so it must be*

accompanied by a report, if any, made by the Directors. Therefore, even though the balance-sheet may be a separate document these two documents in the facts and circumstances of the case should be read together and should be construed together. It was held by the Supreme Court in the case of L.C. Mills v. Aluminium Corpn. of India Ltd., (1971) 1 SCC 67 : AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgement was founded should relate to a subsisting liability as the section required and it should be made before the expiration of the period prescribed under the Act. It need not, however, amount to a promise to pay for an acknowledgement did not create a new right of action but merely extended the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question must, however, relate to a present subsisting liability and indicate the existence of a jural relationship between the parties such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not, however, be in express terms and could be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course did not mean that where a statement was made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. In order to find out the intention of the document by which acknowledgement was to be construed the document as a whole must be read and

the intention of the parties must be found out from the total effect of the document read as a whole. …"

121. In South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana (supra), this Court observed:—

> *"46. Shri Rameshwar Dial argued that statements in the balance-sheet of a company cannot amount to acknowledgement of liability because the balance-sheet is made under compulsion of the provisions in the Companies Act. There is no force in this argument. In the first place, section 18 of the Limitation Act, 1963, requires only that the acknowledgement of liability must have been made in writing, but it does not prescribe that the writing should be in any particular kind of document. So, the fact that the writing is contained in a balance-sheet is immaterial. In the second place, it is true that section 131 of the Companies Act, 1913 (section 210 of the Companies Act, 1956) makes it compulsory that an annual balance sheet should be prepared and placed before the Company by the Directors, and section 132 (section 211 of the Companies Act, 1956) requires that the balance-sheet should contain a summary, inter alia, of the current liabilities of the company. But, as pointed out by Bachawat J. in Bengal Silk Mills v. Ismail Golam Hossain Ariff, AIR 1962 Cal 115 although there was statutory compulsion to prepare the annual balance-sheet, there was no compulsion to make any particular admission, and a document is not taken out of the purview of section 18 of the Indian Limitation Act, 1963 (section 19 of the Indian Limitation Act, 1908) merely on the ground that it is prepared under compulsion of law*

or in discharge of statutory duty. Reference may also be made to the decisions in Raja of Vizianagram v. Vizianagram Mining Co. Ltd., AIR 1952 Mad 136, Jones v. Bellgrove Properties Ltd., (1949) 1 All ER 498; and Lahore Enamelling and Stamping Co. v. A.K. Bhalla, AIR 1958 Punj 341, in which statements in balance-sheets of companies were held to amount to acknowledgements of liability of the companies.

47. Shri Rameshwar Dial referred to the decision of the Privy Council in Consolidated Agencies Ltd. v. Bertram Ltd., (1964) 3 All ER 282. We shall advert to this decision presently when we deal with another argument of Shri Rameshwar Dial, and it is sufficient to state so far as the argument under consideration is concerned that even in this decision of the Privy Council it has been recognised that balance-sheets could in certain circumstances amount to acknowledgements of liability. It cannot, therefore, be said as a general proposition of law that statements in balance-sheets of a company cannot operate at all as acknowledgements of liability as contended by Shri Rameshwar Dial."

122. In Hegde&Golay Limited v. State Bank of India reported in ILR 1987 Kar 2673, the Karnataka High Court held:

"43. The acknowledgement of liability contained in the balance-sheet of a company furnishes a fresh starting point of limitation. It is not necessary, as the law stands in India, that the acknowledgement should be addressed and communicated to the creditor."

123. In Reliance Asset Reconstruction Co. Ltd. v. Hotel Poonja International Pvt. Ltd.22, the Appellant had relied on two documents in the Paper Book, that is, (i) the Balance Sheet of the Corporate Debtor dated 16 August, 2017 and (ii) a letter dated 23 April, 2019 issued by the Corporate Debtor to contend that the proceedings under Section 7 of the IBC were not barred by limitation, as limitation would start running afresh for a period of three years from the respective dates of those documents in acknowledgment of liability.

124. This Court, however, did not accept the balance sheet dated 16 August, 2017 and 23 April, 2019 for two reasons, the first reason being that there was no evidence or materials to show that the documents had been signed before the expiry of the prescribed period of limitation. In addition, the Court found that there had been no pleading with regard to the alleged acknowledgement in the Application under Section 7 of the IBC. This Court also found that the two documents could not be construed as admission that amounted to acknowledgement of the jural relationship and the existence of liability, since the balance sheet dated 16 August, 2017 did not acknowledge or admit any liability. Rather the Corporate Debtor had disputed and denied its liability. Similarly, the letter dated 23 April, 2019 was also found not be an acknowledgment or admission of liability. On the other hand, the language of the letter made it absolutely clear that the liability had in fact been denied.

