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We find no irregularity in the valuation done by the valuer. 32

Further the data of the company is available with the management and 33
the same has been provided to the valuer to done the valuation. An outsider may have some data of company, in other words it can be said the outsider has the incomplete data. We also note that if an outsider has incomplete data, he will get the valuation done on that incomplete data which is of no use. We also note that the appellant in Company Appeal (A. T.) No. 366 of 2019 has voted against the resolution and as per the affidavit of respondent the appellant can hold the shares of the respondent-company. If the appellant, Mr. Janak Mathuradas feels that the offer price is less and the valuation got done by him is the best, then we allow him to purchase/acquire the shares of other minority shareholders at a price of Rs. 2,100 and can hold it as per his wish.

Learned counsel for the appellants argued that the special resolution 34
passed at the extraordinary general meeting was illegally modified. Learned counsel for the appellants further argued that the resolution cannot be modified by filing undertaking and it can only be modified by shareholders. Learned counsel for the appellants further argued that the National Company Law Tribunal or board of directors have no power to modify the same. Learned counsel for the appellant argued that the company by way of affidavit is creating a class within the class of shareholders.

Learned counsel for the respondent argued that this contention has 35
been raised by the appellant for the first time and this was not urged before the National Company Law Tribunal. Learned counsel for the respondent argued that any such fresh submission/contention taken for the first time at this stage is barred by law and cannot be contended. Learned counsel argued that the factum of this special resolution under section 114 of the Act is not in dispute before the National Company Law Tribunal or the National Company Law Appellate Tribunal. Learned counsel submitted that the affidavit has been filed based on the directions given by the National Company Law Tribunal to the respondent during the course of final hearing on November 8, 2019. Learned counsel argued that vide board resolution dated September 18, 2018, the company secretary was given authority to file the same. Learned counsel further argued that the resolution specifically provides that the said reduction is being approved by the shareholders subject to any terms, modifications or conditions that the National Company Law Tribunal, Mumbai may impose and the board of directors of the respondent may agree (page 61, paragraph 1 of C. A. No. 365 of 2019). Learned counsel for the respondent further argued that the National Company Law Tribunal, Mumbai has the power to approve the

said reduction on such terms and conditions as it may deem fit under the Act and the Reduction Rules and the National Company Law Tribunal, Mumbai has considered/approved to include while sanctioning the said reduction.

36 We have considered the submissions made by the parties. We note that undertaking affidavit was filed as per the direction of the National Company Law Tribunal, Mumbai, when the respondent-company stated that the shareholders who have voted against the resolution can continue to hold the shares of the respondent-company. We also note that the special resolution specifically provides that the said reduction is being approved by the shareholders subject to any terms, modifications or conditions that the National Company Law Tribunal, Mumbai may impose and the board of directors of the respondent may agree. We note from the record that the National Company Law Tribunal has given directions and the same has been approved by the board of directors of the company.

37 If the contention of the appellant is that the National Company Law Tribunal or board of directors on instructions from the National Company Law Tribunal has no power to modify the scheme as approved by the shareholders, it will destroy the case of appellant altogether that even if he has been given an opportunity to continue as a shareholder of the company it would destroy his option to retain his shares as the shareholders in the extraordinary general meeting has already approved the scheme for acquisition of the shares. We may state here that the National Company Law Tribunal has the powers, therefore, the company has approached for approval of the same and the objectors have objected to the scheme and the modification has been done. The same modification has been ratified by the board of directors. Therefore, it cannot be said the National Company Law Tribunal has no power. If we assume that the National Company Law Tribunal has no power then it means that the scheme approved by the shareholders, whether wrong or right, the National Company Law Tribunal has to approve. We are not satisfied with the argument of the appellants that the National Company Law Tribunal has no power.

38 Thus, we also note that the directions issued by the National Company Law Tribunal and modification proposed by the board of directors are the practical method to ensure that the shareholders who want to retain his shares are able to do so which does prejudice them. We also note that the board has already approved the terms of the impugned order, ratified all actions and steps taken for procuring and implementing the impugned order and also caused a copy of the impugned order to be filed with the Registrar of Companies, Pune.

The other issues raised by some of the appellants that they did not attend the meeting and the resolution has been modified and they may be given another option to vote for the same. On this issue we are of the opinion that the appellants are shareholders of the company and they were issued notice to attend the extraordinary general meeting and they did not attend the same. The company has done its duty as per statutory requirements by intimating their shareholders, if the shareholder has not attended the extraordinary general meeting it is their sweet will but they have to go with decision taken in the matter. 39

We also note that the other issues have been dealt with by the National Company Law Tribunal, Mumbai and no serious challenge has been raised to upset the position and we agree to the same. 40

In view of the aforegoing observations and discussions we find no merit in the appeals and accordingly they are dismissed. Interim order passed by this Tribunal, if any, is vacated. No order as to costs. 41

[2020] 221 Comp Cas 99 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — CHANDIGARH BENCH]

PHOENIX ARC P. LTD.[1]

v.

GPI TEXTILES LTD.

R. P. NAGRATH J. ***(Judicial Member)*** and
PRADEEP R. SETHI ***(Technical Member)***

July 6, 2018.

HF ▶ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—ASSIGNMENT OF DEBT—ASSIGNMENT FOR VALUABLE CONSIDERATION RECEIVED—ASSIGNEE IS FINANCIAL CREDITOR—REPRESENTATION REGARDING LOAN BEING NON-PERFORMING ASSET MATTER BETWEEN ASSIGNEE AND FINANCIAL CREDITOR—CORPORATE DEBTOR NOT ENTITLED TO TAKE BENEFIT OF WHETHER ASSIGNED DEBT WAS NON-PERFORMING ASSET—PETITION TO BE ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7.

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 122 (NCLAT) *infra*.—Ed.

The HSBC Bank granted working capital and term loan facilities to the respondent by sanction letter dated March 24, 2019 in a sum of Rs. 129,02,00,000 for a period of 60 months and the respondent and the bank entered into a corporate rupee loan facility agreement dated April 8, 2009 setting out all the terms of the loan agreement and the respondent also executed deed of hypothecation and memorandum of entry in favour of bank to secure the loan, creating a charge on moveable and immovable properties of the respondent in favour of the bank. Due to defaults committed by the respondent in repayment of the loan amount, the account of the respondent was classified as a non-performing asset on March 1, 2012 by the bank in its books of account. Subsequently on March 21, 2012, bank assigned the debts of the respondent together with the underlying securities, save and except a stand by letter of credit in favour of the petitioner through an assignment deed. On a petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 :

Held, *that there was no condition stipulated in section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, that an asset reconstruction company had to acquire only non-performing assets of banks or financial institutions. According to paragraph 2.1(a) of the assignment deed dated March 21, 2012 the agreement to assign was in consideration of the assignee having deposited the purchase consideration in the escrow account and therefore, the assignment was for valuable consideration received. By paragraph 3.1 of the assignment deed dated March 21, 2012 the bank had represented and warranted to the petitioner that as on the date of the deed and with reference to the facts and circumstances then existing, the loans were non-performing assets and had been duly and validly classified as such, in accordance with the guidelines issued by the Reserve Bank of India in this regard and all applicable laws. The breach of representation regarding the loan being non-performing asset was a matter between the petitioner and the bank. The respondent could not seek to take benefit of whether the assigned debt was a non-performing asset. The petitioner was a financial creditor as defined in section 5(7) of the Code and was entitled to initiate the corporate insolvency resolution process in the case of the respondent under section 7 of the Code. The conditions provided for by section 7(5)(a) of the Code were satisfied inasmuch as a default had been proved to have occurred. The application was complete and was to be admitted, an interim resolution professional was to be appointed and a moratorium was to be declared.*

ICICI BANK LTD. *v.* OFFICIAL LIQUIDATOR OF APS STAR INDUSTRIES LTD. [2010] 159 Comp Cas 443 (SC) (paras 11, 12, 15, 23, 25) *referred to.*

C. P. (I. B.) No. 35/Chd/HP/2018.

Manish Jain and *Ms. Divya Sharma* for the petitioner.

Ms. Pooja Mahajan and *Gaurav Arora* for the respondent.

JUDGMENT

The judgment of the Tribunal was delivered by

PRADEEP R. SETHI ***(Technical Member)***.—The instant petition has been filed in Form 1 by M/s. Phoenix ARC P. Ltd. (hereinafter referred to as the petitioner) for initiation of the corporate insolvency resolution process (CIRP) in the case of M/s. GPI Textiles Ltd. (hereinafter referred to as the respondent). The petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the IBC Rules). It is stated that the respondent was incorporated on September 29, 2000 having been allotted CIN U17117HP2000PLC026391 and its registered office is at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh-174 101. Therefore, the matter lies within the territorial jurisdiction of this Bench of the Tribunal. **1**

It is stated that the respondent is engaged in the business of manufacturing of cotton yarns, polyester yarn and blended yarn from cotton and polyester fibre and that on the request of the respondent, the Hongkong and Shanghai Banking Corporation Ltd. (hereinafter referred as HSBC) granted working capital and term loan facilities to the respondent vide sanction letter dated March 24, 2009 for an amount of Rs. 129,02,00,000 for a period of 60 months and the respondent and HSBC entered into a corporate rupee loan facility agreement dated April 8, 2009 wherein all the terms of the loan agreement were set in and the respondent also executed deed of hypothecation and memorandum of entry in favour of HSBC to secure the loan, stipulating therein all the conditions regarding the creation of charge on moveable and immovable properties of the respondent in favour of the HSBC. It is submitted that due to defaults committed by the respondent in repayment of the loan amount, the account of the respondent was classified as NPA on March 1, 2012 by HSBC in its books of account. It is stated that subsequently on March 21, 2012, the HSBC assigned the debts of the respondent together with the underlying securities, save and except stand by letter of credit (SBLC) in favour of the petitioner through an assignment deed. It is submitted that since on account of the continuous default of the respondent, and HSBC having already **2**

classified the account of the respondent as NPA on March 1, 2012 the petitioner issued a demand notice dated May 15, 2012 under the provisions of section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and that the respondent filed reply to the above notice by its reply dated July 6, 2012. It is stated thereafter, the petitioner issued a notice dated September 30, 2015 under section 13(4) of the SARFAESI Act to take possession of the secured assets of the respondent and against the said notice, the respondent filed S. A. No. 281 of 2015 which is pending for adjudication before the Debts Recovery Tribunal-1, Chandigarh.

3 It is stated further that the petitioner filed an application for recovery by O. A. No. 919 of 2016 under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of Rs. 222,07,13,590 along with interest till realisation of the entire amount and expenses of Rs. 73,35,840 and the said application is still pending for adjudication before the Debts Recovery Tribunal-1, Chandigarh. It is submitted that due to the continuous failure of the respondent to pay the loan amount, the petitioner issued recall notice dated January 19, 2016 thereby recalling its all financial facilities. In paragraph 2 of Part IV of Form 1, the amount in default is stated to be Rs. 268,29,20,033 as on December 26, 2017 and workings and computation of the amount of default and date of default are stated to be attached in the table of date of defaults annexed as annexure IV(d) of the petition.

4 In Part III of the petition, the name of Shri Jalesh Kumar Grover IBBI Regd. No. IBBI/IPA-01/IP-P00200/2017-18/10390 has been proposed to act as an interim resolution professional and Form 2 has been annexed as annexure III of the petition. In Form 2, Shri Jalesh Kumar Grover has certified that there are no disciplinary proceedings pending against him with the board or ICSI Insolvency Professional Agency. The petition is accompanied with a copy of the assignment deed dated March 21, 2012 (annexure IV(c) of the petition). The contents of the petition are supported by affidavit of the authorised representative of the petitioner, namely, Gurleen Chhabra, one of the authorised person as per board resolution dated September 20, 2017 of the petitioner (annexure I(c) of the petition). A copy of the petition is also stated to be sent to the respondent by speed post on February 1, 2018.

5 Notice of this petition was issued to the respondent. The respondent contested the petition by filing a written reply. It is stated that the petition is an exercise in fraud practised upon the respondent by the petitioner and its alleged assignor, HSBC and that the assignment purported to be

undertaken by HSBC in favour of the petitioner was not only against the agreements between the respondent and HSBC but also against the guidelines of the Reserve Bank of India (RBI) and as such the purported assignment was illegal, mala fide, fraudulent and undertaken by the HSBC with ulterior motives in connivance with the petitioner and there is no debt owed to the petitioner which can sustain the present application. It is averred that the respondent was incorporated in September, 2000 and gained good reputation in the textile industry and to support its business it availed loans from IDBI Bank Ltd., IFCI Ltd. and ICICI Bank Ltd. In the year 2007, in order to streamline its accounts and settle the outstanding debts with the above original lenders, the respondent entered into an arrangement with GL Asia Mauritius-II Ltd. (GLAM), a non-resident investor for investment and infusion of funds into the respondent-company and for arranging refinancing/one-time settlement of the loans of the original lenders and in pursuance thereof, GLAM arranged Rs. 129 crores from ICICI Bank Ltd., against a stand-by letter of credit (SBLC) issued by Citi Bank N. A., Hongkong Branch to ICICI Bank Ltd., which was fully cash collateralised by GLAM.

It is further alleged that on or about April 8, 2009 the ICICI Bank Ltd., 6
loan was swapped with a loan from HSBC and a corporate loan facility agreement dated April 8, 2009 was entered into between HSBC and the respondent (sanction letter is stated to be dated March 24, 2009). Further, HSBC, the respondent and GLAM also entered into tripartite facility rights agreement dated April 8, 2009 (annexure R1 of the reply). It is submitted that as per the HSBC sanction letter, the HSBC facility agreement and facility rights agreement, the entire principal outstanding of term loan of Rs. 129.02 crores was to be repaid by the respondent to HSBC by way of a bullet repayment at the end of 60 months from the drawn down, i. e., with effect from April 20, 2014 and further monthly interest of 11 per cent. per annum basis was payable on 20th of each month and the HSBC loan was required to be backed by a SBLC denominated in USD from HSBC, Mauritius. It is submitted that as per sanction on March 25, 2009 by HSBC, Mauritius of banking facility to GLAM, the HSBC SBLC was fully cash collateralised by way of a term deposit given by GLAM to HSBC, Mauritius for the full amount of SBLC. It is submitted that the primary security for all amounts due to HSBC from the respondent under the HSBC facility agreement was the HSBC SBLC and that whenever the respondent did not pay the interest/processing fee to HSBC on the date (20th of the month), HSBC used to draw down on the SBLC for the said amount and as and when such draw down was made, the funding of interest and processing fee was

acknowledged by the respondent as interest-free unsecured loan of GLAM in the books of the respondent in terms of Board resolutions dated June 30, 2009, December 16, 2009, November 23, 2011 and March 23, 2012 (annexure R4) (colly) of the reply.

7 It is then submitted that the last payment of interest (before the purported illegal assignment to the petitioner on March 21, 2012) was made to the HSBC by way of draw down from the HSBC SBLC on February 15, 2012 which was against the interest over dues for the month of November, 2011 to January, 2012. It is submitted that all of a sudden, without warning, without notice and without any hint of proposed action, the respondent received a letter dated March 23, 2012 from the HSBC through e-mail on March 26, 2012, stating that the HSBC had assigned the HSBC loan to the petitioner and that through e-mail on March 27, 2012 it was informed by HSBC that by way of a deed of assignment dated March 21, 2012 executed between HSBC and the petitioner, the HSBC loan, "along with the underlying financial documents and the security interest (other than the SBLC and the rights arising thereunder)" has been assigned to the petitioner. It is stated that details of specific transaction dated March 22, 2012 in the "demand deposit transaction history" of the respondent showed a receipt of Rs. 81,25,08,408 as "(proceeds under GTY from HSBC MAR)" (transaction dated March 22, 2012), was asked from HSBC by the respondent but no response was received. It is stated that when State Bank of India, a secured creditor of the respondent, was informed of the impugned assignment, SBI specifically asked HSBC the reasons for assignment of the debt to the petitioner when the recourse was available to HSBC to invoke the HBSC SBLC and also asked to HSBC to confirm that the assignment met "all required RBI/BIFR Guidelines", but no response was given by HSBC to SBI. With reference to notice under section 13(2) of the SARFAESI Act issued by the petitioner, the respondent raised objections as to how it had been classified as NPA by HSBC when interest had been recovered and the principal only became due on April 20, 2014 ; no notice of default was given to the respondent after 2009 ; HSBC appeared to have received approximately Rs. 81 crores by way of transfer from HSBC and on the other hand transferred the entire HSBC loan to the petitioner.

8 According to the respondent several legal proceedings were pending between the promoters of the respondent-company and GLAM before and around the time of the impugned assignment. Further on June 16, 2012 the promoters of the respondent-company filed Title Suit No. 38 of 2012 before the Civil Judge (Senior Division), 1st Court, Alipore along with an application under Order 39, rules 1 and 2 read with section 151 of the Code

of Civil Procedure, 1908, inter alia, assailing the validity of the assignment deed and the impugned assignment. It is stated that vide order dated April 21, 2014 the ex parte ad interim order dated July 17, 2012 was made absolute till final disposal of the promoter's suit. The ex parte ad interim order is stated to restrain the petitioner and others from enforcing any rights under the impugned assignment. It is submitted that against the interim injunction order, revision application bearing C. O. No. 2089 of 2014 was filed by the petitioner before the hon'ble Calcutta High Court which was dismissed as not maintainable by order dated July 28, 2014 and the petitioner thereafter moved the hon'ble Supreme Court of India by way of S. L. P. (C). No. 28146 of 2014. It is submitted that the respondent understands that in the meanwhile, on August 27, 2015 the promoter's suit got dismissed in default (for non-appearance), as a result of which the hon'ble Supreme Court on September 28, 2015 dismissed S. L. P. (C). No. 28146 of 2014 as infructuous and that the respondent further understands that in January, 2016, the promoters of the respondent-company filed a restoration application against the dismissal of the promoter's suit along with an application for condonation of delay and that the delay in filing restoration application has been condoned and the restoration application was listed for April 7, 2018.

As regards notice under section 13(2) of the SARFAESI Act, appeal is 9
stated to be filed before the Debts Recovery Tribunal objecting to the classification of the respondent's account as NPA and assailing the validity of the assignment deed. As regards recall notice of the petitioner issued on January 19, 2016 it is stated that this was duly responded to by the respondent on February 17, 2016 reiterating its objections to the impugned assignment and similar objections were also taken with reference to O. A. under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 filed by the petitioner on June 7, 2016. It is further stated that meanwhile, in 2015 the GLAM sold its 44.44 per cent. shares to one ADAL Media P. Ltd., in 2015. It has been submitted that HSBC was in a great hurry to somehow classify the respondent's account as NPA and then surreptitiously assigned the same to the petitioner without the primary security of the HSBC SBLC. It is stated that in any case, as there is an encashment under the HSBC SBLC which was after about one day of the impugned assignment, the said encashment led to full and complete satisfaction of the outstanding of the respondent alleged being in default. It is stated that under the Code, the financial creditor is defined to inter alia include any person to whom the debt has been legally assigned or transferred to and that the impugned assignment is not only fraudulent but also

illegal in view of the RBI Guidelines dated April 23, 2003 and July 1, 2015 and that the impugned assignment is illegal as the same was made in breach of the agreements between the parties. It is submitted that the impugned assignment is contrary to section 5(3) of the SARFAESI Act and that it was not open to HSBC to conveniently pick and choose securities which are to be assigned and which are not to be assigned and/or released. It is submitted that in absence of the books of the petitioner and of HSBC, duly certified in accordance with the Bankers' Books Evidence Act, 1891, the defaults alleged on part of the respondent cannot be ascertained. It is stated that the assignment deed enclosed with the petition mentions one "annexure A" purportedly being "Details of Ledger Extract" but annexure A is missing from the assignment deed filed along with the petition. It is stated that HSBC was not made a party to the petition, even though it had to answer various critical unanswered questions surrounding the impugned assessment. It is stated that the respondent cannot be considered in default (as the security stood encashed by HSBC) and in fact the respondent stood discharged. It has been prayed that the petition be dismissed with exemplary costs.

10 By order dated April 6, 2018 it was directed that the RBI Guidelines referred to by learned counsel for the respondent be filed in spiral bound paper book. Learned counsel for the respondent also sought time to file copies of orders passed in civil suit filed by the promoters of the respondent, orders passed by the hon'ble High Court and the hon'ble Supreme Court of India and copy of application for restoration in the aforesaid civil suit which was dismissed in default. These documents were filed by the respondent by diary No. 1186, dated April 17, 2018 and taken on record as per order dated May 9, 2018. When the matter was listed on May 9, 2018 this Tribunal also issued notice of defect regarding non-enclosure of ledger extract annexure A to the assignment deed dated March 21, 2012. The compliance was made by diary No. 1575 dated May 15, 2018 and order of the BIFR in case No. 50 of 2011-M/s. GPI Textiles Ltd., for hearing on April 20, 2012 was also filed. The compliance was noted in this Tribunal's order dated May 23, 2018 and the arguments were heard.

11 During the course of the arguments, learned counsel for the petitioner has contended that as per section 7(5)(a) of the Code, the Adjudicating Authority is required to satisfy itself regarding default ; application under Form 1 is complete ; and there are no disciplinary proceedings against the interim resolution professional. It was argued that as per article V of the corporate rupee loan facility agreement dated April 8, 2009 between the respondent and HSBC (annexure IV(b)) of the petition reference to the

BIFR would constitute an event of default and that it is also provided that not acting on the event of default will not constitute the same as having been condoned by the HSBC, unless specifically communicated by the HSBC. It was argued that there is no requirement under any Act to inform the borrower about declaration of his account as NPA and the only obligation in law is that this fact must be declared in the notice under section 13(2) of the SARFAESI Act, 2002 which has been duly complied with (page 497 of the petition). It is argued that other than trying to hide behind frivolous issues, the respondent has not mentioned a single word on their liability to make any repayment whereas in their reply it is admitted that there was complete erosion of net worth which led to filing of reference to the BIFR raising serious questions about their capability to repay the secured debts. It is argued that as per section 11.5 of general conditions to the corporate rupee loan facility agreement dated April 8, 2009 (annexure IV(b)) of the petition, the HSBC has a right to assign in part or whole of the facility and any dispute that the company may have with regard to SBLC can be raised with the HSBC. It is submitted that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated April 20, 2012. It is argued that GLAM was the investor of the respondent-company since 2007 and therefore, it cannot be contended that there was collusion between the HSBC, petitioner and GLAM. It is stated that the facility rights agreement (annexure R1 of the reply) is related to SBLC facility only and thus will not be binding upon the petitioner. It is submitted that till the preliminary arguments on March 21, 2018 in this Tribunal, no case was filed by the petitioner against GLAM or HSBC and the respondent have chosen to challenge the same only in the fourth week of March, 2018 before the hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition vide order dated March 29, 2018. It is argued that both the HSBC and the petitioner have undergone many RBI audits and thus the allegation on behalf of the respondent that there is collusion between the parties or that the default has been manufactured is misconceived and wrong. It is submitted that the respondent has acknowledged its debt vide its letter dated March 15, 2012 towards HSBC on page 839 of the application and also admitted that the said acknowledgment would be binding upon any assignee of the HSBC. It is submitted that the date of the assignment agreement is March 21, 2012 wherein the cut-off date of the principal is mentioned as on March 20, 2012 and the cut-off date for the interest due is on March 19, 2012. Therefore, it is pleaded that in respect of entry for transfer of amount of Rs. 81.25 crores dated March 22, 2012 in the demand

deposit transaction history, the borrower cannot take any benefit of any accounting entry subsequent to the cut-off date and the posting of such entries is the sole domain of the assignor. As regards the entry of Rs. 50 crores on March 22, 2012 in the demand deposit transaction history, the same is stated to relate to the consideration which was paid by the petitioner through RTGS to the HSBC in lieu of the assignment agreement. As regards the reliance by the respondent on the objections to assignment by SBI, it was pleaded that there was no consortium loan and the assignment of debt does not cause any change qua the status of SBI as another secured creditor and the fact remains that the respondent has not even repaid the debts of SBI which is around Rs. 100 crores. Learned counsel for the petitioner has relied on the judgment of *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 11 (paragraph No. 52) in which it was stated that NPAs are created on account of the breaches committed by the borrower, he violates his obligations to repay the debts, one fails to appreciate the opportunity he seeks to participate in the "transfer of account receivable" from one bank to the other.

12 In reply, learned counsel for the respondent has submitted that the petitioner is not a financial creditor under section 5(7) of the Code, as the debt was not legally assigned by the HSBC to the petitioner. It is submitted that as per RBI Guidelines dated April 23, 2003 (page 42 of the reply), a financial asset (i. e., loan) can be sold to a securitisation company/asset reconstruction company (like the petitioner) by a bank/FI (like HSBC) where the asset is declared as NPA and that NPA declaration is a pre-requisite for assignment of loan and in case of interest payment remaining over-due, banks should classify and account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. It is argued that the principal amount of HSBC loan was due on April 20, 2014 and as regards the monthly interest of 11 per cent., the last payment of interest took place on February 15, 2012 by drawing down SBLC for Rs. 3.7 crores and hence the account was not over due for more than 90 days from end of quarter as on March 1, 2012. It is stated that the HSBC loan was not accelerated and there is no notice of demand or notice of default or notice of acceleration or notice of cure issued by the HSBC to the petitioner. It is submitted that the guidelines issued by RBI on NPAs and loan assignments have a statutory force and must be complied with by referring to *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 11. It is argued that since the account could have not been NPA on March 1, 2012,

the very assignment was fraudulent and illegal in clear breach of RBI Guidelines and hence non est. It is pleaded that the impugned assignment is in violation of section 5(3) of the SARFAESI Act which provides for assignment of loan with all underlying security and guarantees, etc., It is argued that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent and it was a condition precedent to the loan and that various orders passed in the Alipore Court (February 26, 2010) and the High Court of Calcutta (June 24, 2011), specifically record the relevance of SBLC and its criticality. It is pleaded that it was incumbent on the HSBC to take recourse to SBLC and clear the default and this was also the practice followed by the HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment of by the respondent on the due date), without reference and without notice to the respondent. It is pleaded that the sequence of events show that the assignment was pre-meditated and NPA was declared and entire loan was made outstanding on March 20, 2012 only so that the HSBC could somehow assign the loan to the petitioner and in addition, the loan was settled by payment of Rs. 81 crores from SBLC and if at all, it is GLAM which is the creditor of the respondent and GLAM is free to file a claim against the respondent for the same. It is submitted that the impugned assignment was challenged by the promoters on June 16, 2012 before the Civil Judge, First Court, Alipore and in addition, the respondent has challenged the assignment before the Debts Recovery Tribunal and has also filed a writ petition before the hon'ble High Court of Himachal Pradesh. It is pleaded that the petitioner has failed to establish default on part of the respondent and failed to explain how more than Rs. 268 crores is amount in default and as evidence of default, old notices of 2009 have been placed on record, even though the default under such notices were cured in 2009 itself and the only other evidence of default is SARFAESI notice which is itself under challenge. As regards the arguments of learned counsel for the petitioner, learned counsel for the respondent reiterated that for an assignee to claim as financial creditor, it must be shown that the debt was legally assigned by the HSBC to the petitioner.

As regards the petitioner's arguments regarding event of default in the **13**
corporate rupee loan agreement dated April 8, 2009 it is submitted by learned counsel for the respondent that the default under the Code is defined as non-payment of financial debt, and not an "event of default" under some agreement. As regards petitioner's arguments regarding assignment of debt being permitted under section 11.5 of general conditions of the corporate rupee loan facility agreement, it is pleaded by learned

counsel for the respondent that the facility agreement does not talk of assignment and that however, facility rights agreement talks of assignment and states that assignment can only take place subject to clause 5 and that SBLC and loan go hand-in-hand.

14 With reference to the petitioner's arguments that facility rights agreement is not binding on the petitioner, it is stated that the facility rights agreement was assigned to the petitioner by the HSBC vide assignment deed (serial No. 92 of Part II of assignment deed at page 255 of the petition). As regards the petitioner's arguments that the respondent admitted/accepted the transfer of the HSBC loan in the BIFR hearing on April 20, 2012 it is submitted that the no objection was given on the specific representation made by the HSBC during the BIFR hearing that they have transferred and released in favour of the petitioner all the financial assistance granted by it together with all underlying securities and rights, interest and title thereto. With reference to the petitioner's contention that the respondent has never challenged the assignment deed before any authority, it is submitted that various clarifications on the assignment deed were sought from the HSBC ; the assignment deed was challenged in the reply to the SARFAESI notice as well as to the O. A. application before the Debts Recovery Tribunal and that in any event, such admissions and non-challenge cannot make illegal assignment legal and this cannot be construed as a waiver of RBI Guidelines. With reference to the petitioner's submissions with regard to the entry of Rs. 81.25 crores on March 22, 2012 in the demand deposit transaction history, it is submitted that the HSBC stated that the details be obtained from the petitioner and the petitioner stated that the details be obtained from the HSBC. With reference to the petitioner's argument that orders in cases filed by the promoters are not relevant and further they have been dismissed, it is reiterated by learned counsel for the respondent that the orders are relevant to the extent they recognise the importance of SBLC to the entire loan structure and that the restoration application filed by the promoters is still pending.

15 In rejoinder, learned counsel for the petitioner reiterated his submissions and pleaded that in view of the decision of the hon'ble Supreme Court in *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 11, the borrower could not take advantage since he was in default. It was pleaded that the petition be allowed and CIRP proceedings initiated against the respondent.

16 We have carefully considered the submissions of learned counsel for the parties and have also perused the records.

17 The present petition is filed under section 7 of the Code. In respect of the plea of the petitioner that the conditions as per section 7(5)(a) of the Code are satisfied, the respondent's argument is that even before that, it must be shown that the debt was legally assigned by the HSBC to the petitioner. Therefore, the respondent has not raised any objection to the satisfaction of the conditions provided for in section 7 of the Code and rule 4 of the IBC Rules. In its reply, the respondent had stated that the assignment deed dated March 21, 2012 (annexure IV(c) of the application) mentions one annexure A purportedly being "details of ledger extract" and that the said annexure A is missing from the assignment deed filed along with the application. Notice of this defect was given to the petitioner and the defect was removed and annexure A was filed along with compliance affidavit by Diary No. 1575, dated May 15, 2018.

18 The other objection (page 57 of the reply) is that the petitioner has failed to substantiate the amount claimed to be in default as per the requirements of the Code. The respondent's contention is that the support given of the claimed default amount is not in accordance with the Bankers' Books Evidence Act, 1891. We find that in annexure V(w) of the application the details of statement of dues showing total dues (including interest and penal interest) of Rs. 268,29,20,033 is accompanied by a certificate under section 2A of the Bankers' Books Evidence Act. This is also noted in this Tribunal's order dated February 13, 2018. Therefore, the contention that the certificate in accordance with the Bankers' Books Evidence Act, 1891 is not filed cannot be accepted. As pointed out by the respondent, we have noted that as per the statement of dues (supra), the outstanding dues with interest as on March 20, 2012 as per assignment agreement is noted as Rs. 131,35,70,672. This is the amount as stated in the assignment deed dated March 21, 2012 (annexure IV(c) of the petition). However, there is a rectification in the outstanding amount made by letter dated May 9, 2012 of the HSBC to the petitioner (page 286 of the application) in which the total outstanding is computed at Rs. 131,21,11,929.50. The difference is on account of interest due (as on March 19, 2012) taken at Rs. 233,70,672.36 in the assignment deed dated March 21, 2012, and interest due as on March 19, 2012 of Rs. 2,19,11,929.50 taken in the rectification letter dated May 9, 2012. It is explained in the letter dated May 9, 2012 that due to some clerical mistake, the particulars of loan as mentioned in clause 1 details of loans of Schedule 1 of the deed of assignment deed dated March 21, 2012 referred different interest due amount as on March 20, 2012 which is being rectified with this letter. It therefore, appears that the notice under section 13(2) of the SARFAESI Act, 2002 dated May 15, 2012 (annexure V(g) of the

petition) mentioned the outstanding dues under the facility as aggregating to Rs. 131,21,11,929.50 as on March 20, 2012. Further, in the statement of dues (annexure V(w) of the application, the outstanding dues with interest as on March 20, 2012 are taken, i. e., it appears that one day's interest of March 20, 2012 is added and the outstanding dues with interest are thereby shown at Rs. 131,35,70,672. We therefore, do not find any force in the objection raised by the respondent.

19 The only issue therefore, requiring consideration is whether the petitioner is a financial creditor of the respondent. The respondent has referred to the provisions of section 5(7) of the Code which reads as follows :

> "'Financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to."

20 The respondent's contention is that the debt should be legally assigned or transferred to make the person to whom the debt is assigned or transferred a financial creditor. The respondent has referred to the Guidelines on sale of financial assets to securitisation company (SC)/reconstruction company (RC) (created under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) and related issues dated April 23, 2003 (2003 RBI Guidelines) (page 8 of Diary No. 1186, dated April 17, 2018 in which the details of financial assets which can be sold is given in paragraph 3 as follows :

> "3. A financial asset may be sold to the SC/RC by any bank/FI where the asset is :
>
> (i) A NPA including a non-performing bond/debenture, and
>
> (ii) A standard asset where :
>
> (a) the asset is under consortium/multiple banking arrangements,
>
> (b) at least 75 per cent. by value of the asset is classified as non-performing asset in the books of other banks/FIs, and
>
> (c) at least 75 per cent. (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of the asset to SC/RC."

21 Further reference is made to paragraph 2.1 of the RBI's Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated July 1, 2015 (Prudential Norms, 2015) defining an NPA as under (page 43 of the reply) :

> "2.1.1 An asset including a leased asset, becomes non-performing asset when it ceases to generate income for the bank.

2.1.2 A non-performing asset (NPA) is a loan or an advance where ;

(a) Interest and/or instalment of principal remain over due for a period of more than 90 days in respect of a term loan . . .

2.1.3 In case of interests payments banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter."

22 The respondent's contention is that the principal amount of the HSBC loan was due on April 20, 2014 and only monthly interest of 11 per cent. was to be paid during the tenure of the HSBC loan and that even the balance confirmation letter dated March 15, 2012 (on which reliance is sought to be placed by the petitioner) mentions outstanding interest of only two months and therefore, the account of the respondent could not be classified as NPA on March 1, 2012 as on the said date no interest has been outstanding for more than 90 days from the end of the quarter in which it was due as per the RBI Guidelines.

23 Vide Diary No. 1186, dated April 17, 2018, the respondent has submitted the RBI Prudential Norms circulated by Master Circular dated July 2, 2012 (page 20 of Diary No. 1186, dated April 17, 2018). The definition of non-performing assets (paragraph 2.1.3) is on the same lines as in the 2015 Prudential Norms. The 2012 Prudential Norms refer to RBI Master Circular dated July 1, 2011. This master circular had been downloaded from the RBI website and the definition of non-performing assets (paragraph 2.1) is on the same lines as in the Master Circular of 2012 and 2015. The respondent's contention is that in *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 11, the hon'ble Supreme Court has held that in exercise of the powers conferred by sections 21 and 35A of the Banking Regulation Act, 1949, the RBI can issue directions having statutory force of law and since these directions relating to assignment of financial assets by a bank to an asset reconstruction company are not satisfied in the present case the assignment is illegal.

24 The issue before the hon'ble Supreme Court was the scope of the power of RBI to define what constitutes "banking business" and it was held that trading in NPAs has the characteristics of a bona fide banking business. In paragraph 35, the hon'ble Supreme Court held that in exercise of the powers conferred by sections 21 and 35A of the Banking Regulation Act, 1949, RBI can issue directions having statutory force of law. However, the directions are to be examined to find out whether the conditions of financial asset being NPA would make the assignment illegal. The first RBI Guidelines referred to by the respondent are the RBI Guidelines dated April 23, 2003 in which details of financial assets which can be sold by banks/FIs to

the securitisation company (SC)/reconstruction company (RC) are given. The relevant paragraph No. 3 has been extracted above. The financial assets which can be sold are not only NPA but include standard asset also, i. e., where the asset is under consortium/multiple banking arrangements/ at least 75 per cent. (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of asset to SC/ RC, etc. Therefore, subject to fulfilment of the conditions even standard asset, i. e., a non-NPA can be sold by the bank/FI to SC/RC. In this context, reference may also be made to Chapter II of the SARFAESI Act, 2002 which inter alia, relates to registration of asset reconstruction company, acquisition of rights or interest in financial assets by an asset reconstruction company. Section 5(1) of the SARFAESI Act 2002 reads as follows :

> "5. *Acquisition of rights or interest in financial assets.*—(1) Notwithstanding any thing contained in any agreement or any other law for the time being in force, any (asset reconstruction company) may acquire financial assets of any bank or financial institution—
>
> (a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them ; or
>
> (b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them."

25 Therefore, there is no condition stipulated in section 5 of the SARFAESI Act, 2002 that an asset reconstruction company has to acquire only NPAs of banks or financial institutions. It is concluded that the nature of the financial asset transferred, i. e., whether it is NPA or not is not such a material condition so as to make the agreement invalid. We may add here that as per paragraph 2.1(a) of the assignment deed dated March 21, 2012 (page 237 of the petition) it is stated that the agreement to assign is in consideration of the assignee having deposited the purchase consideration in the escrow account and therefore, the assignment is for valuable consideration received. Further, as paragraph 3.1 of the assignment deed dated March 21, 2012 the HSBC has represented and warranted to the petitioner that as on the date of the deed and with reference to the facts and circumstances then existing, the loans are non-performing assets and have been duly and validly classified as such, in accordance with the guidelines issued by RBI in this regard and all applicable law. The consequences of the breach of representations are given in paragraph 3.2 of the assignment deed dated March 21, 2012. It is stated therein that if any of the

representations are found to be incorrect, a consequence of which materially and adversely affects the interest of the assignee in the loans, such misrepresentation shall be rectified by the assignor forthwith and in no event later than 30 days from the date of receipt of notice by the assignor from the assignee, after a notice in respect of the breach is given to the assignor by the assignee. Therefore, the breach of representation regarding the loan being non-performing asset is a matter between the petitioner and HSBC. Learned counsel for the petitioner has referred to paragraph 52 of the decision of the hon'ble Supreme Court in *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 11, in which the hon'ble Supreme Court held as follows (page 473 of 159 Comp Cas) :

> "Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the 'transfer of account receivable' from one bank to the other."

In the present case, the respondent cannot seek to take benefit of whether the assigned debt is a NPA and the matter lies between the petitioner and HSBC.

We are now taking into consideration the other issues raised by the respondent in support of its claim that the debt is not legally assigned or transferred by the HSBC to the petitioner : **26**

(i) The respondent has referred to pages 132 and 151 of Diary No. 1186, dated April 17, 2018 filed by the respondent and has stated that the HSBC should have followed a price discovery auction process for sale of loan to the petitioner or it could do a bilateral sale with the petitioner only with the borrower's consent. We find that page 132 is press release 2013-14/1533, dated January 30, 2014 with reference to the RBI releasing on its website the framework for revitalising distressed assets in the economy. The framework is at pages 134 to 155. The press release itself states that the framework outlines the specific proposals RBI will implement. Moreover, the press release is of January 30, 2014, i. e., much after the assignment deed dated March 21, 2012. Therefore, the respondent's contention cannot be accepted.

(ii) The respondent has referred to pages 121, 124 and 125 of Diary No. 1186, dated April 17, 2018 filed by the respondent to state that as per RBI Guidelines, initial holding period (of NPAs) of two years has been prescribed for banks holding NPAs prior to the amendment. The reference therein sought to be relied upon by the respondent is with regard to RBI

Circular dated July 13, 2005. This circular is available at page 14 of Diary No. 1186, dated April 17, 2018 filed by the respondent. The first paragraph thereof clearly states that the guidelines would be applicable to banks/FIs and NBFCs purchasing/selling non-performing financial assets from/to other banks/FIs/NBFCs (excluding securitisation companies/reconstruction companies). Therefore, this RBI Guidelines is not applicable in the present case which is of an asset reconstruction company.

(iii) Learned counsel for the respondent has argued that the assignment of debt was in violation of section 5(3) of the SARFEASI Act, 2002 which provides for assignment of the loan with all underlying security and guarantees, etc., section 5(3) is only in respect of the rights of the asset reconstruction company in respect of contracts, deeds, bonds, etc., of the predecessor bank and cannot be read to restrict the bank from assigning loan only with all underlying securities and guarantees, etc., as claimed. As regards section 13(2) of the SARFEASI Act, making reference to NPA, the matter is not relevant for the purposes of present discussion whether debt is legally assigned or transferred.

(iv) It is argued by learned counsel for the respondent that assignment of debt was contrary to the agreement between the parties and that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent-company and that it was a condition precedent to the loan. It has been stated at page 3 of the respondent's reply filed by Diary No. 757, dated March 15, 2018 that a tripartite share subscription and shareholders agreement was entered into in March, 2007 between GLAM, the promoters and the respondent-company, for investment in the respondent-company and the understanding between the parties was that, to settle the dues of original lenders, GLAM will arrange financing for the respondent-company, which financing shall be supported by GLAM and this understanding was the very basis of the investment in the respondent-company by GLAM. However, no evidence to support the contentions raised has been filed and moreover, the issue relates to GLAM, the respondent and the promoters of the respondent-company and does not have any bearing on the assignment. Article III-security of the corporate rupee loan facility agreement dated April 8, 2009 between the respondent and HSBC (annexure IV(b) of the application) includes three paragraphs, i. e., paragraph 3.1-security for the facility ; paragraph 3.2-security cover and paragraph 3.3-creation of additional security. The details of security given in paragraph 3.1(A) are firstly, a first charge ; secondly, a second charge ; and thirdly, SBLC. Paragraph 3.1(B) states that the first charge and second charge shall be created

by the respondent within 180 days from the draw down date whereas the SBLC would have to be provided as the condition precedent to the draw down. Therefore, SBLC being provided as a condition precedent to the draw down has to be taken in the context that the first charge and second charge to be created by the respondent would take time especially since the earlier borrowal was from ICICI Bank and the period of 180 days from the draw down date was given for this purpose.

We find that the respondent's interpretation that SBLC was a condition precedent to the loan cannot therefore, be taken to be correct. In this context, the argument of learned counsel for the respondent that in case of default, it was incumbent on the HSBC to take recourse of the SBLC and clear the default is being considered. The condition provided for by clause 3.1 of the corporate rupee loan facility agreement dated April 8, 2009 (supra) is minimum security cover by way of SBLC for 105 per cent. of the outstanding principal and interest calculated at the facility interest rate for the next two months (including on account of exchange rate fluctuation for securities other than SBLC, minimum security cover of 1.00 is set out in clause 3.1). Clause 3.3 provides for the respondent procuring, providing and furnishing additional security when the HSBC is of the opinion that the security provided for the facility has fallen below the security cover. Therefore, the clauses in article III of the corporate rupee loan facility agreement (supra) only provide for the minimum security cover and creation of additional security when the security provided falls below the security cover. The respondent had sought to rely on the practice followed by the HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment by the respondent on the due date) without reference and often without notice to the respondent.

We may firstly state that as per clause (I)(C) of the corporate rupee loan facility agreement dated April 8, 2009 "draw down date" means the date on which the facility is drawn down in the manner provided in Schedule III, i. e., the draw down has reference to the date on which the facility involving term loan not exceeding Rs. 129,02,00,000 is taken and utilised by the respondent for repayment of earlier loan borrowed from the ICICI Bank. The draw down date has therefore, no reference to the SBLC. As already discussed above, default of payment of the monthly interest may result in the creation of additional security. The respondent has not referred to any specific clause of the corporate rupee loan facility agreement dated April 8, 2009 or the facility rights agreement dated April 8, 2009 by which the HSBC could make the draw down of monthly interest from SBLC (in case of non-payment by respondent on due date) as claimed by

the respondent. On the other hand, it is seen from the board resolutions dated June 30, 2009, December 16, 2009, November 23, 2011 and March 23, 2012 (annexure A-IV (colly)) of Diary No. 757 dated March 15, 2018 that consequent to the HSBC issuing a default notice to the respondent, GLAM paid the amounts to cure the defaults. It was in these circumstances that the amounts were acknowledged as unsecured loans from GLAM in the books of the respondent. Therefore, the respondent's contention of practice followed by HSBC of drawing down monthly interest from SBLC (in case of non-payment by the respondent on due date) without reference and often without notice to the respondent cannot be accepted.

(v) Learned counsel for the respondent has referred to clause 9.3 of the facility rights agreement (annexure R1 of the reply) for pleading that SBLC and the HSBC loan went together and one could not be assigned without the other. Clause 9.3 states that subject to clause 5 (right of first refusal), the HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under the facility rights agreement and the transaction documents without prior notice to or consent from either GLAM or the respondent and it is further provided that any assignment of the SBLC to a proposed assignee shall only be done together with the concurrent assignment of the facility rights agreement in favour of the same assignee. The assignment of SBLC is specifically excluded in the assignment deed dated March 21, 2012 and therefore, the proviso has no effect.

As regards the other part, the prior notice to or consent from either GLAM or the respondent for assignment or transfer is required only for the rights, benefits and obligations under the facility rights agreement and the transaction documents. Moreover, clause 9.11 of the facility rights agreement states that the agreement shall be read in conjunction with the corporate rupee loan facility agreement and in the event there is any conflict between the terms of the two agreements, the corporate rupee loan facility agreement shall prevail. Clause 2.1 of the corporate rupee loan facility agreement (annexure IV(b) of the application) clearly states that the term loan is subject to the terms and conditions contained in the agreement as also in the general conditions. Section 11.5 of the general conditions states that the respondent shall not assign or transfer all or any of its rights, benefits or obligations under the corporate rupee loan facility agreement and the transaction documents without the approval of the HSBC and the HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under the corporate rupee loan facility agreement and the transaction documents, i. e., approval of the respondent or any other person is not required. Moreover, transfer need not be of all the rights,

benefits and obligations. Some benefits, rights and obligations can also be transferred, i. e., the assignment without SBLC can be made. Therefore, the contentions of the respondent cannot be accepted.

(vi) Learned counsel for the respondent has referred to various orders passed in the Alipore Court (February 26, 2010) and the hon'ble High Court of Calcutta (June 24, 2011) which are stated to be specifically record the relevance of SBLC and its criticality. We find that at pages 25 and 26 of the reply filed by Diary No. 757, dated March 15, 2018, the respondent has stated that by S. L. P. (Civil) No. 36285 of 2011 (against the order dated June 24, 2011 of the hon'ble Calcutta High Court), the hon'ble Supreme Court by order dated March 24, 2014 declared the order dated February 26, 2010 of the Alipore Court ineffective from the date of filing of the suit. In view of these facts, the orders of the Alipore Court and the hon'ble Calcutta High Court are not being further examined.

(vii) The pleas taken by learned counsel for respondent for stating that the assignment of debt was contrary to agreements between the parties cannot be accepted.

(viii) Learned counsel for the respondent has submitted that a fraud was committed on the respondent and that there was also settlement of loan. The major ground taken is that the HSBC and the petitioner have failed to explain the draw down of more than Rs. 81 crores which was made on SBLC (reflecting in the bank account statement of the respondent on March 22, 2012, i. e., one day after assignment). It is stated at page 16 of the reply filed by Diary No. 757, dated March 15, 2018 that the "demand deposit transaction history" of the respondent showed a receipt of Rs. 81,25,08,408 as "proceeds under GTY from HSBC MAR". The copy of the demand deposit transaction history dated April 5, 2012 has been enclosed as annexure R8 of the reply. This demand deposit transaction history relates to the respondent's account with the HSBC and the relevant entry of March 22, 2012 reads as follows :

Page 106 of reply

Date	*Transaction details*	*Deposit*	*Balance*
March 22, 2012	Transfer HSBC Phoenix ARC-escrow FT to GPI Textiles Ltd. WRLR-00069 11:13:52 transfer partial claim proceeds under GTY FM HSBC MAR App roprtinod TRF to GPI Textile Ltd.	500,000,000	478,088,070.50
	WRLP-00112 17: 46: 03	812,508,408	1,290,596,478.50

The respondent has only taken an extract of the narration in its reply at page 16. The contents of the noting of the transaction do not appear to justify the claim of the respondents that this was a draw down which was made on SBLC. The amount involved is substantial. However, with regard to clarification regarding the entry the respondent has mainly referred to communications in March, 2012 (annexure R7 (colly) of reply). It has been also stated that by e-mail dated March 30, 2012 (page 109 of reply) when the respondent enquired from HSBC regarding the entry, it was told that since the account has been assigned to the petitioner with effect from March 21, 2012 all balance confirmations and outstanding details from March 21, 2012 onwards needs to be obtained from the petitioner only and when the respondent asked the petitioner by letter dated July 6, 2012 it was told by letter dated July 20, 2012 (annexure V(h) of the application) that the matter may be taken up separately with the HSBC for seeking the details. It appears that no further action has been taken by the respondent to find out the complete details of the amount of about Rs. 81.25 crores. We may add that in the letter dated July 20, 2012 the petitioner has stated that they have not received any money as part of repayment towards the loan due and payable after the execution of deed of assignment and that the allegation regarding appropriation of amount received from encashment of SBLC is incorrect and unjustified. The contention raised is of fraud committed on the respondent and settlement between the HSBC, the petitioner and GLAM (without knowledge and consent of the respondent). The evidence relied upon by the respondent is discussed above and in view of the discussion the contention cannot be accepted.

(ix) Learned counsel for the petitioner has pleaded that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated April 20, 2012 and thus they cannot say that they were not aware regarding the assignment and declaration of NPA. It is further pleaded that till the preliminary arguments on March 21, 2018 in the present case in this Tribunal, no case has been filed by the respondent against GLAM or the HSBC and the respondents have chosen to challenge the same only in the fourth week of March, 2018 before the hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition. It is stated that no payment whatsoever was made in respect of the loan and interest by the respondent since March 21, 2012, and this is also evidenced by the statement of dues at annexure V(w) of the application. The respondent's explanation is that its no objection is in view of specific representation made by the HSBC stating that pursuant to the assignment deed all the financial assistance granted by

it together with all underlying securities and rights, interest and title thereto were transferred and released in favour of the petitioner, i. e., all securities including SBLC were assigned. We find from page 13 of the respondent's reply filed by Diary No. 757, dated March 15, 2018 that the respondent has stated that it received e-mail from the HSBC on March 27, 2012 stating that the assignment deed dated March 21, 2012, assigned the security interest (other than the SBLC and the rights arising thereunder). Therefore, as on the date of BIFR hearing on April 20, 2012, the respondent was well aware that SBLC has not been assigned to the petitioner. In these circumstances the reliance on the representations by the HSBC is misplaced. Moreover, no further action was taken for withdrawing the no objection. As regards the challenge to the assignment deed, the respondent's reply is that the assignment deed was challenged in reply to SARFAESI notices, OA application before the Debts Recovery Tribunal, etc. Therefore, effectively, the assignment deed dated March 21, 2012, was unchallenged.