125. Significantly, in Reliance Asset Reconstruction (supra), the loan had been sanctioned by Vijaya Bank in May 1986. The loan amount was declared NPA on 01 April 1993, an original application moved under the Debt Recovery Act was compromised in 2001 and the DRT had issued a Recovery

Certificate in May 2003. Vijaya Bank assigned its Reliance Asset Reconstruction in May 2011 after which amended Recovery Certificate was issued in December 2012. The Petition under Section 7 of the IBC was, however filed on 27 July 2018.

126. The finding of the NCLAT that there was nothing on record to suggest that the 'Corporate Debtor' acknowledged the debt within three years and agreed to pay debt is not sustainable in law, in view of the Statement of Accounts/Balance sheets/Financial Statements for the years 2016-2017 and 2017-2018 and the offer of One Time Settlement referred to above including in particular, the offer of One Time Settlement made on 03 March, 2017.

127. Section 18 of the Limitation Act speaks of an Acknowledgment in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgment is undated, evidence might be given of the time when it was signed. The explanation clarifies that an acknowledgment may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent.

128. In the instant case, Rs. 111 lakhs had been paid towards outstanding interest on 28 March, 2014 and the offer of One Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery has been issued in favour of Appellant Bank on 25 May 2017. The Corporate Debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself

gives a fresh cause of action to the Appellant Bank to institute a petition under Section 7 of IBC. The Petition under Section 7 IBC was well within three years from 28 March 2014.

129. In Jignesh Shah v. Union of India (supra), this Court relied upon a judgment of the Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited23, the relevant portion whereof is extracted hereinbelow:—

> *"….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 enure 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 the opposite party No. 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."*

130. In effect, this Court speaking through Nariman J., approved the proposition that an application under Section 7 or 9 of the IBC may be time barred, even though some other recovery proceedings might have been instituted earlier, well within the period of limitation, in respect of the same debt.

However, it would have been a different matter, if the applicant had approached the Adjudicating Authority after obtaining a final order and/or decree in the recovery proceedings, if the decree remained unsatisfied. This Court held that a decree and/or final adjudication would give rise to a fresh period of limitation for initiation of the Corporate Insolvency Resolution Process.

131. It is true that the finding of Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited (supra) was rendered in the context of Section 434(1)(b) of the Companies Act 1956, which provided that a company would be deemed to be unable to pay its debts if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company was returned unsatisfied in whole or in part.

132. We see no reason why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.

133. It is not in dispute that the Respondent No. 2 is a Corporate Debtor and the Appellant Bank, a Financial Creditor. The question is, whether the Petition under Section 7 of the IBC has been instituted within 3 years from the date of

default. 'Default' is defined in Section 3(12) to mean "non-payment" of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor".

134. It is true that, when the Petition under Section 7 of IBC was filed, the date of default was mentioned as 30 September 2013 and 31 December 2013 was stated to be the date of declaration of the Account of the Corporate Debtor as NPA. However, it is not correct to say that there was no averment in the Petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings.

135. As observed above, the Appellant Bank filed the Petition under Section 7 of the IBC on 12 October 2018. Within three months, the Appellant Bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/decree dated 27.3.2017 in O.A. 16/2015 and the Recovery Certificate dated 25.5.2017, enabling the Appellant Bank to recover Rs. 52 crores odd. The judgment and order/decree of the DRT and the Recovery Certificate gave a fresh cause of action to the Appellant Bank to initiate a petition under Section 7 of the IBC.

136. On or about 05 March 2019, the Appellant Bank filed another application for permission to place on record additional documents including inter alia financial statements, Annual Report etc. of the period from 01 April 2016 to 31 March 2017, and again, from 01 April 2017 to 31 March 2018 and a letter dated 03 March 2017 proposing a One Time

Settlement. This Application was also allowed on 06 March 2021. The Adjudicating Authority, took into consideration the new documents and admitted the Petition under Section 7 of the IBC.

137. ***Even assuming that documents were brought on record at a later stage, as argued by Mr. Shivshankar, the Adjudicating Authority was not precluded from considering the same. The documents were brought on record before any final decision was taken in the Petition under Section 7 of IBC.***

138. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate.

139. The Appellant Bank was thus entitled to initiate proceedings under Section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24 May, 2020.

140. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT

is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.

141. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the Application by its order dated 21 March, 2019.