(x) In view of the above discussion, we reject the contention of the respondent that the debt is not legally assigned or transferred to the petitioner. It is therefore, held that the petitioner is a financial creditor as defined in section 5(7) of the Code and is entitled to initiate CIRP in the case of the respondent under section 7 of the Code. We are also satisfied that the conditions provided for by section 7(5)(a) of the Code are satisfied inasmuch as a default has been proved to have occurred ; the application under section 7(2) of the Code is complete ; and there are no disciplinary proceedings pending against the proposed resolution professional, i. e., Shri Jalesh Kumar Grover.

The petition is, therefore, admitted under section 7(5)(a) of the Code **27**
and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of section 14 of the Code :

> "(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority ;
>
> (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein ;
>
> (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) ;

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

28 It is further directed that the supply of essential goods or services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of the Code shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

29 The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33 as the case may be.

30 The matter be posted on July 12, 2018 for passing formal order to appoint interim resolution professional with further directions.

Copy of this order be communicated to both the parties.

[2020] 221 Comp Cas 122 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

LALAN KUMAR SINGH

v.

PHOENIX ARC P. LTD. AND ANOTHER

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)*** and
BANSI LAL BHAT J. ***(Judicial Member)***

December 20, 2018.

HF ▶ Respondent

INSOLVENCY RESOLUTION—APPLICATION BY FINANCIAL CREDITOR ADMITTED—CLAIM BASED ON ASSIGNMENT OF LOAN—CORPORATE DEBTOR ACKNOWLEDGING ASSIGNMENT DEED—LEGALITY OF ASSIGNMENT CANNOT BE CHALLENGED IN PETITION UNDER SECTION 7—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

The application filed under section 7 of the Insolvency and Bankruptcy Code, 2016, for initiation of the corporate insolvency resolution process against the corporate debtor was admitted. On appeal by the executive director and shareholder of the corporate debtor contending that the claim was based on an illegal assignment of a loan :

Held, *dismissing the appeal, that the assignment could not be challenged in the petition under section 7 and that too by a party who had knowledge of the assignment deed as far back as in the year 2012, as noted by the Debts Recovery Tribunal. From the letter written by the corporate debtor on March 19, 2018 it was clear that the corporate debtor had agreed to the assignment. Therefore it was not open to the appellant to raise allegation of mala fides or to allege that the assignment was illegal.*

Order of the National Company Law Tribunal in PHOENIX ARC P. LTD. *v.* GPI TEXTILES LTD. [2020] 221 Comp Cas 99 (NCLT) *affirmed*.

Cases referred to :

Binani Industries Ltd. *v.* Bank of Baroda [2019] 5 Comp Cas-OL 28 (NCLAT) (para 20)

ICICI Bank Ltd. *v.* Official Liquidator of APS Star Industries Ltd. [2010] 159 Comp Cas 443 (SC) (para 17)

Innoventive Industries Ltd. *v.* ICICI Bank [2017] 205 Comp Cas 57 (SC) (para 18)

Phoenix ARC P. Ltd. *v.* GPI Textiles Ltd. [2020] 221 Comp Cas 99 (NCLT) (para 1)

Company Appeal (A. T.) (Insolvency) No. 485 of 2018.

Ms. Pooja Mahajan, *Ms. Mahima Singh*, *Gaurav Arora*, *Sanjeev Deora*, Chartered Accountants, *Mohd. Nazim Khan*, Practising Company Secretary and *Mohtashim Kibriya*, for the interim resolution professional for the appellant.

Manish Jain, *Sanjay Bhatt* and *Ms. Divya Sharma*, for respondent No. 1.

Sanyam Goel, Practising Company Secretary and *Jalesh Kumar Grover*, resolution professional for respondent No. 2.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***.—M/s. Phoenix 1
ARC P. Ltd. ("Phoenix" for short) (financial creditor) filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 ("I and B Code" for short) for initiation of the "corporate insolvency resolution process" against M/s. GPI Textiles Ltd. ("GPI" for short) (corporate debtor). The Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh by impugned order dated July 6, 2018—(*Phoenix ARC P. Ltd.* v. *GPI Textiles Ltd.* [2020] 221 Comp Cas 99 (NCLT)) having admitted the application, the appellant Mr. Lalan Kumar Singh, executive

director and shareholder of "corporate debtor" has preferred this appeal challenging the said order of admission.

2 Learned counsel appearing on behalf of the appellant submitted that loan was originally granted by the HSBC India (HSBC) to GPI. The Phoenix's claim is based solely on an illegal assignment of a loan purported to have been granted by the HSBC by way of an "assignment deed" dated March 21, 2012. Therefore, according to the appellant "Phoenix" is not the "financial creditor" of "GPI" and has failed to establish "debt" and "default" or that the "debt was legally assigned or transferred", within the meaning of the "I and B Code".

3 According to learned counsel for the appellant as per section 5(7) of the "I and B Code" the "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. Phoenix's claim is based on assignment of loan by the HSBC, which is not legal.

4 It was submitted that assignment was against RBI Guidelines dated April 23, 2003 which have a statutory force. As per the RBI Guidelines, NPA declaration is a pre-requisite for legal assignment of loan to an asset reconstruction company. The principal amount of the HSBC loan was due on April 20, 2014 and only the monthly interest of 11 per cent. was to be paid during the tenor. The HSBC India had drawn down on SBLC/Guarantee on February 15, 2012 for Rs. 3.7 crores to clear pending interest payments. Hence there was no default as on March 1, 2012 and account was not overdue for more than 90 days from the end of quarter as on March 1, 2012 (i. e., date of NPA). Since there is no way the account could have been NPA on March 1, 2012 the assignment was fraudulent and illegal, in clear breach of the RBI Guidelines and, hence non est.

5 Further, according to learned counsel for the appellant, paragraph B of article V of the loan agreement provides for 7 business days cure period before declaring an event of default and before acceleration. There is no notice of demand or notice of default or notice of acceleration or notice of cure issued by the HSBC India. It is also submitted that the impugned assignment also contravenes the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act"). Section 5(3) of the SARFAESI Act, provides for assignment of the loan with all underlying security and guarantees, etc., the HSBC loan was assigned under the SARFAESI Act, but without assigning the most important and liquid security of the HSBC SBLC/Guarantee, which was backed by lien and security over cash fixed deposit by the largest shareholder of GPI and formed the very backbone of financing arrangements

between "HSBC India", "GPI" and "GLAM". Further, section 2(1)(j) of the SARFAESI Act, defines "default" only upon classification of NPA. Despite no default by "GPI", "Phoenix" was served with the SARFAESI notice demand of Rs. 131 crores.

6 Further according to learned counsel for the appellant the impugned assignment was also contrary to agreements between the parties and the order dated February 26, 2010 of the Alipore Court read with order dated June 24, 2011 of the High Court of Kolkata. In case of default, it was incumbent on the HSBC India to take recourse to the HSBC SBLC/guarantee and clear the default, as done in the past. Further when the HSBC loan was only due on April 20, 2014 it was not open to the HSBC India to engineer a default and make Rs. 131 crores outstanding on March 20, 2012 thereby making it impossible for "GPI" to pay such a huge amount prior to its due date. Therefore, according to the appellant, the act of the HSBC India in illegally engineering default and illegally assigning the HSBC loan without the HSBC SBLC/Guarantee amounts to fundamental variation of agreements between the parties.

7 Learned counsel for the appellant also submitted that a monumental fraud has been practiced by the HSBC India and "Phoenix" to illegally takeover and extract amounts from GPI and this fraud constitutes the basis of section 7 application, leading to passing of the impugned order :

(a) Even though the HSBC SBLC/guarantee was drawn for the last time prior to alleged release on February 15, 2012 (to clear outstanding interest), the HSBC India declared NPA on March 1, 2012 without informing GPI. The assignment deed states that assignment agreement is executed on March 20, 2012 though the loan which was due on April 20, 2014, i. e., after more than two years as on that day and no default existed as on that day, therefore, it was illegally made to be overdue (for more than Rs. 131 crores). The sequence of events show that the assignment was premeditated and NPA was manufactured, and the loan account was illegally declared NPA in order to make the entire loan outstanding only so that the HSBC India could somehow assign the loan to "Phoenix".

(b) If needed, there was a default (even though the evidence shows otherwise), the HSBC India had to, like before, call on the guarantee issued by its co-branch and the co-branch had recourse on fixed deposit for making payment to the HSBC.

(c) The "HSBC India" and "Phoenix" have enjoyed the benefit of draw down of more than Rs. 81 crores made on the HSBC SBLC/guarantee (which is reflecting in the bank account statement of GPI on March 22, 2012 (i. e., one day after assignment), and also the credit of Rs. 50 crores on

March 22, 2012 reflecting in the bank account statement of "GPI". No benefit of both the aforesaid amounts has been allowed to "GPI", whose debt admitting assignment stands fully satisfied. If the HSBC SBLC/Guarantee was released between March 20, 2012 and March 21, 2012 (as stated in assignment deed), the draw down of Rs. 81 crores from the HSBC SBLC/guarantee made on March 22, 2012 and the credit of balance of Rs. 50 crores reflecting in the HSBC Bank account of GPI on March 22, 2012 can only be for satisfaction of debt of "GPI". The aforesaid facts explain the outcome of release of the HSBC SBLC/Guarantee, which encashment reflects in the bank account of "GPI" in the HSBC, and that non-transfer of SBLC/guarantee with the assignment of loan and encashed subsequently can cause no prejudice to the satisfaction of amount recoverable from "GPI".

8 Therefore, according to learned counsel for the appellant, "Phoenix" has failed to establish "default", within the meaning of the "I and B Code". Form No. 1 filed by Phoenix shows a principal of Rs. 129 crores (approximately) as on March 20, 2012 and an interest of Rs. 2.33 crores as on March 19, 2012. A sum of Rs. 268 crores (approximately) is shown as the cumulative default as on December 26, 2017, which "Phoenix" has failed to explain. Charging of interest being consequent upon determination of default, interest cannot be considered to have accrued when default itself is not established. Thereby, the appellant while sought for declaration of NPA as on March 1, 2012 as illegal and has also challenged the assignment as was made by the HSBC in favour of the respondent "Phoenix".

9 From the record, the following facts emerges :

10 The "corporate debtor" was categorized as NPA on March 1, 2012 by the HSBC.

Subsequently, the account of the "corporate debtor" was assigned by the HSBC to "Phoenix" with the underlying securities, save and except stand by "letter of credit" (SBLC) vide deed of assignment dated March 21, 2012.

11 The "corporate debtor" had full knowledge of such assignment without SBLC as is apparent from the following facts :

The "corporate debtor" by its letter dated March 19, 2018 agreed for assignment by the HSBC in favour of "Phoenix", relevant portion of which is quoted below :

ANNEXURE 9 (COLLY)

GPI TEXTILES LIMITED
(AN ISPAT GROUP COMPANY)

Works & Registered Office : Bharatgarh Road, Nalagarh – 174101, District Solan (H.P.) India
CIN No. U71110HP2006PLC026701 Ph. : +91-1795-222282, +91-98163-60380-82 Fax : + 91-1795-222601
E-mail : gpitex@gpitextiles.com Website : www.gpitextiles.com

GPT/2017-18/19032018/01
Dated: 19th March 2018

1. The Department of Banking Regulation,
Reserve Bank of India
12th Floor, Central Office Building,
Shahid Bhagat Singh Road,
Mumbai-400 001

2. The Department of Non-Banking Regulation
Reserve Bank of India
Centre I, World Trade Centre,
Mumbai-400 005

3. The Department of Banking Supervision,
Reserve Bank of India,
Centre I, World Trade Centre,
Mumbai-400 005

4. The Department of Non-Banking Supervision
Reserve Bank of India
Central Office, Centre I,
World Trade Centre,
Mumbai-400 005

5. The Regional Director
Reserve Bank of India
6, Sansad Marg
New Delhi - 110 001

6. The Reserve Bank of India
Central Vista, Sector 17,
Chandigarh - 160 017

Sub: Request to investigate certain fraudulent, illegal, mala fide and arbitrary actions by The Hongkong and Shanghai Banking Corporation Limited, Barakhamba Branch, Delhi and Phoenix ARC Private Limited

Dear Sir,

We, GPI Textiles Limited (**Company**) are a company incorporated under the provisions of the Companies Act, 1956, with its registered office at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh.

We are writing this letter to bring to your attention, certain fraudulent, illegal, mala fide and arbitrary actions by The Hongkong and Shanghai Banking Corporation Limited, Barakhamba Branch, Delhi (**HSBC India**) and Phoenix ARC Private Limited (**Phoenix**).

HSBC India, being a scheduled commercial bank, and Phoenix, being an asset reconstruction company (ARC) are under Your regulatory supervision. We are bringing certain actions taken by HSBC India and Phoenix, in collusion with each other, with require serious and urgent investigation by Your good offices.

The facts leading up to the present letter are as follows:

1. The Company had initially availed loans from IDBI Bank Ltd., IFCI Ltd. and ICICI Bank Ltd. (**Original Lenders**). In 2007, in order to streamline our accounts and settle then outstanding debts with the Original

Panchkula Offices:- House No. 922, Sector-7, Panchkula- 134109, Haryana, Ph- +91-172-2596788

xxx xxx xxx

xxx xxx xxx

GPI TEXTILES LIMITED
(AN ISPAT GROUP COMPANY)

Works & Registered Office : Bhatot garh Road, Nalagarh – 174101, District Solan (H.P.) India
CIN No. U17117HP2008PLC032401 Ph. : +91-1795-222282, +91-98163-00380-82 Fax : +91-1795-222601
E-mail : gpitex2@gpitex.com Website : www.gpitextiles.com

We are happy to provide any assistance required from us by the RBI in this matter. We are enclosing the copies of the agreements between HSBC India and the Company, the sanction letters, the HSBC SBLC, the correspondences exchanged between the parties and the Assignment Deed between HSBC India and Phoenix. In case any further document is required for your good offices to investigate the matter, we shall be happy to provide the same to you.
Yours faithfully

For GPI Textiles Limited

Authorised Signatory

Encl: As above

The "corporate debtor" had also conveyed its consent for substitution of "Phoenix" as the secured creditor in place of the HSBC during the course of proceedings before the BIFR on April 20, 2012. Admittedly, the "corporate debtor" never challenged the said order dated April 20, 2012.

12 "Phoenix" issued the notice dated May 15, 2012 under section 13(2) of the SARFAESI Act, 2002 to the "corporate debtor" demanding Rs. 131,21,11,929.50 as on March 20, 2012 along with further interest and other charges thereon at the contractual rates starting from March 21, 2012 till actual payment and/or realization. "Phoenix" also issued a notice dated September 30, 2015 under section 13(4) of the SARFAESI Act to take possession of secured assets of the "corporate debtor". The "corporate debtor" has filed S. A. No. 919 of 2016 challenging the action under section 13(4). Subsequently respondent No. 1 has also filed O. A. No. 919 of 2016. Both the matters are pending in the Debts Recovery Tribunal-I, Chandigarh.

13 Thereafter, "Phoenix" filed petition under section 7 of the I and B Code before the Adjudicating Authority, Chandigarh Bench which satisfied the following three requirements as laid down under section 7(5)(a) :

"(i) Existence of default,

(ii) Application under Form No. 1 being complete, and

(iii) No disciplinary proceedings against the IP proposed as IP."

Apart from the above, the "corporate debtor" had executed balance-cum-security confirmation letter dated March 15, 2012 admitting the debt due to the "financial creditor". **14**

The loan agreement contains a covenant that the loan can be assigned in part or in whole without permission of the borrower. **15**

The appellant has challenged the "deed of assignment" executed between the "HSBC and Phoenix", but while filing reply to the notice issued during the admission of application under section 7 of the I and B Code, such issue cannot be raised as it cannot be decided by the Adjudicating Authority on objection. **16**

In *ICICI Bank Ltd.* v. *Official Liquidator of APS Star Industries Ltd.* [2010] 159 Comp Cas 443 (SC) ; [2010] 10 SCC 1 it was observed (page 473 of 159 Comp Cas) : **17**

> "Before concluding, we may state that NPA's are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity, he seeks to participate in the 'transfer of account receivable' from one bank to the other."

In *Innoventive Industries Ltd.* v. *ICICI Bank* [2017] 205 Comp Cas 57 (SC) ; [2018] 1 SCC 407, the hon'ble Supreme Court, inter alia, held that the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the "financial creditor" to satisfy itself that a default had occurred and observed (page 87 of 205 Comp Cas) : **18**

> "When it comes to a financial creditor triggering the process, section 7 becomes relevant. Under the *Explanation* to section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor—it need not be a debt owed to the applicant financial creditor. Under section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed Form in 5 Parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under rule 4(3), the applicant is to dispatch a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which

the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority. Under sub-section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within seven days of admission or rejection of such application, as the case may be . . .

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

19 In the present case we find that the appellant has sought declaration that the assignment made by the HSBC to "Phoenix" as illegal, which can be raised only in a civil suit. The appellant is trying to convert the proceedings under the "I and B Code" as civil proceedings akin to a trial which is not the legislative intent.

20 In *Binani Industries Ltd.* v. *Bank of Baroda* (in Company Appeal (A. T.) (Insolvency) No. 82 of 2018) [2019] 5 Comp Cas-OL 28 (NCLAT)), this Appellate Tribunal by its judgment dated November 14, 2018 observed and held that the I and B Code is for reorganisation and insolvency resolution of "corporate persons" ; it is not a sale that is selling or buying the "corporate debtor" ; it is not an auction ; it is not a recovery and it is not a liquidation.

21 The objective of the I and B Code is to ensure re-organization and insolvency resolution of the corporate persons, partnership firms and individ-

uals, in a time-bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit and balance of interest of all stakeholders. The assignment cannot be challenged in the petition under section 7 and that too by a party who had the knowledge of "assignment deed" as back as in the year 2012, as noted above, the Debts Recovery Tribunal, Chandigarh, when it requested and never challenged the same before a court of competent jurisdiction.

We have noticed the letter written by the "corporate debtor", on March 19, 2018 from which it is clear that the "corporate debtor" agreed for assignment by the HSBC in favour of "Phoenix". In this background, it is not open to the appellant either to raise allegation of mala fide against the HSBC or to allege that the assignment is illegal. 22

In view of the discussion as made above and the reason as shown, no relief can be granted. The appeal is accordingly dismissed. No costs. 23

[2020] 221 Comp Cas 131 (NCLT)

[Before the National Company Law Tribunal — Kolkata Bench]

UV ASSET RECONSTRUCTION CO. LTD.[1]

v.

KALPATARU COLD STORAGE P. LTD.

Madan B. Gosavi *(Judicial Member)* and
Virendra Kumar Gupta *(Technical Member)*

September 30, 2019.

HF ▸ Petitioner

Insolvency resolution—Petition by financial creditor—Assigned debt—Assignment deed executed on deficient stamp paper—Not to render it invalid—Deficiency could be recovered with penalty—Deed registered with Registrar of Assurances—Assignment, a legally valid assignment—Assignee covered under definition of "financial creditor"—Debt due and default established—Petition admitted—Insolvency and Bankruptcy Code, 2016, ss. 5(7), 7.

Insolvency resolution—Petition by financial creditor—Limitation—Acknowledgment of debt—Corporate debtor's balance-sheet reflecting debt payable to financial creditor in 2016

1. This order has been reversed by National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 139 (NCLAT) *infra*.—Ed.

EXTENDING LIMITATION—PETITION FILED IN 2018 NOT TIME-BARRED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7—LIMITATION ACT, 1963, art. 137.

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 filed by the financial creditor, who had been assigned the debt by the lending bank was challenged by the corporate debtor questioning the validity of the assignment of the debt and contending that the petition was time-barred :

Held, *admitting the petition, (i) that section 5(7) of the Code includes a person to whom such debt has been legally assigned or transferred under the definition of "financial creditor". The law requires that there must be legal assignment of the debt. The deed of assignment was prepared on stamp paper of Rs. 100 and had been registered duly before the Registrar of Assurances. Prima facie, it was a legal and valid deed of assignment of debt. If, at all, it was on insufficient stamp paper, the deficiency could be recovered with penalty. The deed could not be said to be illegal. The petitioner was a financial creditor within the meaning of section 5(7) of the Code.*

LALAN KUMAR SINGH *v.* PHOENIX ARC P. LTD. [2020] 221 Comp Cas 122 (NCLAT) *relied on.*

(ii) That the bank had declared the loan account of the corporate debtor to be a non-performing asset on March 31, 2014. The bank got the right to sue the corporate debtor in March, 2014. In terms of article 137 of the Limitation Act, 1963, the bank could have filed the recovery proceedings against the corporate debtor on or before March 30, 2017. However, on March 29, 2017 the bank assigned the debt to the financial creditor. Prior to that the bank had filed the recovery proceedings against the corporate debtor in the Debts Recovery Tribunal. But there was no equity about limitation. The financial creditor and earlier the bank ought to have filed proceeding against the corporate debtor within three years from the date on which the account of the corporate debtor became a non-performing asset. In this case the account was declared to be a non-performing asset on March 31, 2014 and the proceedings under the Code were filed on October 31, 2018. However, it was seen from the corporate debtor's balance-sheet for the year ending March, 2016, that the corporate debtor had noted that it had to pay the debt of the bank. In short, in the year 2016, the corporate debtor in its balance-sheet had acknowledged the debt and this acknowledgment of debt brought the claim of the financial creditor within period of limitation. It was filed well within period of limitation. The debt was not time-barred.

(iii) That there was no dispute that the corporate debtor was liable to pay debt more than Rs. 21 crores. It was also not in dispute that the corporate

debtor had committed default in paying the debt. The petition being defect-free was to be admitted.

Cases referred to :

B. K. Educational Services P. Ltd. *v.* Parag Gupta and Associates [2019] 212 Comp Cas 1 (SC) (para 14)

Gaurav Hargovindbhai Dave *v.* Asset Reconstruction Co. (India) Ltd. [2019] 8 Comp Cas-OL 250 (SC) (para 14)

Lalan Kumar Singh *v.* Phoenix ARC P. Ltd. [2020] 221 Comp Cas 122 (NCLAT) (para 10)

C. P. (I. B.) No. 1498/KB/2018.

Shaunak Mitra, *Ritoban Sarkar* and *Ms. Madhuja Barman* for the financial creditor.

Avishek Das, *Satyaki Chaudhuri* and *Asim Kumar Kundu* for the respondent.

ORDER

The order of the Bench was delivered by

Madan B. Gosavi ***(Judicial Member)***.—UV Asset Reconstruction Co. Ltd.-the financial creditor filed this application under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short, I and B Code) against Kalpataru Cold Storage P. Ltd.-corporate debtor to start the corporate insolvency resolution process (in short, "ClRP") of the corporate debtor as the corporate debtor committed default in paying the financial debt of Rs. 21,61,12,013. 1

The following facts are not in dispute. 2

By a loan sanction letter dated March 28, 2019 United Bank of India granted and disbursed loan of Rs. 12.26 crores to the corporate debtor. The corporate debtor executed demand promissory notes and other documents, having availed the loan. The loan was not repaid as agreed by the corporate debtor. Hence, on March 31, 2014 the loan account was declared to be a NPA by the United Bank of India. 3

On March 29, 2014 the bank assigned the debt to the financial creditor by way of a deed of assignment. It was within the knowledge of the corporate debtor. The financial creditor claimed the recovery of assigned debt from the corporate debtor but the corporate debtor did not pay. Hence, the proceeding for recovery of loan which was already initiated by United Bank of India bearing O. A. No. 530 of 2015. It is pending for adjudication. The financial creditor filed this application to start the CIRP of the corporate debtor. 4

5 The financial creditor suggested name of one Mr. Anup Kumar Singh, having registration No. IBBI/IPA-001/IP-P00153/2-17-2018/10322 and e-mail id *anupsingh@sumedhamanagement.com* for appointment as the IRP.

6 The corporate debtor is served with the notice of this application. One Mr. Gurupada Sinha, one of the directors of the corporate debtor appeared. He filed affidavit-in-reply. He contended that the time-barred debt is sought to be recovered. The deed of assignment on the basis of which, this proceeding is filed, is not legal and valid document. The financial creditor does not get right to initiate any proceeding on the basis of such invalid deed of assignment.

7 He further contended that corporate debtor has filed a suit bearing Title Suit No. 1609 of 2017 in the City Civil Court, Kolkata challenging the legality and validity of the deed of assignment. It is pending. Since the court of competent jurisdiction is yet to decide the legality of the deed of assignment, this authority cannot take cognizance of this proceeding. The proceeding is not maintainable and may be dismissed.

8 We heard learned counsel for the financial creditor and the corporate debtor at length. Learned counsel for the corporate debtor brought to our notice the deed of assignment but he argued that it is not properly stamped. It has not been duly registered. Deed is not legal and it is invalid. It cannot be said that by virtue of such deed, debt is legally assigned or transferred in favour of the applicant. The applicant is not a financial creditor within the meaning of section 5(7) of the I and B Code.

9 He further contended that according to the applicant the debt became due upon declaring the loan account to be a NPA by the bank. That date is March 31, 2014. If it was so, this proceeding ought to have been filed within three years thereafter. It is filed beyond the period of limitation.

10 Learned counsel for the financial creditor submitted that the deed is legal and valid. It is properly stamped and registered. Its legality cannot be challenged. He relied on the order of the hon'ble National Company Law Appellate Tribunal in the case of *Lalan Kumar Singh* v. *Phoenix ARC P. Ltd.* [2020] 221 Comp Cas 122 (NCLAT) (Company Appeal (A. T.) (Insolvency) No. 485 of 2018).

11 He further submitted that the pendency of suit in between the parties not a ground to reject this application. He further submitted that the loan account of the corporate debtor declared to be a NPA in March, 2014 and immediately thereafter the bank has filed recovery proceeding against the corporate debtor in the Debts Recovery Tribunal, Kolkata. Thereby, period of limitation stopped running against the financial creditor. This proceed-

ing is filed well within time. The corporate debtor may be admitted in CIRP.

On the basis of materials on record and the submissions made at the bar, the following points of controversy arises for our determination. We record our findings thereon as follows : 12

(i) Whether the applicant can be said to be financial creditor on the basis of the deed of assignment dated March 19, 2017 ?

(ii) Whether the debt is time-barred ?

We deal with the first objection raised by the corporate debtor. It is submitted that the applicant cannot be financial creditor within the meaning of section 5(7) of the IBC as the deed of assignment is legal and valid. 13

Section 5(7) of the IBC defines the financial creditor that, "'financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to" ;

The law requires that there must be legally assignment of debt. Hereinbefore us the deed of assignment is produced as annexure P3. We find that it is prepared on stamp paper of Rs. 100. It has been registered duly before the Registrar of Assurance, Kolkata. Prima facie, we hold that it is legal and valid deed of assignment of debt. If, at all, it is on insufficient stamp paper, then law requires that the deficiency of paying stamp can be recovered with penalty. The deed cannot be said to be illegal thereby. Moreover, the hon'ble Appellate Tribunal in the order stated above held that in paragraph 16 that (page 129 of 221 Comp Cas) : "The appellant has challenged the 'deed of assignment' executed between the 'HSBC and Phoenix', but while filing reply to the notice issued during the admission of application under section 7 of the I and B Code, such issue cannot be raised as it cannot be decided by the Adjudicating Authority on objection".

In view of above, we hold that the applicant herein is the financial creditor within the meaning of section 5(7) of the IBC. We answer first point in the affirmative.

The proceeding is also challenged on the ground that it is time-barred debt. It is not in dispute that the bank declared the loan account of the corporate debtor to be a NPA on March 31, 2014. The bank got right to sue the corporate debtor in March, 2014. As per article 137 of Law of Limitation, bank could have filed the recovery proceedings against the corporate debtor on or before March 30, 2017. However, on March 29, 2017 the bank assigned the debt to the financial creditor. Prior to that the bank had filed the recovery proceeding against the corporate debtor in the Debts Recovery Tribunal, Kolkata. Learned counsel for the financial creditor submitted that 14

time to file other proceeding against the corporate debtor stopped running thereby. However, it is difficult for us to accept this submission. Very recently, the apex court in the case of *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) (Civil Appeal No. 4952 of 2019) has held that (page 253) :

> "Having heard learned counsel for both sides, what is apparent is that article 62 is out of the way on the ground that it would only apply to suits. The present case being 'an application' which is filed under section 7, would fall only within the residuary article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on July 21, 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 paragraph 7 of *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC), 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.
>
> This being the case, we fail to see how this paragraph 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."

15 In short, it was expected from the financial creditor and earlier to that by the bank to file proceeding against the corporate debtor within three years from the date on which the account of the corporate debtor became a NPA. In this case the account declared to be a NPA on March 31, 2014 proceeding is filed on October 31, 2018.

16 However, there is one more dimension as far as case in hand is concerned. The financial creditor and even corporate debtor have produced on record the corporate debtor's balance-sheet for the year ending March, 2016 (page No. 300 onwards in paper book). From the perusal of those financial papers of the corporate debtor, it is seen that corporate debtor noted that they have to pay the debt of United Bank of India. Their account is declared as a NPA. In short, in the year 2016, the corporate debtor in its balance-sheet acknowledged the debt to be payable by them which is claimed herein by the financial creditor. This acknowledgment of debt in its balance-sheet by the corporate debtor in the year 2016 has brought the claim of financial creditor within period of limitation. It is filed well within

period of limitation. We hold that the debt is not time-barred. We answer point No. 2 in the negative.

Coming back to other facts that there is no dispute that the corporate 17
debtor is liable to pay debt more than Rs. 21 crores. It is also not in dispute that the corporate debtor has committed default in paying the debt. By virtue of corporate debtor's admission about the debt in its balance-sheet for the year 2016, this proceeding appears to have been filed within period of limitation. The financial creditor suggested name of resolution professional for appointment as the IRP against whom no disciplinary proceeding appears to be pending. This application is defect-free. Hence, we admit the same and pass the following order :

Order

(i) The application filed by the financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 is hereby admitted for initiating the corporate insolvency resolution process in respect of Kalpataru Cold Storage P. Ltd. Moratorium order is passed for a public announcement as stated in section 13 of the IBC, 2016.

(ii) The moratorium is declared for the purposes referred to in section 14 of the Insolvency and Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15. The public announcement referred to in clause (b) of sub-section (1) of section 13 of the Insolvency and Bankruptcy Code, 2016 shall be made immediately.

(iii) Moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 prohibits the following :

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

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

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) ;

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

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

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

(vi) The order of moratorium shall affect the date of admission till the completion of the corporate insolvency resolution process.

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

(viii) Necessary public announcement as per section 15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.

(ix) As per proposal given by the financial creditor, Mr. Anup Kumar Singh, having registration No. IBBI/IPA-001/IP-P00153/2-17-2018/10322 and e-mail id *anupsingh@sumedhamanagement.com* is appointed as the interim resolution professional for ascertaining the particulars of creditors and convening a committee of creditors for evolving a resolution plan.

(x) The financial creditor to pay to the IRP a sum of Rs. 50,000 as payment of his fees as advance, as per regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment.

(xi) The resolution professional shall conduct the CIRP in time-bound manner as per regulation 40A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(xii) Registry is hereby directed under section 7(7) of the I and B Code, 2016 to communicate the order to the financial creditor, corporate debtor and to the interim resolution professional by speed post and also by e-mail.

Let the certified copy of the order be issued upon compliance with requisite formalities.

List the matter on November 8, 2019 for filing the progress report.

[2020] 221 Comp Cas 139 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

GAUTAM SINHA

v.

UV ASSET RECONSTRUCTION CO. LTD. AND OTHERS

A. I. S. CHEEMA J. ***(Judicial Member)*** and
KANTHI NARAHARI ***(Technical Member)***

February 25, 2020.

HF ▸ Appellant

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—LIMITATION—ACKNOWLEDGMENT OF DEBT—BALANCE-SHEET TO BE READ WITH DIRECTORS' REPORT—NO ACKNOWLEDGMENT OF DEBT IN DIRECTORS'S REPORT OR AUDITOR'S REPORT—PETITION TIME-BARRED—PETITION NOT TO BE ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7—LIMITATION ACT, 1963, S. 18.

The petition filed by the financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 was admitted by the Adjudicating Authority overruling the objections of the corporate debtor regarding the validity of the assignment deed and limitation. On an appeal :

Held, *allowing the appeal, that the auditor had recorded that in its own opinion and according to the information and explanations given, the company had not defaulted in the repayment of loan or borrowings to the financial institution. It further recorded a statement of fact that the bank had declared the corporate debtor as a non-performing asset and the proceedings were pending before the Debts Recovery Tribunal. In effect, the company claimed to the auditors that the company had not defaulted in the repayment of loans or borrowings. This could not be read as acknowledgment. The balance-sheet would be required to be read with the directors' report. In the directors report there was no acknowledgment of debt. The statement recorded by the auditor with regard to the pending litigation could not be read as an acknowledgment by the company under section 18 of the Limitation Act, 1963. The Adjudicating Authority did not go into the particulars. The contents in the balance-sheet did not show that the corporate debtor had acknowledged the liability to pay the alleged outstanding debt. The petition was time-barred for the purpose of filing of the petition under section 7 of the Code. The petition, thus should not have been admitted.*

SHEETAL FABRICS *v.* COIR CUSHIONS LTD. [2005] SCC Online Delhi 247 *and* PADAM TEA CO. LTD., *In re* [1974] AIR 1974 Cal 170 *relied on.*

Order of the National Company Law Tribunal in UV ASSET RECONSTRUCTION CO. LTD. *v.* KALPATARU COLD STORAGE P. LTD. [2020] 221 Comp Cas 131 (NCLT) *reversed.*

Cases referred to :

CIT *v.* Shri Vardhman Overseas Ltd. [2012] 343 ITR 408 (Delhi) (paras 7, 8)

Jones *v.* Bellgrove Properties Ltd. [1949] 2 KB 700 (para 8)

Lakshmirattan Cotton Mills Co. Ltd. *v.* Aluminium Corporation of India Ltd. [1971] 1 SCC 67 ; [1971] AIR 1971 SC 1482 (para 9)

Mahabir Cold Storage *v.* CIT [1991] 188 ITR 91 (SC) (paras 7, 8)

Padam Tea Co. Ltd., *In re* [1974] AIR 1974 Cal 170 (paras 9, 10, 14)

Sheetal Fabrics *v.* Coir Cushions Ltd. [2005] SCC Online Delhi 247 (paras 7, 9, 14)

UV Asset Reconstruction Co. Ltd. *v.* Kalpataru Cold Storage P. Ltd. [2020] 221 Comp Cas 131 (NCLT) (para 1)

Company Appeal (A. T.) (**Insolvency**) No. **1382 of 2019.**

Ajay K. Jain, *Asim Kumar Kundu*, *Murari Kumar*, *Achint Kumar* and *Atanu Mukherjee*, for the appellant.

Gautam Sinha, ex-director, the appellant-in-person.

Sumesh Dhawan and *Ms. Aporva Chowdhary* for respondent No. 1.

R. N. Rout for respondent No. 2.

Ms. Pratissha Sharma and *Ankit Acharya* for respondent No. 3.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 A. I. S. CHEEMA J. ***(Judicial Member)***.—Respondent No. 1-UV Asset Reconstruction Co. Ltd. (financial creditor), on assignment of debt from respondent No. 2-United Bank of India, filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" in short) before the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) against M/s. Kalpataru Cold Storage P. Ltd. (corporate debtor) claiming that there was debt and default of Rs. 21,61,12,013 not paid by the corporate debtor. The Adjudicating Authority heard the parties and by impugned order dated September 30, 2019—(*UV Asset Reconstruction Co. Ltd.* v. *Kalpataru Cold Storage P. Ltd.* [2020] 221 Comp Cas 131 (NCLT)), brushing aside question of limitation admitted the application under

section 7. The present appeal has been filed by the ex-director/promoter of the corporate debtor taking up the case for the corporate debtor.

Briefly stated, the facts are that respondent No. 2-United Bank of India **2**
("Bank" in short) had sanctioned fresh seasonal cash credit facility, working capital loan and extended bank guarantee facility to the corporate debtor in 2006. As per the application under section 7 of the IBC filed by the financial creditor (annexure A10 at page 205), it is claimed that there was default in repayment of the facilities on December 31, 2013 and the bank declared the corporate debtor as NPA (non-performing asset) on March 30, 2014. Respondent No. 1-financial creditor appears to have been assigned the loan on March 29, 2017. It is stated that earlier the bank had moved the Debts Recovery Tribunal by way of O. A. No. 530 of 2015 which was pending. The application under section 7 came to be filed on October 31, 2018.

Before the Adjudicating Authority, it appears that various disputes were **3**
raised with regard to the assignment also. It is seen that the financial creditor by letter dated April 5, 2017 and the bank vide letter dated April 8, 2017 had informed the corporate debtor regarding the assignment agreement dated March 29, 2017. The appellant claims having filed Title Suit No. 66 of 2018 against the financial creditor and the bank, on the ground that the assignment agreement was fraud and it was on insufficient stamp and there was want of registration. In this regard, the observation of the Adjudicating Authority in paragraph 13 of the impugned order is as follows (page 135 of 221 Comp Cas) :

> "The law requires that there must be legally assignment of debt. Hereinbefore us the deed of assignment is produced as annexure P3. We find that it is prepared on stamp paper of Rs. 100. It has been registered duly before the Registrar of Assurance, Kolkata. Prima facie, we hold that it is legal and valid deed of assignment of debt. If, at all, it is on insufficient stamp paper, then law requires that the deficiency of paying stamp can be recovered with penalty. The deed cannot be said to be illegal thereby. Moreover, the hon'ble Appellate Tribunal in the order stated above held that in paragraph 16 that (page 129 of 221 Comp Cas) : "'*The appellant has challenged the "deed of assignment" executed between the "HSBC and Phoenix", but while filing reply to the notice issued during the admission of application under section 7 of the I and B Code, such issue cannot be raised as it cannot be decided by the Adjudicating Authority an objection*'.
>
> In view of above, we hold that the applicant herein is the financial creditor within the meaning of section 5(7) of the IBC. We answer first point in the affirmative."

4 Apparently, the dispute regarding the assignment is being contested in the city civil court and in a summary proceeding before the Adjudicating Authority when the financial creditor and bank are supporting each other, it is not possible for the Adjudicating Authority to decide the dispute which would be a matter of suit. Before us, not much stress was laid on this aspect and we do not find any reason to differ from the Adjudicating Authority on this count.

5 The dispute that needs to be decided is with regard to the limitation. The date of default is stated to be December 31, 2013 and NPA was declared on March 30, 2014. The Adjudicating Authority found that the claim was within limitation on the following basis (page 136 of 221 Comp Cas) :

> "However, there is one more dimension as far as case in hand is concerned. The financial creditor and even corporate debtor have produced on record the corporate debtor's balance-sheet for the year ending March, 2016 (page No. 300 onwards in paper book). From the perusal of those financial papers of the corporate debtor, it is seen that the corporate debtor noted that they have to pay the debt of United Bank of India. Their account is declared as a NPA. In short, in the year 2016, the corporate debtor in its balance-sheet acknowledged the debt to be payable by them which is claimed herein by the financial creditor. This acknowledgment of debt in its balance-sheet by the corporate debtor in the year 2016 has brought the claim of financial creditor within period of limitation. It is filed well within period of limitation. We hold that the debt is not time-barred. We answer point No. 2 in the negative."

6 Thus, the Adjudicating Authority relied on the balance-sheet to hold that there was acknowledgment and thus, the claim was within limitation.

7 Before us, learned counsel for respondent No. 1 (respondent–in short) referred to the judgments in the matters of *Sheetal Fabrics* v. *Coir Cushions Ltd.* reported as [2005] SCC Online Delhi 247 ; *CIT* v. *Shri Vardhman Overseas Ltd.* reported as [2011] SCC Online Delhi 5599 ; [2012] 343 ITR 408 (Delhi) and *Mahabir Cold Storage* v. *CIT* reported as [1991] 188 ITR 91 (SC) ; [1991] Supp (1) SCC 402. The argument is that acknowledgment of debt in the balance-sheet also amounts to acknowledgment under section 18 of the Limitation Act.

8 The judgment in the matter of *CIT* v. *Shri Vardhman Overseas Ltd.* [2011] SCC Online Delhi 5599 ; [2012] 343 ITR 408 (Delhi) was in the context of provisions of the Income-tax Act. In paragraph 17 of the judgment, it was observed (page 421 of 343 ITR) :

"In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance-sheet as on March 31, 2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect of acknowledgment in writing. It says where before the expiration of the prescribed period for a suit 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, a fresh period of limitation shall commence from the time when the acknowledgment was so signed. In an early case, in England, in *Jones* v. *Bellgrove Properties Ltd.* [1949] 2 KB 700, it was held that a statement in a balance-sheet of a company presented to a creditor-shareholder of the company and duly signed by the directors constitutes an acknowledgment of the debt. In *Mahabir Cold Storage* v. *CIT* [1991] 188 ITR 91 (SC), the Supreme Court held (page 97) :

'The entries in the books of account of the appellant would amount to an acknowledgment of the liability to Messrs. Prayagchand Hanumanmal within the meaning of section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt.'

In several judgments of this court, this legal position has been accepted."

The hon'ble High Court then referred to some of the judgments.

In the judgment in the matter of *Sheetal Fabrics* v. *Coir Cushions Ltd.* [2005] SCC Online Delhi 247, the hon'ble High Court of Delhi referred to judgment in the matter of *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170 and referred to the said judgment as under : 9

"10. Let me first deal with the case of *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170. This case relied upon by learned counsel for the respondent-company in support of his plea that acknowledgment contained in the balance-sheet could not be relied upon by the petitioner. However, on going through this judgment, one would clearly notice that it does not lay down the proposition which is sought to be advanced by learned counsel. That was a case where balance-sheet was not confirmed or passed by the shareholders. The court observed that such a balance-sheet, before it could be relied upon, must be duly passed by the shareholders at the appropriate meeting and must

be accompanied by a report, if any, made by the directors for its validation. *The principle of law laid down was that statement in the balance-sheet indicating liability is to be read along with the directors' report to see whether both so read would amount to an acknowledgment. There is no dispute about this proposition of law.* However, in that case, the court refused to accept entry in the balance-sheet as acknowledgment of debt because of two reasons :

(a) The balance-sheet was not passed by the shareholders at the appropriate meeting.

(b) The directors' report, in the balance-sheet, contained the following statement :

11. Your directors are of the opinion that the liabilities shown in Schedules 'A' and 'B' of the balance-sheet excepting those of United Bank of India, M/s. Goenka and Co. P. Ltd. and Caritt, Moran and Co. P. Ltd., are barred by limitations, hence these liabilities are not confirmed by your directors.

12. These were the two considerations which led the court to conclude that even the debt shown in the balance-sheet in respect of the said petitioning creditor would not amount to an acknowledgment as contemplated under section 18 of the Limitation Act and following observations in this regard are reported :

'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 acknowledgment on the balance-sheet is a statutory document and perhaps is a separate document but the balance-sheet not confirmed or 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.

13. In the same breath, the High Court also explained as to what would constitute an acknowledgment under section 18 of the Limitation Act by referring to the judgment of the Supreme Court and this discussion would be found in the following passage :

"It was held by the Supreme Court in the case of *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corporation of India Ltd.* [1971] 1 SCC 67 ; AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgment 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 farfetched reasoning. In order to find out the intention of the document by which acknowledgment 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'." (emphasis[1] supplied)

Then the High Court after referring to the judgment in the matter of **10**
Padam Tea Co. Ltd., In re, AIR 1974 Cal 170 examined the case, which was before the hon'ble High Court, and in the facts of that matter, found that the list of creditors maintained by the respondent-company before the High Court or in the balance-sheet, was without any conditions or any strings attached.

Question before us is whether in the balance-sheet which is being relied **11**
on, what is seen in the statement and if the same could be read as acknowledgment. Copy of the balance-sheet of 2016 relied on by the Adjudicating Authority is at page 412 of the paper book of appeal. Page 412 is the directors' report which presented the annual report and audited financial statements for the financial year ended March 31, 2016. The relevant portion pointed out to us by the parties is at page 421. It is annexure A to the auditors' report and what auditors' report stated in sub-paragraph (viii), is as under :

"(viii) *In our opinion and according to the information and explanations given to us, that company has not defaulted in the repayment*

1. Here printed in italics.

of loans or borrowings to financial institution. The company did not have any dues outstanding to Government as at the beginning of the year nor did it obtain any such loans during the year. *However*, the company has failed to repay its dues owing to bank and has been declared as NPA by bank and the matter is lying with the Debts Recovery Tribunal and sub judice (note No. 29). Amount overdue is as under :

United Bank of India, Lohapatty Branch, Kolkata	*Amount outstanding (Rs./lakhs)*	*Period*
Term loan	411.63	2011-12
Cash credit	668.99	2014-15
Working capital	136.57	2014-15"

(emphasis[1] supplied)

12 Note No. 29 referred by the auditor at page 438 of the paper book is as under :

"29. No balance confirmation/bank statement in respect of term loans and other loans obtained from United Bank of India, Lohapatty Branch, Kolkata has been received by the company for the periods from April 1, 2015 to March 31, 2016 the company has not provided interest on these loans in the books of account.

Company's accounts were declared non-performing assets (NPA) earlier on certain defaults in repayment of loans instalments and interest dues thereon to the bank. A notice under section 13(2) of the SARFAESI Act, 2002 has been served by bank on April 3, 2014 and date of declaration of NPA is March 31, 2014. *The matter is sub judice before the Debts Recovery Tribunal (DRT).*" (emphasis[1] supplied)

13 Thus, the auditor rather stated its own opinion and according to the information and explanations given that the company has not defaulted in the repayment of loan or borrowings to the financial institution. What is further recorded is statement of fact that bank has declared the corporate debtor NPA and proceedings are pending before DRT. In effect, company claimed to the auditors that company has not defaulted in the repayment of loans or borrowings. This cannot be read as acknowledgment.

14 We have already referred to the judgments in the matters of *Sheetal Fabrics* v. *Coir Cushions Ltd.* [2005] SCC Online Delhi 247 and *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170 which show that the balance-sheet would be required to be read with directors' report. In the directors report which is

1. Here printed in italics.

before us, there does not appear to be any acknowledgment of debt. The statement recorded by the auditor with regard to the pending litigation in the facts of the present matter, we find, cannot be read as an acknowledgment by company under section 18 of the Limitation Act. The Adjudicating Authority did not go into the particulars. In present matter, we are not deliberating whether entry in balance-sheet can be termed acknowledgment in law. In our view, even if we are to consider that contents in balance-sheet could be read as acknowledgment even then if we read the contents in balance-sheet in the matter, for reasons stated above, we do not find that the corporate debtor acknowledged as such the liability to pay the alleged outstanding debt.

15 It is stated that the application under section 19(4) of the SARFAESI Act filed by the bank on June 29, 2015 is still pending adjudication before the Debts Recovery Tribunal-3, Kolkata.

16 We find that default dated December 31, 2013 which was declared NPA on March 30, 2014, was time-barred for the purpose of filing of an application under section 7 of the IBC on October 31, 2018. The application thus should not have been admitted.

17 (A) For above reasons, the appeal is allowed. The application under section 7 of the IBC filed by respondent No. 1-financial creditor is dismissed.

(B) The impugned order is quashed and set aside. Actions taken by IRP/RP in consequence of the impugned order are quashed and set aside. The corporate debtor is released from the rigour of law and is allowed to function independently through its board of directors. The IRP/RP will hand back the records and management of the affairs of corporate debtor, to the board of directors.

(C) The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same, will direct the financial creditor to pay the same in time to be specified by the Adjudicating Authority.

The appeal is disposed accordingly. No costs.

[2020] 221 Comp Cas 148 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — CHENNAI BENCH]

STRESSED ASSETS STABILIZATION FUND (SASF)[1]

v.

UTHARA FASHION KNITWEAR LTD.

B. S. V. PRAKASH KUMAR *(Judicial Member)* and
S. VIJAYARAGHAVAN *(Technical Member)*

November 21, 2019.

HF ▶ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—DEBT AND DEFAULT ESTABLISHED—NO REPLY FROM CORPORATE DEBTOR TO DEMAND NOTICE OR NOTICE FROM TRIBUNAL—PETITION ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

In a petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by the financial creditor to whom the bank which had given a loan under the term loan agreement to the corporate debtor had assigned the defaulted debt :

Held, *admitting the petition, that the financial creditor had granted credit facilities. The corporate debtor had defaulted in repaying the outstanding debt. Proof of service of private notice to the registered e-mail address of the corporate debtor on October 3, 2019 had been produced. There was no representation on behalf of the corporate debtor and it had not responded to the notice sent by the financial creditor and by the Tribunal. There was no defence on the part of the corporate debtor either to deny dispute the total outstanding due. The petition was to be admitted.*

I. B. A. No. 895 of 2019.

S. Sathiyarayanan, for the financial creditor.

None present on the date of hearing for the corporate debtor.

ORDER

The order of the Bench was delivered by

1 S. VIJAYARAGHAVAN ***(Technical Member)***.—It is an insolvency and bankruptcy application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") by M/s. Stressed Asset Stabilization Fund (SASF) (hereinafter called as the "financial creditor") for initiation of the corporate insolvency resolution process (in short "CIRP") against M/s.

1. This order has been reversed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 153 (NCLAT) *infra*.—Ed.

Uthara Fashion Knitwear Ltd. (hereinafter called as the "corporate debtor") on the ground that it has defaulted in repaying an amount of Rs. 76,64,72,470 (principal Rs. 4,22,50,884, interest Rs. 11,83,06,579, Further Rs. 52,68,98,056 and liquidated damages Rs. 7,90,16,951) as on April 1, 2019.

Learned counsel for the financial creditor submitted that the Industrial 2
Development Bank of India (IDBI), at request, granted financial assistance of Rs. 600 lakhs by way of a term loan agreement dated March 2, 2000 to the corporate debtor and the loan disbursed was primarily secured by hypothecation of plant and machinery together with machinery spares, tools and accessories, raw materials, semi-finished and finished goods, consumable stores, book debts and such other movables and equitable mortgage of properties at an estimated value of Rs. 790.70 lakhs as in the memorandum of entry dated August 24, 2000. Pursuant to the said loan agreement, IDBI disbursed financial assistance aggregating an amount of Rs. 420.21 lakhs from time-to-time. Since the corporate debtor had not repaid the loan properly, IDBI had cancelled the balance loan amount of Rs. 179.79 lakhs. The account of the corporate debtor was classified as "non-performing asset" (NPA) on May 29, 2002.