142. ***To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.***"

5.9 Further,In the case RajendraNarottamdasSheth and Another v Chandra Prakash Jain and Another 2021 SCC OnLine SC 843 Hon'ble Supreme Court has held that;

"***22.*** *In the instant case, there is no dispute that the date of default is 30.09.2014 and the Application under Section 7 of the Code was filed on 25.04.2019. According to the Financial Creditor, Section 18 of the Limitation Act is applicable in view of the Corporate Debtor acknowledging its debt by way of letters, written in and after 2018, giving details of amount repaid, acknowledging the amount outstanding and requesting consideration of one-time settlement proposal. Sub-section (1) of Section 18 of the Limitation Act reads as under:*

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

23. *It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the Application under Section 7 is filed beyond the period of three years from the date of default and the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences and the Application can be entertained, if filed within this extended period.*

24. *There is no dispute that the date of default in this case is 30.09.2014, as mentioned by the financial creditor in its Application under Section 7. A copy of the debit balance confirmation letter dated 07.04.2016 was filed along with the Application. As the Application was filed only on 25.04.2019, which*

is beyond a period of three years even after taking into account the debit balance confirmation letter dated 07.04.2016, the Application was barred by limitation. However, the Corporate Debtor had, in its reply before the Adjudicating Authority, placed on record a letter dated 17.11.2018, which detailed the amount repaid till 30.09.2018 and acknowledged the amount outstanding as on 30.09.2018. On the basis of this letter and the record showing that the Corporate Debtor had executed various documents amounting to acknowledgement of the debt even in the financial year 2019-20, the NCLT was of the opinion that the Application was filed within the period of limitation. The said view was upheld by the NCLAT.

25. We have already held that the burden of prima facie proving occurrence of the default and that the Application filed under Section 7 of the Code is within the period of limitation, is entirely on the financial creditor. While the decision to admit an application under Section 7 is typically made on the basis of material furnished by the financial creditor, the Adjudicating Authority is not barred from examining the material that is placed on record by the corporate debtor to determine that such Application is not beyond the period of limitation. Undoubtedly, there is sufficient material in the present case to justify enlargement of the extension period in accordance with Section 18 of the Limitation Act and such material has also been considered by the Adjudicating Authority before admitting the Application under Section 7 of the Code. The plea of Section 18 of the Limitation Act not having been raised by the Financial Creditor in the Application filed under Section 7 cannot come to the rescue of the Appellants in the facts of this case. It is clarified that the onus on the financial creditor, at the time of filing an application under Section 7, to prima facie demonstrate default with respect to a debt, which is not time-barred, is not sought to be diluted herein. In the present case, if the documents constituting acknowledgement of the debt beyond April, 2016 had not been brought on record by the Corporate Debtor, the Application would have been fit for dismissal on the ground of lack of any plea by the Financial Creditor before the Adjudicating

Authority with respect to extension of the limitation period and Application of Section 18 of the Limitation Act."

(emphasis supplied)

5.10 In the instant case undisputedly, the account of the Corporate Debtor was classified Non-Performing Asset on 01 July 2015. The date of default, as mentioned in Section 7 petition, is 01 July 2015. On perusal of the statement of the account of Corporate Debtor, it appears that the amount of Rs.5,99,760/- was credited in the account of Corporate Debtor on 30 December 2015. The Appellant claims that this payment was made by a completely unrelated party, i.e. 'Dynamic Extractors'. It is further stated that the said payment by 'Dynamic Extractors' was wrongfully made, and the Appellant returned it. The contention of the Appellant is unsupported by any evidence. However, it is unbelievable that an unrelated party will transfer such a vast amount of Rs.5,99,760/- in the loan account of Corporate Debtor. Moreover, there is no such document to show that Appellant ever returned the said amount to the 'Dynamic Extractors'.

5.11 Apart from the above, the Respondent Bank has filed the balance sheet as of 31March 2017, 31 March 2018 and 31 March 2019 showing the amount due and payable to the Respondent No.1 Bank, which is recorded under the heading long term borrowings (in respect of term loan) and short term borrowing (in respect of cash credit), which proves that on 31 March 2016. Term loan of Central Bank of India secured against hypothecation of the windmill is shown as Rs.83,61,600/- as of 31 March 2016, and short term borrowing (secured) from Central Bank of India is shown as Rs.20,47,65,214/-. In this statement, a note is also mentioned:

> *"Loan from Central Bank of India towards Packing Credit is secured against hypothecation of stock related to export and Cash Credit is secured against hypothecation of stock and book debts and equitable mortgage of personal residential property of director and factory land & building belonging to MOCIL."*

5.12 Based on the above discussion, we believe that the learned Adjudicating Authority has rightly admitted the Application filed under section 7 of the Insolvency and Bankruptcy Code 2016. The Appeal filed by the Appellant sans merit and deserves to be dismissed.

In fine, the company appeal (AT) (Insolvency) No. 623 of 2020 fails. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
10 November, 2021
pks