2.1. Under the transfer deed dated September 30, 2004 executed by IDBI in favour of SASF, IDBI unconditionally and irrevocably transferred and assigned to SASF the loan sanctioned by IDBI, including the loan granted to the corporate debtor herein with the intent that SASF shall be full and absolute legal owner to receive the amounts payable to IDBI by the corporate debtor. Accordingly, SASF is now a secured creditor fully entitled to recover the debt in terms of the said transfer.

2.2. The borrower company approached SASF (the financial creditor) with one-time settlement (OTS) proposal in letter dated March 18, 2009. The corporate debtor paid an amount of Rs. 25,00,000 towards OTS and defaulted in making further payment. Hence, the financial creditor was constrained to revoke the OTS on February 31, 2011 and restored the original notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002 was issued to the corporate debtor.

2.3. On the application filed by the IDBI in O. A. No. 413 of 2007 before the hon'ble Debts Recovery Tribunal-II, Chennai, the application was allowed on August 31, 2009 and it was ordered for the recovery of Rs. 5,37,28,928 together with further interest at 17 per cent. per annum from October 21, 2003 till the date of realization. On November 30, 2012, the corporate debtor approached the hon'ble Debts Recovery Tribunal-I,

Mumbai and filed Securitization Application No. 43 of 2011. It was argued that SASF (the financial creditor herein) had no authority to issue notice under section 13(2) or under section 13(4) of the SARFAESI Act since the final order passed by the Debts Recovery Tribunal-II, Chennai was in favour of IDBI (original creditor) and not in favour of the financial creditor (SASF). Based on the above pleadings by the applicant/corporate debtor (Uthara Fashions Knitwear Ltd.), the hon'ble Debts Recovery Tribunal-I, allowed S. A. No. 43 of 2011 in favour of the corporate debtor herein. Pursuant to this, the IDBI (original creditor) filed M. A. No. 98 of 2014 for impleading the name of SASF in the transfer deed and the same was allowed and corrigendum to order dated April 22, 2015 in D. R. C. No. 78 of 2009 was also issued on April 30, 2015 by the hon'ble Debts Recovery Tribunal-II, Chennai. Further, on February 29, 2016, borrowers (Uthara Fashions Knitwear Ltd.) filed a review application R. A. No. 3 of 2015 before the hon'ble Debts Recovery Tribunal-II, Chennai claiming that "only debt was transferred and the secured asset were not transferred". The Debts Recovery Tribunal-II, Chennai has passed an order by inserting the word "not" in between the word "was" and "transferred". On April 18, 2018, the appellant-bank substituted by SASF (the financial creditor herein) filed M. A. No. 161 of 2017 challenging the order passed by the Debts Recovery Tribunal-II, Chennai in R. A. No. 3 of 2015. On perusing the clause 1.1.19 of transfer deed, it was held that the term "'security interest' shall mean the right, title and interest to any kind whatsoever upon property, created in favour of the transferor and includes any mortgage, charge, hypothecation, assignment, pledge, guarantee and third party security" and confirmed the order dated April 22, 2015 passed by the Debts Recovery Tribunal-II, Chennai.

2.4. To support their claim, the financial creditor (SASF) has filed dates and events disclosing existence of debt and occurrence of default, which are as follows :

S. No.	*Dates*	*Events*
1.	2-3-2000	The corporate debtor availed financial assistance from IDBI
2.	28-11-2002	IDBI invoked guarantee agreement
3.	16-10-2003	IDBI filed OA before the DRT-I, Chennai for recovery of Rs. 5.37 crores
4.	24-9-2004	IDBI executed trust deed and formed the financial creditor herein for the purpose of recovery of amounts due to IDBI
5.	30-9-2004	The corporate debtor's loan was transferred to financial creditor herein by IDBI by way of transfer deed

6.	2007	OA filed before DRT-I was transferred to DRT-II, Chennai and renumbered as O. A. No. 413 of 2007
7.	24-2-2009	The corporate debtor offered Rs. 250 lakhs as OTS to the financial creditor
8.	18-3-2009	The financial creditor accepted OTS proposal
9.	19-6-2009	DRT-II Chennai allowed and permitted the financial creditor for recovery of Rs. 5.37 crores
10.	9-3-2011	Recall notice under section 13(2) of the SARFAESI Act issued to the corporate debtor
11.	22-1-2015	The financial creditor cancelled negotiated settlement since the corporate debtor defaulted final settlement amount of Rs. 426.32 lakhs

Looking at the dates and events as well as the annexure to the application, it is apparent that the financial creditor has furnished material disclosing that the financial creditor (IDBI) has granted credit facilities as mentioned above but the corporate debtor defaulted in repaying the same. 3

On perusal of the material and submissions by the financial creditor, this Bench is of the view that the corporate debtor has defaulted in repaying outstanding debt of Rs. 76,64,72,470 (rupees seventy six crores sixty four lakhs seventy two thousand four hundred and seventy). The financial creditor counsel has filed proof of service for serving private notice through registered e-mail address of the respondent on October 3, 2019. Moreover, there was no representation on behalf of the corporate debtor side when the matter came up for hearing on September 25, 2019, October 9, 2019, October 15, 2019, October 18, 2019 and November 6, 2019 and they have not responded to the notice sent by the financial creditor and by this Tribunal. It appears that there is no defence on the part of the corporate debtor either to deny or dispute the total outstanding due. In view thereof, we hereby admit this application I. B. A. No. 895 of 2019 by appointing Mr. Ramakrishnan Sadasivan, as interim resolution professional (IRP) looking at the consent given by the said IRP with directions as follows : 4

I. That moratorium is hereby declared prohibiting all of the following actions, namely,

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

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

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) ;

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

II. That Supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

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

IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of corporate debtor under section 33 of the IBC, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the IBC.

VI. That this Bench hereby appoints Mr. Ramakrishnan Sadasivan, as Interim Resolution Professional, having (Regn. No. IBBI/IPA-001/IP-P00108/2017-18/10215), New No. 28, Old No. 22, Menod Street, Purasawalkam, Chennai-600 007, E-mail : *sadasivanr@gmail.com*, Mobile : 9444455982 to carry out the functions as mentioned under the IBC. Fee payable to the IRP/RP shall be in compliance with the IBBI Regulations/ Circulars/Directions issued in this regard.

5 Accordingly, this application is admitted.

6 The registry is hereby directed to immediately communicate this order to the financial creditor, the corporate debtor and the interim resolution professional by way of e-mail.

[2020] 221 Comp Cas 153 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

V. PADMAKUMAR

v.

STRESSED ASSETS STABILISATION FUND (SASF) AND ANOTHER

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***, **BANSI LAL BHAT, A. I. S. CHEEMA, VENUGOPAL (M.)** JJ. ***(Judicial Members)*** and **KANTHI NARAHARI *(Technical Member)***

March 12, 2020.

HF ▸ Appellant

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—LIMITATION—DATE OF DEFAULT—DATE OF DECLARATION OF CORPORATE DEBTOR'S ACCOUNT AS NON-PERFORMING ASSET—MERE FILING OF SUIT FOR RECOVERY OR DECREE PASSED BY COURT NOT TO SHIFT FORWARD DATE OF DEFAULT—PETITION FILED BEYOND 3 YEARS FROM DATE OF DEFAULT—BARRED BY LIMITATION—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7—LIMITATION ACT, 1963, art. 137.

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—LIMITATION—EXTENSION OF LIMITATION—ACKNOWLEDGMENT OF DEBT—BALANCE-SHEET AND ANNUAL RETURNS FILED DUE TO STATUTORY REQUIREMENT AND FAILURE TO FILE TO INVITE PENAL CONSEQUENCE—BALANCE-SHEET OR ANNUAL RETURN OF CORPORATE DEBTOR CANNOT BE TREATED AS ACKNOWLEDGMENT OF DEBT FOR PURPOSE OF LIMITATION—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7—COMPANIES ACT, 2013, s. 92—LIMITATION ACT, 1963, s. 18.

For the purpose of computing the period of limitation for a petition under section 7 of the Insolvency and Bankruptcy Code, 2016, the date of default is the date of declaration of the loan account as a non-performing asset and hence this is a crucial date.

GAURAV HARGOVINDBHAI DAVE *v.* ASSET RECONSTRUCTION CO. (INDIA) LTD. [2019] 8 Comp Cas-OL 250 (SC), VASHDEO R. BHOJWANI *v.* ABHYUDAYA CO-OPERATIVE BANK LTD. [2019] 8 Comp Cas-OL 551 (SC) *and* V. HOTELS LTD. *v.* ASSET RECONSTRUCTION CO. (INDIA) LTD. [2020] 218 Comp Cas 198 (NCLAT) *relied on*.

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. Mere filing of a suit for recovery or a decree passed by a court cannot shift forward the date of default. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of the decree or date of payment for execution. A decree can be executed within specified period, i. e., 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.

JIGNESH SHAH *v.* UNION OF INDIA [2019] 217 Comp Cas 139 (SC) *relied on.*

An appeal was filed by the corporate debtor against the order of admission of a petition filed by a financial creditor under section 7 of the Code, contending that the debt was time-barred. The appellant contended that the demand notice was not served before the order of admission was passed on November 21, 2019. Otherwise, the appellant would have shown that the petition under section 7 of the Code was barred by limitation. The creditor also contended that the corporate debtor had acknowledged the claim in its audited balance-sheet for the financial years 2011-12 and 2012-13 onwards, thereby extending the limitation :

Held accordingly, *allowing the appeal, (i) (by the Full Bench) that a judgment or a decree passed by a court for recovery of money by the civil court or the Debts Recovery Tribunal would not shift forward the date of default for the purpose of computing the period for filing a petition under section 7 of the Code.*

UGRO CAPITAL LTD. *v.* BANGALORE DEHYDRATION AND DRYING EQUIPMENT CO. P. LTD. [2020] 9 Comp Cas-OL 379 (NCLAT) *overruled.*

(ii) Per SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***, BANSI LAL BHAT *and* VENUGOPAL (M.) JJ. ***(Judicial Members)*** *and* KANTHI NARAHARI ***(Technical Member)*** (A. I. S. CHEEMA J. ***(Judicial Member)*** *(dissenting)), that as the filing of the balance-sheet and annual return was mandatory under section 92(4) of the Companies Act, 2013, failing of which penal action under section 92(5) and (6) of the 2013 Act was attracted, the balance-sheet or annual return of the corporate debtor could not be treated to be an acknowledgment under section 18 of the 1963 Act. If the balance-sheet or annual return of the corporate debtor were taken to amount to acknowledgment under section 18 of the 1963 Act no limitation would be applicable because every year, it was mandatory for the corporate debtor to file balance-sheet and annual return. The account of the corporate debtor was declared a non-performing asset on October 31, 2002 and a decree was passed on June 19, 2009 or August 31, 2009. Therefore the petition under section 7 filed by*

the financial creditor was barred by limitation and was not maintainable. The order of the Adjudicating Authority was to be set aside without remanding matter for fresh decision on the facts.

Per A. I. S. CHEEMA J. ***(Judicial Member)*** *(dissenting), that the balance-sheets could be looked into to see if there was an acknowledgment of debt. If the amount borrowed was shown in the balance-sheet, it might amount to acknowledgment. Balance-sheets could not be outright ignored. Annual returns or audited balance-sheets, one-time settlement proposals, proposals to restructure loans, by whatever names called, could not be simply ignored as debarred from consideration and in every given matter, it would be a question of applying the facts to the law and vice versa, to see whether or not the specific contents spell out an acknowledgment under the 1963 Act.*

Order of the National Company Law Tribunal in STRESSED ASSETS STABILIZATION FUND (SASF) *v.* UTHARA FASHION KNITWEAR LTD. [2020] 221 Comp Cas 148 (NCLT) *reversed*.

Cases referred to :

Ambika Mills Ltd. *v.* CIT [1964] 54 ITR 167 (Guj) (para 33)

B. K. Educational Services P. Ltd. *v.* Parag Gupta and Associates [2019] 212 Comp Cas 1 (SC) (paras 8, 10, 11)

Bradford and Bingley Plc *v.* Rashid [2006] UKHL 37 (HL) (para 35)

CIT *v.* Shri Vardhman Overseas Ltd. [2012] 343 ITR 408 (Delhi) (paras 31, 33)

Daya Chand Uttam Prakash Jain *v.* Santosh Devi Sharma [1997] 67 DLT 13 (para 33)

Eswara Rao (G.) *v.* Stressed Assets Stabilisation Fund [2020] 219 Comp Cas 231 (NCLAT) (paras 21, 29)

Ferro Alloys Corporation Ltd. *v.* Rajhans Steel Ltd. [2000] 99 Comp Cas 426 (Patna) (paras 9, 14)

Gaurav Hargovindbhai Dave *v.* Asset Reconstruction Co. (India) Ltd. [2019] 8 Comp Cas-OL 250 (SC) (para 10)

Gautam Sinha *v.* UV Asset Reconstruction Co. Ltd. [2020] 221 Comp Cas 139 (NCLAT) (paras 31, 32, 33)

Gouri Prasad Goenka *v.* Punjab National Bank [2019] 217 Comp Cas 418 (NCLAT) (para 34)

Hariom Firestock Ltd. *v.* Sunjal Engineering P. Ltd. [1999] 96 Comp Cas 349 (Karn) (para 9)

ITC Ltd. *v.* Blue Coast Hotels Ltd. [2018] 2 Comp Cas-OL 459 (SC) (paras 35, 36)

Jignesh Shah *v.* Union of India [2019] 217 Comp Cas 139 (SC) (paras 9, 14, 16)

Jones *v.* Bellgrove Properties Ltd. [1949] 2 KB 700 (para 31)

Kashinath Sankarappa Wani *v.* New Akot Cotton Ginning and Pressing Co. Ltd. MANU/SC/0007/1958 (para 38)

Lakshmirattan Cotton Mills Co. Ltd, *v.* Aluminium Corporation of India Ltd. [1971] 1 SCC 67 ; [1971] AIR 1971 SC 1482 (para 31)

Larsen and Toubro Ltd. *v.* Commercial Electric Works [1997] 67 DLT 387 (para 33)

Mahabir Cold Storage *v.* CIT [1991] 188 ITR 91 (SC) (para 31, 33, 38)

Murthy (A. V.) *v.* Nagabasavanna (B. S.) [2002] 108 Comp Cas 838 (SC) (paras 39, 40)

Natarajan (S.) *v.* Sama Dharman MANU/SC/0698/2014 (para 40)

Padam Tea Co. Ltd., *In re* [1974] AIR 1974 Cal 170 (paras 31, 32, 37)

Rishi Pal Gupta *v.* S. J. Knitting and Finishing Mills P. Ltd. [1998] 73 DLT 593 (para 33)

Sampuran Singh *v.* Niranjan Kaur [1999] 2 SCC 679 (para 12)

Sheetal Fabrics *v.* Coir Cushions Ltd. [2005] SCC Online Delhi 247 (paras 31, 32)

Spencer *v.* Hemmerde [1922] 2 AC 507 (HL) (para 35)

Stressed Assets Stabilization Fund (SASF) *v.* Uthara Fashion Knitwear Ltd. [2020] 221 Comp Cas 148 (NCLT) (para 1)

Ugro Capital Ltd. *v.* Bangalore Dehydration and Drying Equipment Co. P. Ltd. [2020] 9 Comp Cas-OL 379 (NCLAT) (paras 3, 19)

V. Hotels Ltd. *v.* Asset Reconstruction Co. (India) Ltd. [2020] 218 Comp Cas 198 (NCLAT) (paras 12, 29, 38)

Vashdeo R. Bhojwani *v.* Abhyudaya Co-operative Bank Ltd. [2019] 8 Comp Cas-OL 551 (SC) (para 11)

Company Appeal (AT) (Insolvency) No. 57 of 2020.

Jayesh Dolia, *R. Chandrachud* and *Nitin Thukral*, for the appellant.

Abhijeet Sinha, *Ms. Anju Bhushan Gupta* and *Kanishk Rana*, for respondent No. 1.

Parthasarathy Bose, *Mayank Kshirsagar* and *Ms. Pankhuri*, for respondent No. 2.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)***.—"M/s. Stressed Assets Stabilization Fund (SASF)"-(the "financial creditor") filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (the "I and B Code" for short) for initiation of the corporate insolvency resolution process against M/s. Uthara Fashion Knitwear Ltd."-(the "corporate debtor"). The Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, by the impugned order dated November 21, 2019 (*Stressed Assets Stabilization Fund (SASF)* v. *Uthara Fashion Knitwear Ltd.* [2020] 221 Comp Cas 148 (NCLT)) admitted the application. 1

Initially the plea that was taken by the appellant is that the demand notice was not served before the order of admission was passed on November 21, 2019. Otherwise, the appellant would have shown that the application under section 7 was barred by limitation, the account of the "corporate debtor" having been declared as NPA in the year 2009 and the case being decreed in the year 2013. 2

On notice, the respondents appeared and relied on decision of the three hon'ble Members of this Appellate Tribunal dated January 22, 2020 in *Ugro Capital Ltd.* v. *Bangalore Dehydration and Drying Equipment Co. P. Ltd.* [2020] 9 Comp Cas-OL 379 (NCLAT) Company Appeal (AT) (Insolvency) No. 984 of 2019. In the said case, the hon'ble Members of this Appellate Tribunal taking into consideration that the suit was decreed on May 22, 2015, held that non-payment of debt thereafter amounts to "committed default" in terms of section 3(12) of the "I and B Code" for the first time and in terms of article 137 of the Limitation Act, 1963, for the purpose of filing application under section 7 of the "I and B Code" three years from the date the right to apply accrued for the first time from the date of default in terms of the decree. 3

As the judgment was doubted, the matter was referred to the larger Bench to decide the issue. 4

The brief facts of the case are as follows : 5

At the request of the "corporate debtor", the "Industrial Development Bank of India" ("IDBI" for short) granted financial assistance of Rs. 600 lakhs by way of term loan agreement dated March 2, 2000 to the corporate debtor and the loan disbursed was primarily secured by hypothecation of plant and machinery together with machinery spares, tools and accessories, raw materials, semi-finished and finished goods, consumable stores, book debts and such other movables and equitable mortgage of properties at an

estimated value of Rs. 790.70 lakhs as was specified in the memorandum of entry dated August 24, 2000. The account of the corporate debtor was classified as "non-performing asset" on May 29, 2002.

In the year 2003, at the instance of the "IDBI Bank", debt recovery proceeding was initiated under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (O. A. No. 289 of 2003 now renumbered as O. A. No. 413 of 2007). It was decreed on June 19, 2009 and recovery certificate was issued on August 31, 2009, which was reflected in the balance-sheet dated March 31, 2012.

6 In the aforesaid background, it was argued that the application under section 7 filed in the year 2019 was barred by limitation.

7 Section 7 relates to "initiation of corporate insolvency resolution process by the financial creditor". As per section 7(1), the "financial creditor" may file an application for initiation of corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when "a default has occurred".

8 In *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) ; [2019] 11 SCC 633, the hon'ble Supreme Court held that for the purpose of section 7 of the Limitation Act, 1963 is applied from the date of inception of the Code. The hon'ble Supreme Court noticed section 238A, inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which relates to the "proceedings" or "appeals" before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal.

However, as section 238A does not deal with application under section 7, 9 or 10 of the "I and B Code", the decision of the hon'ble Supreme Court in *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) ; [2019] 11 SCC 633 being the law of land under article 141 of the Constitution of India, article 137 of the Limitation Act, 1963 will be applicable to application under section 7, 9 or 10 of the I and B Code since the date of inception of the Code (commencement of the Code i. e., December 1, 2016).

9 In *Jignesh Shah* v. *Union of India* [2019] 217 Comp Cas 139 (SC) ; [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 (page 152 of 217 Comp Cas) :

> "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, in so far as the winding up proceeding was concerned. Thus, in *Hariom Firestock Ltd.* v. *Sunjal Engineering P. Ltd.* [1999] 96 Comp Cas 349 (Karn), 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 (page 354) :

'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 de hors 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.'

Likewise, a single judge of the Patna High Court in *Ferro Alloys Corporation Ltd.* v. *Rajhans Steel Ltd.* [2000] 99 Comp Cas 426 (Patna) also held (page 432) :

'In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner-company against opposite party No. 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-com-

pany approached this court for winding up of 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. 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 No. 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 (page 159 of 217 Comp Cas) :

"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 . . .

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."

Similar issue fell for consideration before the hon'ble Supreme Court in **10** *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) ; [2019] 10 SCC 572. In the said case, the hon'ble Supreme Court has noticed that the respondent was declared NPA on July 21, 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 July 21, 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 (page 251 of 8 Comp Cas-OL) :

"In the present case, respondent No. 2 was declared NPA on July 21, 2011. At that point of time, State Bank of India filed two O. As. in the Debts Recovery Tribunal in 2012 in order to recover a total debt of Rs. 50 crores of rupees. In the meanwhile, by an assignment dated March 28, 2014, State Bank of India assigned the aforesaid debt to respondent No. 1. The Debts Recovery Tribunal proceedings reached judgment on June 10, 2016, the Tribunal holding that the O. As. filed before it were not maintainable for the reasons given therein.

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 March 27, 2017.

An independent proceeding was then begun by respondent No. 1 on October 3, 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 section 7 application in Column II which was the date on which default occurred, the date of the NPA i. e., July 21, 2011 was filled up. The National Company Law Tribunal 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 National Company Law Tribunal reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, aforesaid claim was filed within limitation and hence admitted the section 7 application. The National Company Law Appellate Tribunal 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 December 1, 2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

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 July 21, 2011, three years having elapsed since then in 2014, 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* [2019] 212 Comp Cas 1 (SC) ; [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.

Mr. Debal Banerjee, learned senior counsel, appearing on behalf of the respondents, countered this by stressing, in particular, paragraph 11 of *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) ; [2019] 11 SCC 633 and reiterated the finding of the National Company Law Tribunal 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.

Having heard learned counsel for both sides, what is apparent is that article 62 is out of the way on the ground that it would only apply to suits. The present case being 'an application' which is filed under section 7, would fall only within the residuary article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on July 21, 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 paragraph 11 of *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) ; [2019] 11 SCC 633, 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.

This being the case, we fail to see how this paragraph 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.

This being the case, the appeal is allowed and the judgments of the National Company Law Tribunal and the National Company Law Appellate Tribunal are set aside."

In *Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* [2019] 8 Comp Cas-OL 551 (SC) ; [2019] 9 SCC 158, the hon'ble Supreme Court referring to *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) ; [2018] SCC Online SC 1921 observed (page 553 of 8 Comp Cas-OL) : **11**

"Having heard 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* [2019] 212 Comp Cas 1 (SC) ; [2018] SCC Online SC 1921, paragraph 42 of which reads as follows :

'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 (page 554 of 8 Comp Cas-OL) :

"Following this judgment, it is clear that when the recovery certificate dated December 24, 2001 was issued, this certificate injured

effectively and completely the appellant's rights as a result of which limitation would have begun ticking."

12 This Appellate Tribunal also considered the same issue in *V. Hotels Ltd.* v. *Asset Reconstruction Co. (India) Ltd.* [2020] 218 Comp Cas 198 (NCLAT) Company Appeal (AT) (Insolvency) No. 525 of 2019 decided on December 11, 2019, by referring to the aforesaid judgment of the hon'ble Supreme Court observed (page 212 of 218 Comp Cas) :

"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 December 1, 2008 as has been noticed by the Adjudicating Authority . . .

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 non-performing 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).'

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 (page 213 of 218 Comp Cas) :

"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.

In the present case, 'Asset Reconstruction Company (India) Ltd.'-(the 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.'-(the financial creditor) signed by the corporate debtor or its authorised signatory.

In *Sampuran Singh* v. *Niranjan Kaur* [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 December 1, 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 December 1, 2008."

13 The aforesaid decisions of the hon'ble Supreme Court and this Appellate Tribunal make it clear that for the purpose of computing the period of limitation of application under section 7, the date of default is "NPA" and hence a crucial date.

14 In *Jignesh Shah* v. *Union of India* [2019] 217 Comp Cas 139 (SC) ; [2019] 10 SCC 750, the hon'ble Supreme Court noticed the decision of the hon'ble Patna High Court in *Ferro Alloys Corporation Ltd.* v. *Rajhans Steel Ltd.* [2000] 99 Comp Cas 426 (Patna), wherein the hon'ble Patna High Court held that simply because a suit for realisation of the debt of the petitioner-company against opposite party No. 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.

15 In the said case, the hon'ble Patna High Court further held that 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 No. 1 cannot be ordered due to non-payment of the said debt.

16 Appreciating the aforesaid judgment of the hon'ble Patna High Court, the hon'ble Supreme Court in *Jignesh Shah* v. *Union of India* [2019] 217 Comp Cas 139 (SC) ; [2019] 10 SCC 750 observed that 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.

Thus, while holding so, the hon'ble Supreme Court held that the date of default to be taken into consideration for computing the period of limitation of application under section 7. As the decision of the hon'ble Supreme

Court is binding, we hold that mere filing of a suit for recovery or a decree passed by a court cannot shift forward the date of default.

17 A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. As a decree can be executed within specified period, i. e., 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.

18 Therefore, we hold that a judgment or a decree passed by a court for recovery of money by the civil court/Debts Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under section 7 of the "I and B Code".

19 In *Ugro Capital Ltd.* v. *Bangalore Dehydration and Drying Equipment Co. P. Ltd.* [2020] 9 Comp Cas-OL 379 (NCLAT) Company Appeal (AT) (Insolvency) No. 984 of 2019 as other decisions have not been brought to the notice of the hon'ble Bench, it cannot be cited as a precedent.

20 It is next submitted by learned counsel appearing for the respondents that the application under section 7 was not barred by limitation as the corporate debtor has acknowledged the claim in its audited balance-sheet for the financial years 2011-12 and 2012-13 onwards.

21 The question as to whether reflection of debt in a balance-sheet of the corporate debtor prepared pursuant to section 92 of the Companies Act, 2013 amounts to acknowledgment of debt fell for consideration before this Appellate Tribunal in *G. Eswara Rao* v. *Stressed Assets Stabilisation Fund* [2020] 219 Comp Cas 231 (NCLAT) Company Appeal (AT) (Insolvency) No. 1097 of 2019. In the said case, this Appellate Tribunal by the judgment dated February 7, 2020 noticed the provision of acknowledgment in writing under section 18 of the Limitation Act, 1963 and section 92 of the Companies Act, 2013. This Appellate Tribunal also noticed the decree passed by the Debts Recovery Tribunal to find out whether the same can be held to be acknowledgment of debt under section 18 of the Limitation Act, 1963, and held (page 236) :

> "The date of default can be forwarded to a future date only under 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.'

As the decree passed by the Debts Recovery Tribunal on August 17, 2018 cannot be said to be an acknowledgment of debt by the corporate debtor in terms of section 18 of the Limitation Act, 1963 learned counsel for the respondent relied on balance-sheet of the corporate debtor for the years ending 2014-15, 2015-16 and 2016-17 to suggest that the corporate debtor admitted the liability in its independent auditor's report and balance-sheet.

Section 92 of the Companies Act, 2013 mandates a company to prepare a return in the prescribed form as they stood on the close of the financial year regarding providing different details. Under section 92(5), if a company fails to file its annual return under sub-section (4), before the expiry of the period specified, it is punishable with fine and the Officers of the company on such default are also punishable with imprisonment or fine or both as under :

Companies Act, section 92(1), (4), (5) and (6) to be reproduced :

'92. *Annual return*.—(1) Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding—

(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies ;

(b) its shares, debentures and other securities and shareholding pattern ; . . .

(d) its members and debenture-holders along with changes therein since the close of the previous financial year ;

(e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year ;

(f) meetings of members or a class thereof, Board and its various committees along with attendance details ;

(g) remuneration of directors and key managerial personnel ;

(h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment ;

(i) matters relating to certification of compliances, disclosures as may be prescribed ;

(j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors ; and

(k) such other matters as may be prescribed,

and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice :

Provided that in relation to one person company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company :

Provided further that the Central Government may prescribe abridged form of annual return for 'one person company, small company and such other class or classes of companies as may be prescribed'. . .

(4) Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed.

(5) If a company fails to file its annual return under sub-section (4), before the expiry of the period specified (therein), the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees and every officer of the company who is in default shall be punishable with

imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees, or with both.

(6) If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made there under, he shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees.'

As the filing of balance-sheet/annual return being mandatory under section 92(4), failing of which attracts penal action under section 92(5) and (6), the balance-sheet/annual return of the corporate debtor cannot be treated to be an acknowledgment under section 18 of the Limitation Act, 1963.

If the argument is accepted that the balance-sheet/annual return of the corporate debtor amounts to acknowledgment under section 18 of the Limitation Act, 1963 then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for the corporate debtor to file balance-sheet/annual return, which is not the law."

In view of the aforesaid findings, agreeing with the decisions aforesaid, **22**
at the cost of repetition, we hold :

(i) As the filing of the balance-sheet/annual return being mandatory under section 92(4) of the Companies Act, 2013, failing of which attracts penal action under section 92(5) and (6), the balance-sheet/annual return of the corporate debtor cannot be treated to be an acknowledgment under section 18 of the Limitation Act, 1963.

(ii) If the argument is accepted that the balance-sheet/annual return of the corporate debtor amounts to acknowledgment under section 18 of the Limitation Act, 1963 then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for the corporate debtor to file balance-sheet annual return, which is not the law.

In the present case, as we find that the account of the corporate debtor **23**
was declared NPA on October 31, 2002 and decree was passed on June 19, 2009/August 31, 2009, we hold that the application under section 7 filed by "M/s. Stressed Assets Stabilization Fund (SASF)" against "M/s. Uthara Fashion Knitwear Ltd."-(the "corporate debtor") is barred by limitation and was not maintainable.

For the said reasons, we are not remitting the matter to the Bench for **24**
fresh decision on the facts. The impugned order dated November 21, 2019

passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, is set aside.

25 In effect, order(s), passed by the Adjudicating Authority appointing "Interim Resolution Professional", declaring moratorium, freezing of account, and all other order(s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the "Interim Resolution Professional", including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by respondent under section 7 of the I and B Code is dismissed. The learned Adjudicating Authority will now close the proceeding. The corporate debtor (company) is released from all the rigour of law and is allowed to function independently through its board of directors from immediate effect.

26 The Adjudicating Authority will fix the fee of "Interim Resolution Professional" and "corporate insolvency resolution process cost" and "M/s. Stressed Assets Stabilization Fund (SASF)" will pay the fee of the "Interim Resolution Professional" and "corporate insolvency resolution process cost", as may be determined. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to costs.

27 A. I. S. CHEEMA J. ***(Judicial Member)***.—I have had the opportunity to go through the draft of the erudite judgment by the hon'ble Chairperson. With great respect and all humility at my command I have reservations regarding part of the judgment where it relates to annual returns/audited balance-sheets.

28 I am not recording here particulars of how the appeal has arisen and facts of the case and why present Bench of Chairperson and four Members was required to be constituted as it is dealt with in the judgment crafted by the hon'ble Chairperson.

29 I have gone through judgment in the matter of *V. Hotels Ltd.* v. *Asset Reconstruction Co. (India) Ltd.* [2020] 218 Comp Cas 198 (NCLAT) Company Appeal (AT) (Insolvency) No. 525 of 2019 and its finding in paragraph 23 that "books of account" cannot be treated as acknowledgment. I have also gone through the judgment in the matter of *G. Eswara Rao* v. *Stressed Assets Stabilisation Fund* [2020] 219 Comp Cas 231 (NCLAT) in Company Appeal (AT) (Insolvency) No. 1097 of 2019 dated February 7, 2020, especially, paragraphs 15 and 16 of that judgment which is also relied on, and the finding recorded in paragraph 22 that :

> "(i) As the filing of balance-sheet/annual return being mandatory under section 92(4) of the Companies Act, 2013, failing of which

attracts penal action under section 92(5) and (6), the balance-sheet/annual return of the corporate debtor cannot be treated to be an acknowledgment under section 18 of the Limitation Act, 1963.

(ii) If the argument is accepted that the balance-sheet/annual return of the corporate debtor amounts to acknowledgment under section 18 of the Limitation Act, 1963 then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for the corporate debtor to file balance-sheet/annual return, which is not the law."

30 With respect, I am unable to agree. I find that there are various judgments passed by the various hon'ble High Courts including High Court of Delhi which have dealt with the balance-sheet/annual returns of companies and where entries in the same have been treated as "acknowledgment of debt" and even accepted the same for the purpose of section 18 of the Limitation Act, 1963.

31 In judgment in the matter of *Gautam Sinha* v. *UV Asset Reconstruction Co. Ltd.* [2020] 221 Comp Cas 139 (NCLAT) in Company Appeal (AT) (Ins.) No. 1382 of 2019 dated February 25, 2020 passed by this Tribunal by a Bench also comprising myself, I had the occasion to deal with some of the judgments relating to balance-sheets/annual returns/entries in books of account. I will extract portion of the analysis of those judgments which I recorded in that judgment of ours in *Gautam Sinha* v. *UV Asset Reconstruction Co. Ltd.* [2020] 221 Comp Cas 139 (NCLAT). The said portions are as under (page 142) :

"Before us, learned counsel for respondent No. 1 (respondent in short) referred to the judgments in the matters of *Sheetal Fabrics* v. *Coir Cushions Ltd*. reported as [2005] SCC Online Delhi 247. *CIT* v. *Shri Vardhman Overseas Ltd.* reported as [2011] SCC Online Delhi 5599 ; [2012] 343 ITR 408 (Delhi) and *Mahabir Cold Storage* v. *CIT* reported as [1991] 188 ITR 91 (SC) ; [1991] (Supp.) 1 SCC 402. The argument is that acknowledgment of debt in the balance-sheet also amounts to acknowledgment under section 18 of the Limitation Act.

The judgment in the matter of *CIT* v. *Shri Vardhman Overseas Ltd.* reported as [2011] SCC Online Delhi 5599 ; [2012] 343 ITR 408 (Delhi) was in the context of provisions of the Income-tax Act. In paragraph 17 of the judgment, it was observed (page 421 of 343 ITR) :

'In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance-sheet as on March 31, 2002. The assessee being a limited

company, this amounted to acknowledging the debts in favour of the creditors. *Section 18* of the Limitation Act, 1963 provides for effect of acknowledgment in writing. It says where before the expiration of the prescribed period for a suit 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, a fresh period of limitation shall commence from the time when the acknowledgment was so signed. In an early case, in England, in *Jones* v. *Bellgrove Properties Ltd.* [1949] 2 KB 700, it was held that a statement in a balance-sheet of a company presented to a creditor shareholder of the company and duly signed by the directors constitutes an acknowledgment of the debt. In *Mahabir Cold Storage* v. *CIT* [1991] 188 ITR 91 (SC), the Supreme Court held (page 97) :

"The entries in the books of account of the appellant would amount to an acknowledgment of the liability to Messrs. Prayagchand Hanumanmal within the meaning of *section 18* of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt."

In several judgments of this court, this legal position has been accepted.'

The hon'ble High Court then referred to some of the judgments.

In judgment in the matter of *Sheetal Fabrics* v. *Coir Cushions Ltd.* reported as [2005] SCC Online Delhi 247, the hon'ble High Court of Delhi referred to the judgment in the matter of *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170 and referred to the said judgment as under :

'Let me first deal with the case of *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170. This case relied upon by learned counsel for the respondent-company in support of his plea that acknowledgment contained in the balance-sheet could not be relied upon by the petitioner. However, on going through this judgment, one would clearly notice that it does not lay down the proposition which is sought to be advanced by learned counsel. That was a case where balance-sheet was not confirmed or passed by the shareholders. The court observed that such a balance-sheet, before it could be relied upon, must be duly passed by the shareholders at the appropriate meeting and must be accompanied by a report, if any, made by the directors for its validation. *The principle of law laid down was that statement in the balance-sheet indicating liability is to be read along with the directors' report to see whether both so read would amount to an*

acknowledgment. There is no dispute about this proposition of law. However, in that case, the court refused to accept entry in the balance-sheet as acknowledgment of debt because of two reasons :

(a) The balance-sheet was not passed by the shareholders at the appropriate meeting.

(b) The directors' report, in the balance-sheet, contained the following statement :

Your directors are of the opinion that the liabilities shown in Schedules A and B of the balance-sheet excepting those of United Bank of India, M/s. Goenka and Co. P. Ltd. and Caritt, Moran and Co. P. Ltd. are barred by limitations, hence these liabilities are not confirmed by your directors.

These were the two considerations which led the court to conclude that even the debt shown in the balance-sheet in respect of the said petitioning creditor would not amount to an acknowledgment as contemplated under *section 18* of the Limitation Act and following observations in this regard are reported :

'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 acknowledgment on the balance-sheet is a statutory document and perhaps is a separate document but the balance-sheet not confirmed or 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.'

In the same breath, the High Court also explained as to what would constitute an acknowledgment under *section 18* of the Limitation Act by referring to the judgment of the Supreme Court and this discussion would be found in the following passage :

'It was held by the Supreme Court in the case of *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corporation of India Ltd.* [1971] 1 SCC 67 ; AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgment 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 farfetched reasoning. *In order to find out the intention of the document by which acknowledgment 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.*'

Then the High Court after referring to the judgment in the matter of *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170 examined the case, which was before the hon'ble High Court, and in the facts of that matter, found that the list of creditors maintained by the respondent-company before the High Court or in the balance-sheet, was without any conditions or any strings attached." (emphasis[1] supplied)

32 Thereafter, this Tribunal in judgment in the matter of *Gautam Sinha* v. *UV Asset Reconstruction Co. Ltd.* [2020] 221 Comp Cas 139 (NCLAT) discussed facts regarding the balance-sheet as was relied on in that matter and concluded as under (page 146) :

"We have already referred to the judgments in the matters of *Sheetal Fabrics* v. *Coir Cushions Ltd.* reported as [2005] SCC Online Delhi 247 and *Padam Tea Co. Ltd., In re*, AIR 1974 Cal 170 which show that the balance-sheet would be required to be read with directors' report. In the directors report which is before us, there does not appear to be any acknowledgment of debt. The statement recorded by the auditor with regard to the pending litigation in the facts of the present matter, we find, cannot be read as an acknowledgment by the company under section 18 of the Limitation Act."

33 In the above reference to judgment in the matter of *Gautam Sinha* v. *UV Asset Reconstruction Co. Ltd.* [2020] 221 Comp Cas 139 (NCLAT) while referring the judgment of the hon'ble High Court of Delhi in the matter of *CIT* v. *Shri Vardhman Overseas Ltd.* reported as [2012] 343 ITR

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408 (Delhi) ; [2011] SCC Online Delhi 5599, only part of paragraph 17 of that judgment was reproduced. In judgment in the matter of *CIT* v. *Shri Vardhman Overseas Ltd.* reported as [2012] 343 ITR 408 (Delhi) ; [2011] SCC Online Delhi 5599, the hon'ble High Court of Delhi after referring to judgment of the hon'ble Supreme Court in *Mahabir Cold Storage* v. *CIT* [1991] 188 ITR 91 (SC) ; [1991] (Supp.) 1 SCC 402 and the legal position in paragraph 17, observed that in several judgments of the High Court, the legal position has been accepted and added (page 421 of 343 ITR) :

> "In *Daya Chand Uttam Prakash Jain* v. *Santosh Devi Sharma* [1997] 67 DLT 13, S. N. Kapoor J. applied the principle in a case where the primary question was whether a suit under Order 37 of the CPC could be filed on the basis of an acknowledgment. In *Larsen and Toubro Ltd.* v. *Commercial Electric Works* [1997] 67 DLT 387 a single judge of this court observed that it is well-settled that a balance-sheet of a company, where the defendants had shown a particular amount as due to the plaintiff, would constitute an acknowledgment within the meaning of section 18 of the Limitation Act. In *Rishi Pal Gupta* v. *S. J. Knitting and Finishing Mills P. Ltd.* [1998] 73 DLT 593, the same view was taken. The last two decisions were cited by Geeta Mittal J. in *S. C. Gupta* v. *Allied Beverages Co. P. Ltd.* (decided on April 30, 2007) and it was held that the acknowledgment made by a company in its balance-sheet has the effect of extending the period of limitation for the purposes of section 18 of the Limitation Act. In *Ambika Mills Ltd.* v. *CIT* [1964] 54 ITR 167 (Guj), it was further held that a debt shown in a balance-sheet of a company amounts to an acknowledgment for the purpose of section 19 of the Limitation Act and in order to be so, the balance-sheet in which such acknowledgment is made need not be addressed to the creditors. In light of these authorities, it must be held that in the present case, the disclosure by the assessee-company in its balance-sheet as on March 31, 2002 of the accounts of the sundry creditors amounts to an acknowledgment of the debts in their favour for the purposes of section 18 of the Limitation Act. The assessee's liability to the creditors, thus, subsisted and did not cease nor was it remitted by the creditors. The liability was enforceable in a court of law."

Another Bench of this Tribunal has in the matter of *Gouri Prasad Goenka* v. *Punjab National Bank* in Company Appeal (AT) (Insolvency) No. 28 of 2019 reported as [2019] 217 Comp Cas 418 (NCLAT) ; MANU/NL/0518/2019 held that letter emanating from the corporate debtor in that matter, addressed to the financial creditor where the corporate debtor **34**

agreed to settle all outstanding dues of the financial creditor on one-time settlement (OTS) basis amounted to acknowledgment of outstanding debt in writing.

35 In judgment in the matter of *ITC Ltd*. v. *Blue Coast Hotels Ltd.* dated March 19, 2018 reported as [2018] 2 Comp Cas-OL 459 (SC) ; MANU/SC/0263/2018, the hon'ble Supreme Court was dealing with question whether sub-section (3A) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act in short) was mandatory or directory in nature and in the context, dealt with the matter where the creditor had not replied to debtors' representation and it was claimed that there was breach of section 13(3A). In that context, the hon'ble Supreme Court dealt with attendant circumstances and the notices which were issued by the creditor and the different proposals debtor made including a "letter of undertaking" dated November 25, 2013 and in paragraph 35 of that judgment observed (page 478 of 2 Comp Cas-OL) :

> *"Letter of undertaking without prejudice*
>
> Much was sought to be made of the words 'without prejudice' in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgment of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgment or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in *Spencer* v. *Hemmerde* [1922] 2 AC 507 (HL) case as pointed out by Mr. Harish Salve, '. . . as a rule the debtor who writes such letters has no intention to bind himself further than' is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure.
>
> It was argued in a subsequent case[1] that an acknowledgment made 'without prejudice' in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows :

1. *Bradford and Bingley Plc* v. *Rashid* [2006] UKHL 37 (HL).

'But when a statement is used as acknowledgment for the purpose of section 29(5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgment. It is the acknowledgment.'

Therefore, without prejudice rule could have no application. It said :

Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment.

We, thus, find that the mere introduction of the words 'without prejudice' have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up." (emphasis[1] supplied)

Carefully going through *ITC Ltd.* v. *Blue Coast Hotels Ltd.* [2018] 2 Comp Cas-OL 459 (SC) ; MANU/SC/0263/2018 judgment, I am aware that the context there was not Limitation Act but the substance emanating is that even "letter of undertaking" issued "without prejudice" clause could contain an "acknowledgment of debt". **36**

Going through the judgments of the hon'ble High Courts of Delhi and other High Courts, what appears to me is that it is well-settled position of law that annual returns/audited balance-sheets can be referred to and relied on to see if contents therein amount to acknowledgment or not. The above discussion of the judgments shows that even after referring to the annual reports/balance-sheets, there are instances where the contents are not relied on to conclude that there is acknowledgment of debt. For such reasons, I find it difficult to accept that only because section 129 of the Companies Act, 2013 makes filing of financial statements and section 92 of the Companies Act, 2013 requires filing of annual returns by the company mandatory and the default attracts penal action, the same cannot be treated as an acknowledgment under section 18 of the Limitation Act, 1963. The law requires preparation of financial statements and annual returns and filing of the same. The default in filing attracts action. There is no compulsion or force regarding the contents disclosing acknowledgment. This is clear from paragraph 11 of the judgment in the matter of *Padam Tea Co. Ltd., In re,* AIR 1974 Cal 170. There the directors recorded their opinion with regard to the liabilities shown to say that the same are barred by limitations and hence, the liabilities are not being confirmed by the directors. Thus the provisions of the Companies Act mandating filing of **37**

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annual return/balance-sheet cannot be treated as if they are coercive and so should be treated as inadmissible.

38 Apart from the judgments of the High Courts, as referred, judgment in the matter of *Mahabir Cold Storag*e v. *CIT* [1991] 188 ITR 91 (SC) ; [1991] (Supp.) 1 SCC 402 clearly recorded in paragraph 12 that entries in the books of account would amount to an acknowledgment of the liability within the meaning of section 18 of the Limitation Act, 1963. As such, I have difficulty with the judgment in the matter of *V. Hotels Ltd.* v. *Asset Reconstruction Co. (India) Ltd.* [2020] 218 Comp Cas 198 (NCLAT) relied on where in paragraph 23, the Bench of this Tribunal observed that "The books of account cannot be treated as an acknowledgment of liability in respect of debt . . .". If the books of account can be considered, I find it difficult to hold that the audited balance-sheet prepared on the basis of books of account, needs to be ignored. Apart from the above, in judgment in the matter of *Kashinath Sankarappa Wani* v. *New Akot Cotton Ginning and Pressing Co. Ltd.* reported as MANU/SC/0007/1958, while dealing with resolution of board of directors and while considering the balance-sheet with regard to question of limitation, the hon'ble Supreme Court examined the resolution and also the balance-sheet and in the context of the facts of that matter came to a conclusion that the resolution or the balance-sheet did not help the appellant. It is not that it was held that for the purpose of limitation, balance-sheet cannot be considered at all.

39 In the matter of *A. V. Murthy* v. *B. S. Nagabasavanna* reported as [2002] 108 Comp Cas 838 (SC) ; [2002] 2 SCC 642, while dealing with a complaint under section 138 of the Negotiable Instruments Act, 1881 when dispute came up whether the cheque drawn was in respect of a debt or liability not legally enforceable, and the Additional Sessions Judge had held that there was error in taking cognizance of the offence, the hon'ble Supreme Court observed in paragraph 5 as under (page 840 of 108 Comp Cas) :

> "Moreover, in the instant case, the appellant has submitted before us that the respondent, in his balance-sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance-sheet as on March 31, 1997 is also produced before us. *If the amount borrowed by the respondent is shown in the balance-sheet, it may amount to acknowledgment and the creditor might have a fresh period of limitation from the date on which the acknowledgment was made.* However, we do not express any final opinion on all these aspects, as

these are matters to be agitated before the Magistrate by way of defence of the respondent." (emphasis[1] supplied)

The judgment in the matter of *A. V. Murthy* v. *B. S. Nagabasavanna* reported as [2002] 108 Comp Cas 838 (SC) ; [2002] 2 SCC 642 was relied on by the hon'ble Supreme Court in the matter of *S. Natarajan* v. *Sama Dharman* reported as MANU/SC/0698/2014. Thus, what appears to me is that even the hon'ble Supreme Court has observed that if the amount borrowed by the party is shown in the balance-sheet, it may amount to acknowledgment and the creditor might have a fresh period of limitation from the date on which the acknowledgment was made. 40

Thus, I find it is settled law appearing from the judgments of the High Court of Delhi and other High Courts that the balance-sheets can be looked into to see if there is acknowledgment of debt. Perusing the judgments of the hon'ble Supreme Court I find that even the hon'ble Supreme Court has looked into balance-sheets and books of account to see if there is acknowledgment of liability. If the amount borrowed is shown in the balance-sheet, it may amount to acknowledgment. I find the judgments of the hon'ble Supreme Court of India are binding and balance-sheets cannot be outright ignored. 41

For the above reasons, I am of the opinion that annual returns/audited balance-sheets, one-time settlement proposals, proposals to restructure loans, by whatever names called, cannot be simply ignored as debarred from consideration and in every given matter, it would be a question of applying the facts to the law and vice versa, to see whether or not the specific contents, spell out an acknowledgment under the Limitation Act. 42

For such reasons, in my view, the present Company Appeal (AT) (Insolvency) No. 57 of 2020 should be placed before the regular Bench to consider whether or not the audited balance-sheets and OTS proposals referred would on facts read with the law, amount to acknowledgments, so as to save limitation. 43

Except for the above aspects, I agree with the erudite judgment of the hon'ble Chairperson. 44

I direct accordingly. 45

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[2020] 221 Comp Cas 180 (Bom)

[IN THE BOMBAY HIGH COURT]

RATAN N. TATA AND OTHERS

v.

STATE OF MAHARASHTRA AND ANOTHER

RANJIT MORE and **SMT. BHARATH H. DANGRE** JJ.

July 22, 2019.

HF ▶ Petitioner

OFFENCES AND PROSECUTION—DEFAMATION—DIRECTORS—REMOVAL—SPECIAL RESOLUTION—STATEMENTS MADE IN SPECIAL NOTICE ISSUED FOR REMOVAL OF DIRECTOR—IMPUTATION IN NOTICE TO BE READ IN REFERENCE TO THE PURPOSE FOR WHICH IT WAS MENTIONED IN SPECIAL NOTICE—POWERS EXERCISED UNDER SECTION 169 BY COMPANY—DIRECTORS CANNOT BE HELD VICARIOUSLY LIABLE AND NO MALICE ATTRIBUTABLE ON THEM—NO INTENT TO CAUSE HARM TO REPUTATION OF DIRECTOR SOUGHT TO BE REMOVED—NO ACTUAL HARM CAUSED TO COMPLAINANT AS ELEMENT OF MENS REA ABSENT—PUBLICATION LIMITED TO BOARD OF DIRECTORS OF HOLDING COMPANY AND RESPECTIVE SHAREHOLDERS OF GROUP COMPANIES—NOT AMOUNTING TO CIRCULATION WIDELY OVER SECTION OF GENERAL PUBLIC—PRIMA FACIE CASE OF DEFAMATION NOT MADE OUT—FAILURE BY MAGISTRATE TO APPLY MIND BEFORE ISSUING PROCESS—ORDER ISSUING PROCESS AGAINST ACCUSED SET ASIDE—COMPANIES ACT, 2013, SS. 102, 169—INDIAN PENAL CODE, 1860, SS. 499, 500—CODE OF CRIMINAL PROCEDURE, 1973, SS. 202, 482.

The power conferred on the court under section 482 of the Code of Criminal Procedure, 1973, is inherent power and is to be exercised with great circumspection and in the rarest of rare cases where the complaint does not disclose any offence. It is settled position of law that if the complaint itself discloses an offence, it is not permissible for the court to embark upon an inquiry as to the genuineness of the allegations made in the complaint or whether or not those allegations are likely to be established on evidence. It is not permissible for the court to verify the authenticity or truthfulness of the allegations made in a complaint and if an offence prima facie falls under the provisions of the Indian Penal Code, 1860, the launching of prosecution cannot be thwarted by the High Court under section 482 of the 1973 Code. Where the allegations made in the complaint even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or no case

is made out against the accused the court exercising power under section 482 of the 1973 Code would be justified in exercise of its power.

STATE OF HARYANA *v.* BHAJANLAL [1992] Supp. (1) SCC 335 *relied on.*

A conjoint reading of section 169 of the Companies Act, 2013 read with section 102 of the Act would disclose that whereas any special notice is required of any resolution, it would be imperative to give to the company, a notice of the intention to move such requisition. Section 102 of the Act prescribes that if special business is to be transacted in any meeting, it should be accompanied by a statement setting out the material facts in form of information and such facts that may enable the members to understand the meaning, scope and implication of the items of business and to take decision thereon.

Section 169 of the Act, empowers the company to remove a director by an ordinary resolution before expiry of the period of notice after giving reasonable opportunity of being heard. Sub-section (2) of section 169 contemplates special notice of any resolution to remove a director and sub-section (3) contemplates that the company send forthwith a copy of the resolution to the director concerned, and the director is entitled to be heard on the resolution at the meeting. Sub-section (4) contemplates a further opportunity to the director who is sought to be removed to make a representation to the company in writing and he can request its notification to the members of the company and then the company is duty bound, if time permits, to issue notice of the resolution to the members of the company stating the fact that the representation has been made and send a copy of the representation to every member of the company to whom notice of meeting is sent. But for if any reason the representation could not be sent due to insufficient time or of the company's default, the director may without prejudice to this right to be heard orally, require that the representation shall be read out at the meeting. The only exception to this procedure, is the proviso appended to sub-section (4) which sets out that the copy of the representation need not be sent out and the representation need not be read out in the meeting if, on the application either of the company or of any person who claims to be aggrieved, has approached the Tribunal and the Tribunal is satisfied that the rights of such person are being affected. Then it may not be permit publicity of the representation.

The offence of defamation under the 1860 Code, inter alia, consists of three initial ingredients namely : (a) the making or publishing of any imputation concerning a person ; (b) such imputation must have been made either by words either spoken or intended to be read or by sign or by visible representation ; (c) the imputation must have been read with the intention of harming

or with the knowledge or having reason to believe that it will harm the reputation of the person concerned.

Since summoning of an accused is a serious matter affecting his dignity and reputation in the society, there has to be application of mind before proceeding against the accused persons and the Magistrate has to be prima facie satisfied that there are sufficient grounds for proceeding against the accused.

BIRLA CORPORATION LTD. *v.* ADVENTZ INVESTMENTS AND HOLDINGS LTD. [2019] 216 Comp Cas 1 (SC) *relied on.*

Respondent No. 2 filed a complaint against the petitioners for the offence of defamation alleging that the act of the petitioners had damaged his reputation. The complainant alleged that the special notice issued under section 169(2) read with section 115 of the Act for his removal as a director contained allegations which were per se defamatory and no due diligence was shown by the petitioners by ascertaining before issuance of the notice containing the imputation whether the allegations were true, that the notices containing the defamatory material were further circulated to the shareholders of the operating companies, again without verification of the statements contained therein and this amounted to an irresponsible behaviour.The Magistrate was of the view that the statements in the notice were per se defamatory and issued process against the petitioners for the offences punishable under section 500 read with section 34 of the 1860 Code. On a petition filed under article 227 of the Constitution of India read with section 482 of the 1973 Code seeking quashing the order of the Magistrate :

Held, *allowing the petition, (i) that the special notice made a reference to certain acts of the complainant in reference to the erstwhile chairman. The special notices contained certain statements in respect of the complainant and his conduct, but this imputation would have to be read in reference to the purpose for which it found place in the special notice. The special notice issued by the company, as a promoter, was in form of requisition to the holding companies to call for an extraordinary general meeting for removal of their independent director in whom the "principal shareholder" had lost confidence. The special notice was thus issued for the purpose of seeking removal of an independent director of the company since the principal shareholders were of the opinion that the complainant was acting in a manner that was designed to harm the "T group" and his conduct reflected that he was not conducting himself independently and instead had been, inter alia, galvanizing independent directors and acting prejudicially and as such, the principal shareholders were apprehensive that in future his action might put the company and its future in great jeopardy and impact the overall morals of the workers,*

employees and management who had joined the company. The imputation formed part of the resolution passed by the board of directors of the company, i. e., the petitioners and it was contained in a requisition or special notice proposing resolutions for removal of the complainant as director of the company seeking a vote in favour of such resolution. It was not to be construed as an independent statement but would have to be referred to in the background in which it was made. The action of the petitioners was in exercise of power conferred under section 169 of the Act. It was not necessary to assess or judge the truthfulness of the imputation or allegation since ultimately the allegations levelled against the complainant had caused his removal by the board of directors of the respective companies. The imputation contained in the special notice could not be viewed independent of the purpose for which it was included in the special notice and if the petitioners had adopted a legal course permissible to be adopted under the frame work of the statute governing it, the allegations could not be termed as "per se defamatory". The special notices were prepared and submitted in the name of the company and the petitioners being the directors or the officers of company, could not be held vicariously liable. No malice could be attributed to the petitioners, since the power under section 169 has been exercised by the company, a corporate entity.

(ii) That there was no prima facie case of defamation as there was no intent on the part of the petitioners to cause harm to the reputation of the respondent as contemplated by section 499 of the 1860 Code. No actual harm was caused to his reputation as the element of mens rea was absent and since the publication was only limited to the board of directors of the holding company and the respective shareholders of these companies, it could not be said that it was circulated widely over a section of the general public. Publication of the news about a resolution being passed by a well acclaimed business house happened to be business news for the media and both petitioner No. 1 and the complainant being well-known business personalities, they drew the attention of the media and the allegations or imputations and the story of removal of the complainant happened to be a hot topic for media. However, it was not conclusively established that it was the petitioners who had leaked the information to the media particularly when the complainant himself had addressed the communication to the shareholders independent of his representation in terms of section 169(4) of the Act which he requested for being circulated to the shareholders. The allegations of the complainant of the disparaging remarks or comments being widely circulated was also not correct since it was only circulated to the shareholders and they had a right to know the background of the resolution on which they were supposed to vote. There

was no intention to malign the image of the complainant by making his conduct known to the public particularly when the petitioners were exercising their statutory power. There was no prima facie case of defamation which the Magistrate had failed to consider. The Magistrate before issuing the process had failed to take into consideration the conspectus of the matter and though it was the duty cast upon him to be satisfied before issuance of a process, he had concluded without any material being placed before him that the statement was defamatory. The test to be applied to determine whether a statement was defamatory was that the statement must be understood as defamatory by right thinking or reasonable minded persons and certain yardsticks were laid down to enable the court to have an objective assessment of a subjective crime, i. e., defamation.

(iii) That there was no compliance with the provisions of section 202 of the 1973 Code in letter and spirit. Though a detailed enquiry was not necessary the Magistrate had failed to apply his mind before issuing the process against the accused. The Magistrate had failed to take into consideration the very basis of exercise of his power and did not satisfy himself about the issuance of process. The Magistrate had in a mechanical manner referred to the list of documents. There was no indication in the order demonstrating the Magistrate's satisfaction based on the material placed before him. The petitioners could not be held liable for defamation. The Magistrate had failed to conduct an inquiry, and the order could not be sustained.

Cases referred to :

Abdul Pal Abdul Rahim *v.* State of Maharashtra [2012] All. MR (Criminal) 131 (para 14)

Abhijit Pawar *v.* Hemant Madhukar Nimbalkar [2017] 3 SCC 528 (para 9)

Bhushan Kumar *v.* State (NCT of Delhi) [2012] 5 SCC 424 (para 29)

Birla Corporation Ltd. *v.* Adventz Investments and Holdings Ltd. [2019] 216 Comp Cas 1 (SC) (paras 10, 29, 30)

Chandra Deo Singh *v.* Prokash Chandra Bose [1963] AIR 1963 SC 1430 (para 29)

Jeffery J. Diermeier *v.* State of West Bengal [2010] 6 SCC 243 (para 13)

John Thomas *v.* Jagadeesan (K.) (Dr.) [2001] 106 Comp Cas 619 (SC) (para 12)

Khushboo (S.) *v.* Kanniammal [2010] 5 SCC 600 (paras 8, 27)

Mohinder Singh Dhillon *v.* Ganga Dhar Sharma [1975] 2 SLR 603 (para 8)

Pepsi Foods Ltd. *v.* Special Judicial Magistrate [1998] 5 SCC 749 (para 28)

Punjab National Bank *v.* Surendra Prasad Sinha [1992] 75 Comp Cas 699 (SC) (para 28)

Rajindra Nath Mahato *v.* Ganguly (T.) [1972] 1 SCC 450 (para 28)

Ramchandra Venkataramanan *v.* Shapoorji Pallonji and Co. Ltd. [2019] SCC Online Bom 524 (paras 8, 28)

Shivnarayan Laxminaryan Joshi *v.* State of Maharashtra [1980] 2 SCC 465 (para 11)

State of Haryana *v.* Bhajan Lal [1992] Supp (1) SCC 335 (paras 9, 15)

Sinha (S. K.), Chief Enforcement Officer *v.* Videocon International Ltd. [2008] 2 SCC 492 (para 29)

Subramanian Swamy *v.* Union of India [2016] 7 SCC 221 (paras 8, 13, 28)

Udai Shaker Awasthi *v.* State of Uttar Pradesh [2013] 2 SCC 435 (para 9)

Vijay Dhanuka *v.* Najma Mamtaj [2014] 14 SCC 638 (paras 9, 29)

Writ Petition No. 1238 of 2019.

Dr. Abhishek Manu Singhvi, *Mohan Parasaran* and *Amit Desai*, Senior Counsel with *Nitesh Jain*, *Atul Jain*, *Adrish Majumdar*, *Zulfiquar Memon*, *Parvez Memon*, *Waseem Pangarkar*, *Chirag Naik*, *Sidharth Sharma*, *L. Nidhiram Sharma*, *Azeem Samuel* and *Ashwin Kumar*, instructed by *Shardul Amarchand Mangaldas and Co.*, for the petitioners.

Ms. S. D. Shinde, APP for respondent No. 1-State.

Aabad Ponda with *Karma Vivan*, *Bhomesh Bellam*, *Mrs. Olga Lume Pereira* instructed by *Dastur Kalambi and Associates*, for respondent No. 2.

JUDGMENT

The judgment of the court was delivered by

SMT. BHARATI H. DANGRE J.—The present criminal writ petition emanates from an order dated December 15, 2018 passed by the Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai in a Complaint Case No. 11356/SS/2016 instituted by respondent No. 2 for the offence of defamation and alleging that the act of the respondent (present petitioner) has damaged his reputation. By the said impugned order, process is issued against accused Nos. 2 to 12 for the offences punishable under section 500 read with section 34 of the Indian Penal Code, 1860. 1

2 Before adverting to the order impugned before us, it would be necessary to refer to the bare minimum facts in a chronological manner to have a better understanding of the issue before us. Tata Sons Ltd., is an unlisted public company registered under the provisions of the Companies Act, 1886. The said company is having substantial shareholdings in various listed and unlisted private companies which form a part of the Tata group of companies. The said Tata Sons Ltd., is a shareholder of Tata Steel Ltd., Tata Chemicals Ltd., and Tata Motors Ltd., as it holds ordinary shares representing a marginal percentage of the paid-up ordinary share capital of the three companies. Thus, Tata Sons Ltd., is a promoter/share holder in the three operating companies, i. e., Tata Chemicals, Tata Motors and Tata Steels.

Petitioner No. 1-Ratan Tata was an additional director and interim chairman of the Tata Sons as on November 10, 2016 whereas petitioners Nos. 2 to 10 were the directors of the said promoter company. Petitioner No. 11 was the chief operating officer and company secretary of Tata Sons Ltd. Respondent No. 2 (the complainant-Nusli Neville Wadia) is the chairman of Bombay Dyeing and Manufacturing Co. Ltd., as well as several other companies and claims to be a person of impeccable reputation in society. Respondent No. 2 was an independent director of the three holding companies of the Tata group and came to be appointed as a director of Tata Steel on August 29, 1979 non-executive director of Tata Motors on December 22, 1998 and a non-executive director of Tata Chemicals on June 26, 1981 and in this capacity he claims to have long association with the said three companies.

3 The roots of the present dispute between the aforesaid parties could be traced back to October 24, 2016 when the chairman of the Tata Sons Ltd., by name Mr. Cyrus Mistry came to be removed by the board of directors of Tata Sons Ltd. In the wake of his removal, the independent directors of Tata Chemicals Ltd., met at Bombay House on November 10, 2016 to review the recent events and the subsequent media reports which could impact the management of the business of the company, both on domestic and international front and the meeting was convened to enable the independent directors to review the situation which had developed on account of removal of the chairman of the Tata Sons Ltd. It is this meeting which is core of the dispute between the parties. Both the parties have their own version as to what transpired in the said meeting. However, at present it would be only necessary to refer to the undisputed outcome of the fact that the independent directors unanimously affirmed their confidence in the board, its chairman and the management in the conduct of the business.

The independent directors after due discussion which, according to respondent No. 2 was unanimous whereas according to the petitioners it was an attempt on part of respondent No. 2 to galvanize the independent directors and met with an allegation that he has not conducted himself independently and acted as an interested party. As an outcome of the said meeting dated November 10, 2016 a statement was issued by the independent directors of Tata Chemicals to the stock exchanges affirming their confidence in the board, chairman and the management of the Tata Chemicals and it also reassured all the stake holders, management of the company and its subsidiary where ever located of their full confidence and support. The said statement was issued by one Mr. Rajiv Chandan, general counsel and company secretary on behalf of the independent directors of Tata Chemicals Ltd. It is this conduct of respondent No. 2 which was perceived as unfavourable and prompted the Tata Sons Ltd., which is a shareholder of Tata Chemicals Ltd., to requisition the board of directors of Tata Chemicals for convening an extraordinary general meeting of its shareholders in the manner prescribed under the law to pass two resolutions. Accordingly, on November 10, 2016 itself the Chief Operating Officer and the company secretary of Tata Sons Ltd., i. e., petitioner No. 11 issued notice to the board of directors of Tata Chemicals Ltd., in its capacity as shareholder of Tata Chemicals Ltd. The circular resolution came to be passed by the board of directors of Tata Sons Ltd., which included petitioners Nos. 1 to 10 to submit requisition for convening extraordinary general meeting of the shareholders of the Tata Chemicals and communication came to be addressed informing that pursuant to section 100(2)(a) and other applicable provisions of the Companies Act, 2013 and the rules framed thereunder, a requisition has been forwarded to the holding company for convening an extraordinary general meeting of the shareholders of Tata Chemicals Ltd., to pass two resolutions. Item No. 1 related to removal of Mr. Cyrus P. Mistry as director where as item No. 2 pertain to "Removal of Mr. Nusli Wadia as Director". The similar communications were addressed by Tata Sons Ltd., to the other two holding companies and the special notices issued to the company included the resolution seeking removal of Mr. Nusli Wadia as director of the relevant Tata Companies. The resolution which was contemplated to be passed as an ordinary resolution in pursuant to the provisions of section 169 and other provisions of the Companies Act and the Rules was accompanied with a brief background about the conduct of Mr. Nusli Wadia and it is the reflection of this conduct contained in the special notice issued under section 169(2) read with section 115 of the Companies Act which is the bone of contention

between the parties. According to the petitioners, the narration contained in the special notice issued under section 169(2) read with section 115 of the Companies Act by Tata Sons Ltd., was a statutory requirement before taking action of removal of a director and fall completely within the four corners of the Companies Act and the Rules framed thereunder, whereas according to respondent No. 2, the said special notice containing the allegations is per se defamatory and no due diligence was shown by the petitioner by ascertaining whether the allegations are true or false before issuance of the said notice containing the imputation. The contention of respondent No. 2 is that this special notice contained the defamatory statement and the statement being per se defamatory, respondent No. 2 followed up with the petitioners by asking them to seek legal advise and withdraw the said special notice as the same is alleged to be defamatory. But instead of doing the needful, it is the grievance of respondent No. 2 that the notices containing the defamatory material came to be further circulated to the shareholders of the operating companies, again without verification of the statements contained therein and this amounted to an irresponsible behaviour. It is in the backdrop of this fact we have heard the submissions advanced on behalf of the petitioners as well as the respondents and we would be making reference to the rival contentions of the respective parties by making reference to the voluminous documents placed before us.

4 To continue the assertion of facts, it may be noted that the end result of the proceedings is that the extraordinary general meeting of all the three holding companies came to be held and respondent No. 2 was removed as director by requisite majority and in case of Tata Steel Ltd., on December 21, 2016 in case of Tata Motors on December 22, 2016 and in case of Tata Chemicals on December 23, 2016.

5 It is to be noted that Suit No. 50 of 2017 came to be filed by few public shareholders in relation to the removal of respondent No. 2 along with Notice of Motion No. 345 of 2017. The said suit came to be instituted on December 13, 2016 and certain affidavits came to be filed in this suit which have been sought to be relied upon by the parties. It is also to be noted that respondent No. 2 instituted civil suit which came to be numbered as Civil Suit No. 225 of 2017 before the High Court of Judicature at Bombay (*Nusli Wadia* v. *Tata Sons P. Ltd. and others*) for defamation and he has prayed for declaration that the defendants are jointly and severely liable to compensate him by paying sum of Rs. 3 crores by way of damages, for having published or caused to be published the special notices containing per se defamatory and libelous allegations against him. The said suit came to be filed on December 15, 2016.

Respondent No. 2 Mr. Nusli Wadia filed a complaint in the Court of **6**
Additional Chief Metropolitan Magistrate, Mumbai on December 23, 2016 which is a genesis of the present writ petition. In the complaint, respondent No. 2 has set out in detail his curriculum vitae which is depictive that he is a famous personality who enjoys very good and immaculate reputation amongst caste, creed and calling. Respondent No. 2 highlighted in the complaint his lifetime achievements. It is alleged in the complaint that the complaint is filed since the accused persons individually and collectively have committed an offence of defamation against the complainant by printing, publishing and circulating per se false, frivolous, baseless, incorrect, libelous and defamatory material concerning the complainant which have been so printed and published with the sole intention of lowering, tainting, tarnishing the reputation and self esteem of the complainant in the eyes of right thinking person. The complainant further proceed to state that the accused persons have been instrumental in preparing the contents of the special notice which is defamatory and they collectively ensured that these defamatory contents are published and circulated and thus all the accused persons are jointly and directly responsible for committing the offence under section 500 read with section 109 of the Indian Penal Code. It is also specifically alleged that the special notices which contained the material against the complainant is based on false, baseless and unsubstantiated imputation which have been published with a view to damage and tarnish his reputation and goodwill. It is further alleged that the defamatory and offensive contents of the special notice has caused serious prejudice to his reputation and has affected his status as director in various other companies. The justification is also offered as regards the allegation about his conduct as an independent director and it is stated in the complaint that if the other independent directors have expressed their support towards Mr. Cyrus Mistry as chairman of the company, board and management of the operating companies, it is not on account of the action on the part of the complainant but the collective and unanimous decision of the independent director which is reflected in the minutes of meeting of Tata Chemicals and Tata Motors. It is also stated in the complaint that as an independent director, the complainant is entitled to express his support in the chairman, the board and the management of the operating companies and he is entitled to do so after exercising his independent business judgment as his fiduciary duty is only to the companies in which he is a director. In the said complaint, a request is made to the Magistrate to take cognizance of the offence committed under section 500 of the IPC read with section 109 and also read with section 34 of the IPC and a request was made to issue process against the accused persons.

7 On this complaint, the Magistrate recorded the verification of the complainant on December 14, 2018 and passed the impugned order on December 15, 2018 in which the Magistrate recorded a finding that the complainant has made out a case against the accused persons except accused No. 1 which is a company, hence, he issued process against accused Nos. 2 to 12 (petitioners Nos. 1 to 11) for the offences punishable under section 500 read with section 34 of the Indian Penal Code. The learned Magistrate has recorded that on perusal of the complaint and its verification, in view of section 200 of Cr.P.C. and on perusal of the documents as per list of documents exhibits A to Z and AA to GG, it appears that the averments made in the complaint are supported by documents, i. e., record of minutes of the independent directors of Tata Chemicals Ltd., dated November 10, 2016 outcome of the meeting of the independent directors dated November 10, 2016 special notice issued by the accused to Tata Chemicals Ltd., copy of e-mails, copy of articles published in newspapers, etc., and the allegations levelled against the complainant in the special notice are serious in nature and there was no satisfactory explanation offered as to on what basis the statements were contained in the special notice and the learned Magistrate concluded that the statements are defamatory. That is how the learned Magistrate justify the issuance of process against the present petitioners.

8 In support of the petition, we have heard learned senior counsel Shri Abhishekh M. Sanghvi. After inviting our attention to the sequence of events, Shri Sanghvi would submit that by no imagination the provisions of section 500 of the Indian Penal Code can be invoked and applied against the present petitioners. He would submit that the existence of the prima facie case is a pre-requisite of issuance of process and before exercising power the Magistrate has to satisfy himself, upon due application of mind that there exists sufficient ground for proceeding against the present accused and committing an offence. Shri Sanghvi would submit that the complaint alleges defamation in respect of the special notices issued by the Tata Sons Ltd., to the three operating companies promoted by it on November 10, 2016 under the provisions of the Companies Act seeking removal of the independent director of the relevant Tata Companies. Shri Sanghvi has invited our attention to the statutory power contained in section 169 of the Companies Act which authorizes the company to remove a director including an independent director by following the procedure set out in the said section. He would submit that board of Tata Sons took a decision to replace Mr. Cyrus Mistry as its chairman on October 24, 2016 and the proceedings came to be initiated to remove him from the operating

companies and notices came to be issued for removal of Mr. Cyrus Mistry as director of all the companies in which he was the director. In this process on November 10, 2016 the meeting of the Tata Chemicals was being held and in the evening, one of the non-executive director of the Tata Chemicals Mr. Bhaskar Bhat submitted his resignation as director of the Tata Chemicals and the various events which transpired in the meeting, came to be documented through the affidavits which included the affidavit of Mr. Rajiv Chandan, company secretary, Mr. Mukund, managing director and Mr. Bhaskar Bhat, non-executive director who resigned. This affidavits came to be tendered in suit filed by one Mr. Janak Mathura Das seeking stay of the extraordinary general meeting's of the Tata Companies on account of the resolution proposed for removal of respondent No. 2. Mr. Sanghvi invited our attention to the affidavit reflecting the conduct of respondent No. 2 in the meeting held on November 10, 2016. Shri Sanghvi, would submit that in the light of the events that took place on November 10, 2016 board of Tata Sons in its fiduciary duty as shareholders and promoters of the relevant Tata Companies decided to issue the special notices to seek removal of respondent No. 2 along with Mr. Cyrus Mistry. As a part of the special notices, according to Shri Sanghvi, some background material came to be alluded and it was only with an intention to assist the board of the relevant Tata Companies in the deliberation of the request of the requisitioning of the meeting for removal of respondent No. 2. He would submit that the communication of the Tata Sons was a confidential communication in accordance with the provisions of the Companies Act and the only purpose of the said notice was to request the relevant Tata Companies to requisition meeting of its shareholders and propose resolution at the behest of the promoter company for removal of Mr. Nusli Wadia as an independent director. This was sought to be done strictly in conformity with the mechanism prescribed in section 169 of the Companies Act. He would submit that perusal of the contents of the said notice can by no sense be construed as per se defamatory and rather provisions of the Companies Act contemplate that the notice of the business to be transacted in a meeting should be accompanied with a statement setting out the material fact concerning each item of special business to be transacted in the meeting including the facts or any other information that may enable the members to understand the meaning, scope and implication of the items and to take decision thereon. He would thus submit that the notice contained the relevant background so that the board of directors of the relevant companies would have a brief idea of the purpose of holding a meeting. Shri Sanghvi has also submitted that when the procedure

contemplated under section 169 was sought to be followed, respondent No. 2 actively and consciously consented to the circulation of the special notice of the Tata Sons including the background material to the shareholders of the Tata Companies as an annexure to the explanatory statement and that the relevant Tata companies were duty bound to issue notice in terms of the section 102 of the Companies Act. Shri Sanghvi would submit that the sole intention of the special notices containing the brief factual material was necessary since the meeting was to be held for removing a director in whom the Tata Sons as shareholder had lost confidence and any such comment made for achieving the objective, in any case cannot constitute the defamation. Learned senior counsel further submits that if it leads to a criminal offence of a defamation, it would have a disastrous effect as those who are expected to take an independent and objective decision in an institution would be stalled in exercise of their duty if such a course is permitted. He would further submit that the power of removal of a person including an independent director is vested in the board of directors of the company cannot be stultified through threats of criminal prosecution. Shri Sanghvi has placed reliance on the judgment of the hon'ble apex court in the case of *Subramanian Swamy* v. *Union of India* [2016] 7 SCC 221 to support to his submission that there has to be imputation and it must have been made in the manner as provided in section 499 of the Indian Penal Code with the intention to cause harm to the reputation of a person about whom it is made. He would submit that the said judgment in unequivocal terms has held that the complainant has to show that the accused has intended or had reason to believe that such imputation will harm the reputation of the complainant. He would also place reliance in the judgment of this court in the matter of *Ramchandra Venkataramanan* v. *Shapoorji Pallonji and Co. Ltd.* [2019] SCC Online Bom 524 where certain yardsticks have been set out to find out whether the statement is defamatory or not and it has been held that the statement has to be read in its entirety and while determining the question whether the statement is defamatory or not, it will have to be ascertained whether the averments in the complaint and the statement made are capable as a matter of law being defamatory. Shri Sanghvi would submit that if the statutory powers, has been exercised by a company and the process contemplated under statute is followed to achieve the end result which is within the four corners of the statute, then whether the defamation can be attracted. He would submit that when the petitioners as a board of directors of the Tata Sons had lost confidence in one of its independent director and it proceeded to follow the statutory procedure for his removal and

(b) sub-regulation (4) shall be omitted.

(c) sub-regulation (5) shall be omitted.

(IV) In regulation 14, in sub-regulation (2), a new clause shall be inserted after clause (ba), namely,—

"(bb) maximum subscription from any investor other than sponsor(s), its related parties and its associates shall not be more than 25 per cent. of the total unit capital ;"

(V) In regulation 22,—

(a) in sub-regulation (5), after clause (f), a new clause shall be inserted, namely,—

"(fa) de-classification of the status of sponsor ;"

(b) in sub-regulation (6), clause (d) shall be omitted.

(c) in sub-regulation (6), the proviso under clause (g) shall be omitted.

(d) after sub-regulation (6), the following new sub-regulation shall be inserted, namely,—

"(6A) No person, other than sponsor(s), its related parties and its associates, shall acquire units of a REIT which taken together with units held by him and by persons acting in concert with him in such REIT, exceeds twenty-five per cent. of the value of outstanding REIT units unless approval from seventy-five per cent. of the unit holders by value excluding the value of units held by parties related to the transaction, is obtained :

Provided that if the required approval is not received, the person acquiring the units shall provide an exit option to the dissenting unit holders to the extent and in the manner as may be specified by the Board."

(e) in sub-regulation (8),

(i) for the words and symbols "re-designated" ,wherever it occurs, the word "inducted" shall be substituted.

(ii) clause (a) shall be substituted with the following, namely,—

"(a) prior to such changes, approval from seventy-five per cent. of the unit holders by value excluding the value of units held by parties related to the transaction shall be obtained ;"

(iii) in clause (b), in sub-clause (i), the words "who proposes to buy the units" shall be omitted and the words and symbols "in the manner specified by the Board ;" shall be inserted after the word "units".

(iv) in clause (b), sub-clause (ii) shall be substituted with the following, namely,—

"(ii) in case of change in control of the sponsor or inducted sponsor, the said sponsor or inducted sponsor shall provide the dissenting unit holders an option to exit by buying their units in the manner as specified by the Board ;

Explanation.—Change in sponsor or inducted sponsor shall mean any change due to entry of a new sponsor with or without exit of an existing sponsor."

[ADVT.-III/4/Exty./57/2020-21]

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/17,
dated 16th June, 2020[1].

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following Regulations to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, namely :—

1. These regulations may be called the **Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018,—

(I) in regulation 172, in sub-regulation (3) for the words "six months" the words "two weeks" shall be substituted.

[ADVT.-III/4/Exty./58/2020-21]

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/18,
dated 22nd June, 2020[2].

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby

1. Gaz. of India, Extry. No. 202, dt. 16-6-2020, Pt. III, sec. 4.
2. Gaz. of India, Extry. No. 223, dt. 22-6-2020, Pt. III, sec. 4, p. 5.

makes the following Regulations to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, namely :—

1. These regulations may be called the **Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018,—

(I) After regulation 164 the following new regulation shall be inserted, namely,—

"164A. *Pricing in preferential issue of shares of companies having stressed assets*.—(1) In case of frequently traded shares, the price of the equity shares to be allotted pursuant to the preferential issue shall not be less than the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

(2) No allotment of equity shares shall be made unless the issuer company meets any two of the following criteria :

(a) the issuer has disclosed all the defaults relating to the payment of interest/repayment of principal amount on loans from banks/financial institutions/Systemically Important Non-Deposit taking Non-banking financial companies/Deposit taking Non-banking financial companies and/or listed or unlisted debt securities in terms of SEBI Circular dated November 21, 2019 and such payment default is continuing for a period of at least 90 calendar days after the occurrence of such default ;

(b) there is an Inter-creditor agreement in terms of the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated June 7, 2019 ;

(c) the credit rating of the financial instruments (listed or unlisted), credit instruments/borrowings (listed or unlisted) of the listed company has been downgraded to "D".

(3) The issuer company making the preferential issue shall ensure compliance with the following conditions :

(a) The preference issue shall be made to a person not part of the promoter or promoter group as on the date of the board meeting to consider the preferential issue. The preference issue shall not be made to the following entities :

(i) undischarged insolvent in terms of the Insolvency and Bankruptcy Code, 2016 ;

(ii) "wilful defaulter" as per the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 ;

(iii) a person disqualified to act as a director under the Companies Act, 2013 ;

(iv) a person debarred from trading in securities or accessing the securities market by the Board ;

Explanation.—The restriction under (iv) shall not apply to the persons or entities mentioned therein who were debarred in the past by the Board and the period of debarment is already over as on the date of the board meeting considering the preferential issue.

(v) a person declared as a fugitive economic offender ;

(vi) a person who has been convicted for any offence punishable with imprisonment—

(A) For two years or more under any Act specified under the Twelfth Schedule of the Insolvency and Bankruptcy Code, 2016 ;

(B) For seven years or more under any law for the time being in force :

Provided that such restriction shall not be applicable to a person after the expiry of a period two years from the date of his release from imprisonment.

(vii) A person who has executed a guarantee in favour of a lender of the issuer and such guarantee has been invoked by the lender and remains unpaid in full or part.

(4) The resolution for the preferential issue and exemption from open offer shall provide for the following :

(a) The votes cast by the shareholders in the "public" category in favour of the proposal shall be more than the number of votes cast against it. The proposed allottee(s) in the preferential issue that already hold specified securities shall not be included in the category of "public" for this purpose :

Provided that where the company does not have an identifiable promoter ; the resolution shall be deemed to have been passed if the votes cast in favour are not less than three times the number of the votes, if any, cast against it.

(5) The proceeds of such preferential issue shall not be used for any repayment of loans taken from promoters/promoter group/group

companies. The proposed use of proceeds shall be disclosed in the explanatory statement sent for the purpose of the shareholder resolution.

(6)(a) The issuer shall make arrangements for monitoring the use of proceeds of the issue by a public financial institution or by a scheduled commercial bank, which is not a related party to the issuer :

(i) The monitoring agency shall submit its report to the issuer in the format specified in terms of Schedule XI (with fields as applicable) on a quarterly basis until at least ninety five per cent. of the proceeds of the issue have been utilized.

(ii) The board of directors and the management of the issuer shall provide their comments on the findings of the monitoring agency as specified in Schedule XI.

(iii) The issuer shall, within forty five days from the end of each quarter, publicly disseminate the report of the monitoring agency by uploading the same on its website as well as submit the same to the stock exchange(s) on which the equity shares of the issuer are listed.

(b) The proceeds of the issue shall also be monitored by the audit committee till utilization of the proceeds.

(7) The allotment made shall be locked-in for a period of three years from the last date of trading approval.

(8) The statutory auditor and the audit committee shall certify that all conditions under sub-regulations (1), (2), (3), (4) and (5) of regulation 164A are met at the time of dispatch of notice for general meeting proposed for passing the special resolution and at the time of allotment."

[ADVT.-III/4/Exty./79/2020-21]

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/19, dated 22nd June, 2020[1].

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following Regulations to further amend the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, namely :—

1. Gaz. of India, Extry. No. 224, dt. 22-6-2020, Pt. III, sec. 4.

1. These regulations may be called the **Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011,—

(I) In regulation 10, the following new sub-regulation shall be inserted after sub-regulation (2A), namely—

"(2B) Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub-regulation (1) of regulation 3 and regulation 4.

Explanation.—The above exemption from open offer shall also apply to the target company with infrequently traded shares which is compliant with the provisions of sub-regulations (2), (3), (4), (5), (6), (7) and (8) of regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. The pricing of such infrequently traded shares shall be in terms of regulation 165 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018."

[ADVT.-III/4/Exty./80/2020-21]

Companies (Meetings of Board and its Powers) Second Amendment Rules, 2020

Notification No. G. S. R. 395(E), dated 23rd June, 2020[1].

In exercise of the powers conferred by sections 173, 177, 178 and section 186 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Meetings of Board and its Powers) Rules, 2014, namely :—

1. (1) These rules may be called the **Companies (Meetings of Board and its Powers) Second Amendment Rules, 2020.**

(2) They shall come into force on the date of their publication in the Official Gazette.

1. Gaz. of India, Extry. No. 304, dt. 23-6-2020, Pt. II, sec. 3(i).

2. In the Companies (Meetings of Board and its Powers) Rules, 2014, in rule 4 in sub-rule (2), for the figures, letters and word "30th June, 2020", the figures, letters and word "30th September, 2020" shall be substituted.

[F. No. 1/32/2013-CL-V-Part]

Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2020

Notification No. G. S. R. 396(E), dated 23rd June, 2020[1].

In exercise of the powers conferred by section 149 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014, namely :—

1. (1) These rules may be called the **Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2020.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Appointment and Qualification of Directors) Rules, 2014, in rule 6, in sub-rule (1), in clause (a), for the words "seven months" the words "ten months" shall be substituted.

[F. No. 8/4/2018-CL-I-Part I]

Companies Act, 2013 : Notification under section 467(1) : Amendment to Schedule VII

Notification No. G. S. R. 399(E), dated 23rd June, 2020[2].

In exercise of the powers conferred by sub-section (1) of section 467 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following further amendments in Schedule VII to the said Act, namely :—

In the said Schedule, in item (vi), after the words "war widows and their dependents", the words "Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows ;" shall be inserted.

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1. Gaz. of India, Extry. No. 305, dt. 23-6-2020, Pt. II, sec. 3(i).
2. Gaz. of India, Extry. No. 308, dt. 23-6-2020, Pt. II, sec. 3(i).

2. This notification shall come into force on the date of its publication in the Official Gazette.

[F. No. 13/18/2019-CSR]

Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2020

Notification No. G. S. R. 420(E), dated 29th June, 2020[1].

In exercise of the powers conferred by sub-sections (1), (2) and sub-section (4) of section 248 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, namely :—

1. (1) These rules may be called the **Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2020.**

(2) They shall come into force with effect from their publication in the Official Gazette.

2. In the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 (hereafter referred to as the said rules) in rule 4, in sub-rule (3), in clause (i), the following proviso shall be inserted, namely :—

"Provided that in case of a—

(a) Government company in which the entire paid-up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments ; or

(b) subsidiary of a Government company, referred to in clause (a), in which the entire paid-up share capital is held by that Government company,

a duly notarised indemnity bond in Form STK-3A shall be given by an authorised representative, not below the rank of Under Secretary or its equivalent, in the administrative Ministry or Department of the Government of India or the State Government, as the case may be, on behalf of the company ;"

3. In the said rules, in Form STK 2, in the list of attachments, in serial number 4, at the end, the words "or by an authorised representative of

1. Gaz. of India, Extry. No. 318, dt. 29-6-2020, Pt. II, sec. 3(i).

administrative Ministry/Department in Form No. STK-3A" shall be inserted.

4. In the said rules, after Form STK-3, the following Form shall be inserted, namely :—

"FORM NO. STK-3A

Indemnity Bond

(To be drawn on Stamp Paper of appropriate value)

(To be given by the Authorised Representative of the administrative Ministry/Department)

[Pursuant to the proviso to clause (i) of sub-rule (3) of rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016]

To,

The Registrar of Companies,

I, the authorised representative* of the . . . . . (name of the administrative Ministry/Department) for the . . . . . (mention name of the Government company), incorporated on . . . . . under the Companies Act, 2013 or Companies Act, 1956 having its registered office at . . . . . ., do hereby declare that the Government of India/State (name of the State to be mentioned in case the administrative Ministry/Department belongs to a State) hereby undertakes to indemnify :—

(i) the claimants for all lawful claims against the company arising in future after the striking off the name of the company ;

(ii) any person for any losses that may arise pursuant to striking off the name of the company ;

(iii) the claimants for all lawful claims and liabilities, which have not come to notice up to this stage, and if any claim arises or observed even after the name of the company has been struck off in terms of section 248 of the Companies Act, 2013.

Place : . . . . . Signature :

Date : . . . . . Official Seal :

Name, Father's name,
Address and Designation :

**Authorisation received from the administrative Ministry/Department to furnish this Indemnity Bond shall be attached with this Form."*

[F. No. 1/28/2013-CL-V(Part)]

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/20, dated 1st July, 2020[1].

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following Regulations to further amend the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, namely :—

1. These regulations may be called the **Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011,—

(I) In regulation 17, in sub-regulation (1), the following new proviso shall be inserted after the existing proviso, namely,—

"Provided further that in case of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations, an amount equivalent to hundred per cent. of the consideration payable in the open offer shall be deposited in the escrow account."

(II) In regulation 17, in sub-regulation (3), in clause (c), the following new proviso shall be inserted after the existing proviso, namely,—

"Provided further that the deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations."

III. In regulation 18, after sub-regulation (11), the following new sub-regulation shall be inserted, namely,—

"(11A) Without prejudice to sub-regulation (11), in case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent. per annum :

1. Gaz. of India, Extry. No. 244, dt. 1-7-2020, Pt. III, sec. 4.

Provided that in case the delay was not attributable to any act of omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of acquirer, the Board may grant waiver from the payment of interest :

Provided further that the payment of interest would be without prejudice to the Board taking any action under regulation 32 of these regulation or under the Act."

(IV) In regulation 22, in sub-regulation (2A), the words "other than through bulk deals or block deals," shall be omitted.

[ADVT.-III/4/Exty./104/2020-21]

Recovery of Debts and Bankruptcy Act, 1993 : Notification under section 2(h)(ii) : Specification of financial institution

Notification No. S. O. 2144(E), dated 30th June, 2020[1].

In exercise of the powers conferred by sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993), the Central Government hereby specifies the institution, namely, the "SLS Trust" as financial institution for the purposes of the said Act.

[F. No. 03/03/2020-DRT]

Securities and Exchange Board of India (Investment Advisers) (Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/22, dated 3rd July, 2020[2].

In exercise of the powers conferred by sub-section (1) of section 30 read with clause (b) of sub-section (2) of section 11 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following regulations to further amend the Securities and Exchange Board of India (Investment Advisers) Regulations, 2013, namely :—

1. These Regulations may be called the **Securities and Exchange Board of India (Investment Advisers) (Amendment) Regulations, 2020.**

2. They shall come into force on the ninetieth day from the date of their publication in the Official Gazette.

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1. Gaz. of India, Extry. No. 1899, dt. 30-6-2020, Pt. II, sec. 3(ii).
2. Gaz. of India, Extry. No. 254, dt. 3-7-2020, Pt. III, sec. 4, p. 12.

3. In the Securities and Exchange Board of India (Investment Advisers) Regulations, 2013,—

(I) in sub-regulation (1) of regulation 2,—

(i) after clause (a) and before clause (b), the following clause shall be inserted, namely,—

"(aa) 'assets under advice' shall mean the aggregate net asset value of securities and investment products for which the investment adviser has rendered investment advice irrespective of whether the implementation services are provided by investment adviser or concluded by the client directly or through other service providers ;"

(ii) in clause (c), the words, symbols and numbers "under sub-section (7) of section 2 of the Companies Act, 1956 (1 of 1956)" shall be substituted with the words, symbols and numbers "under sub-section (11) of section 2 of the Companies Act, 2013 (18 of 2013) ;"

(iii) in clause (f), after the words, symbols and numbers "Companies Act, 1956", the words, symbols and numbers "or Companies Act, 2013" shall be inserted.

(iv) after clause (g) and before clause (h), the following clauses shall be inserted, namely,—

"(ga) 'CPE' means continuing professional education in terms of clause (f) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Certification of Associated Persons in the Securities Markets) Regulations, 2007 ;

(gb) 'family of client' shall include individual client, dependent spouse, dependent children and dependent parents ;

(gc) 'family of an individual investment adviser' shall include individual investment adviser, spouse, children and parents ;"

(v) After clause (p) and before clause (q), the following clause shall be inserted, namely,—

"(pa) 'non-individual' means a body corporate including a limited liability partnership and a partnership firm ;"

(vi) clause (r) shall be substituted with the following clause, namely,—

"(r) 'persons associated with investment advice' shall mean any member, partner, officer, director or employee or any sales staff of such investment adviser including any person occupying a similar status or performing a similar function irrespective of the nature of association with the

investment adviser who is engaged in providing investment advisory services to the clients of the investment adviser ;

Explanation.—All client-facing persons such as sales staff, service relationship managers, client relationship managers, etc., by whatever name called shall be deemed to be persons associated with investment advice, but do not include persons who discharge clerical or office administrative functions where there is no client interface."

(vii) After clause (r) and before sub-clause (2), the following clause shall be inserted, namely,—

"(s) 'principal officer' shall mean the managing director or designated director or managing partner or executive chairman of the board or equivalent management body who is responsible for the overall function of the business and operations of non-individual investment adviser."

(II) in sub-regulation (2) of regulation 2, the words "Companies Act, 1956 (1 of 1956)" shall be substituted with the words "Companies Act, 2013 (18 of 2013)".

(III) proviso to sub-regulation (1) of regulation 3 shall be omitted.

(IV) after sub-regulation (1) and before sub-regulation (2) of regulation 3, the following regulation shall be inserted, namely,—

"(1A) Notwithstanding anything contained in sub-regulation (1), any application made by a person prior to coming into force of these regulations containing such particulars or as near thereto as mentioned in Form A of First Schedule shall be treated as an application made in pursuance of sub-regulation (1) and dealt with accordingly ;"

(V) after sub-regulation (2) of regulation 3, the following shall be inserted, namely,—

"(3) On and from the date of commencement of these regulations, no person, while dealing in distribution of securities, shall use the nomenclature 'Independent Financial Adviser or IFA or Wealth Adviser or any other similar name' unless registered with the Board as Investment Adviser."

(VI) in clause (j) of regulation 4, the word "representative," wherever it occurs, shall be substituted with the words and symbol "principal officer, persons associated with advice".

(VII) in regulation 6,—

(i) in clause (a), the words "a body corporate or a firm" shall be substituted with the words "a non-individual" ;

(ii) clause (b) shall be substituted with the following clause, namely,—

"(b) in case the applicant is an individual, he and all persons associated with investment advice are appropriately qualified and certified as specified in regulation 7 ;"

(iii) clause (c) shall be substituted with the following clause, namely,—

"(c) in case the applicant is a body corporate, the principal officer and all persons associated with investment advice of the applicant are appropriately qualified and certified as specified in regulation 7 ;"

(iv) clause (d) shall be substituted with the following clause, namely,—

"(d) in case the applicant is a firm or a limited liability partnership, the principal officer and all persons associated with investment advice of the applicant are appropriately qualified and certified as specified in regulation 7 ;"

(v) in clause (e), the words "capital adequacy" shall be substituted with the words "networth".

(vi) clause (f) shall be substituted with the following clause, namely,—

"(f) whether the applicant, its partners, principal officer and persons associated with investment advice, if any, are fit and proper persons based on the criteria as specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008 ;"

(vii) in clause (k), the words "body corporate" shall be substituted with the words "non-individual".

(VIII) regulation 7 shall be substituted with the following, namely,—

"7. *Qualification and certification requirement*.—(1) An individual investment adviser or a principal officer of a non-individual investment adviser registered as an investment adviser under these regulations, shall have the following minimum qualification, at all times—

(a) A professional qualification or post-graduate degree or post graduate diploma (minimum two years in duration) in finance, accountancy, business management, commerce, economics, capital market, banking, insurance or actuarial science from a university or an institution recognized by the Central Government or any State Government or a recognised foreign university or institution or association or a CFA Charter from the CFA Institute ;

(b) An experience of at least five years in activities relating to advice in financial products or securities or fund or asset or portfolio management ;

(c) Persons associated with investment advice shall meet the following minimum qualifications, at all times—

(i) a professional qualification as provided in clause (a) of sub-regulation (1) of regulation 7 ; and

(ii) an experience of at least two years in activities relating to advice in financial products or securities or fund or asset or portfolio management :

Provided that investment advisers registered under these regulations as on the date of commencement of these regulations shall ensure that the individual investment adviser or principal officer of a non-individual investment adviser registered under these regulations and persons associated with investment advice comply with such qualification and experience requirements within three years :

Provided further that the requirements at clauses (a) and (b) shall not apply to such existing individual investment advisers as may be specified by the Board.

(2) An individual investment adviser or principal officer of a non-individual investment adviser, registered under these regulations and persons associated with investment advice shall have, at all times a certification on financial planning or fund or asset or portfolio management or investment advisory services—

(a) from NISM ; or

(b) from any other organization or institution including Financial Planning Standards Board of India or any recognized stock exchange in India provided such certification is accredited by NISM :

Provided that fresh certification must be obtained before expiry of the validity of the existing certification to ensure continuity in compliance with certification requirements :

Provided further that fresh certification before expiry of the validity of the existing certification shall not be obtained through a CPE program."

(IX) regulation 8 shall be substituted with the following, namely,—

"8. *Networth.*—(1) Investment advisers who are non-individuals shall have a net worth of not less than fifty lakhs rupees.

Explanation.—For the purposes of this regulation, 'networth' means the aggregate value of paid-up share capital plus free reserves (excluding reserves created out of revaluation) reduced by the aggregate value of accumulated losses, deferred expenditure not written off, including miscellaneous expenses not written off, and networth requirement for other

services offered by the advisers in accordance with the applicable rules and regulations.

(2) Investment advisers who are individuals shall have net tangible assets of value not less than five lakh rupees :

Provided that existing investment advisers shall comply with the networth requirement within three years from the date of commencement of the SEBI (Investment Advisers) (Amendment) Regulations, 2020."

(X) in regulation 13,—

(i) in clause (d), the symbol "." shall be substituted with the symbol ";".

(ii) After clause (d), the following clause shall be inserted, namely,—

"(e) individuals registered as investment advisers whose number of clients exceed one hundred and fifty in total, shall apply for registration as non-individual investment adviser within such time as may be specified by the Board."

(XI) in regulation 15, sub-regulation (13) shall be substituted with the following, namely,—

"(13) It shall be the responsibility of the investment adviser to ensure compliance with the certification and qualification requirements as specified under regulation 7 at all times."

(XII) after regulation 15 and before regulation 16, the following regulation shall be inserted, namely,—

"15A. *Fees.*—Investment adviser shall be entitled to charge fees for providing investment advice from a client in the manner as specified by the Board."

(XIII) in regulation 18, sub-regulations (2) and (3) shall be omitted ;

(XIV) in regulation 19,—

(i) clause (d) of sub-regulation (1) shall be substituted by the following clause, namely,—

"(d) Copies of agreements with clients, incorporating the terms and conditions as may be specified by the Board ;"

(ii) in sub-regulation (3), after the words "Institute of Company Secretaries of India" the words "and submit a report of the same as may be specified by the Board" shall be inserted.

(XV) Regulation 22 shall be substituted with the following regulation, namely,—

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ANALYSIS OF CASES PERTAINING TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016—VOLUME 220

Poornima (N.)[1]

Limitation

The law assists those that are vigilant with their rights, and not those that sleep thereupon is the meaning of the maxim *"Vigilantibus Et Non Dormientibus Jura Subveniunt"*. Any person claiming something as his right must enforce it within a reasonable time. In most case, the concerned statute prescribes the time period within which it can be exercised. The Limitation Act, 1963 is an Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith. In respect of the petitions filed under section 7 and section 9 of the Code, the Supreme Court has settled the issue in *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) by stating that the 1963 Act was applicable to the petitions under sections 7 and 9 of the Code from the inception of the Code. It was clarified that the right to sue accrued when default occurred. It was further observed that the "right to sue", therefore, accrued when a default occurred. If the default had occurred over three years prior to the date of filing of the petition, the petition would be barred under article 137 of the 1963 Act, save and except in those cases where, in the facts of the case, section 5 of the 1963 Act might be applied to condone the delay in filing such petition. This view was reiterated by the Supreme Court in *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC). Thereby the general understanding of the Adjudicating Authority and the Appellate Tribunal in *Neelkanth Township and Construction P. Ltd.* v. *Urban Infrastructure Trustees Ltd.* [2018] 2 Comp Cas-OL 49 (NCLAT), *Parag Gupta and Associates* v. *B. K. Educational Services P. Ltd.* [2018] 2

1. B.Com, LL.B, Consultant.

Comp Cas-OL 695 (NCLAT), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (I) Ltd.* [2019] 7 Comp Cas-OL 431 (NCLAT) and other cases were overruled. Thus, it is very clear that the petitions under sections 7 and 9 have been filed within 3 years from the date of default. However, this limitation period can be extended if there is an acknowledgment of debt by the debtor in terms of section 18 of the 1963 Act. Section 18 of the 1963 Act provides for a fresh period of limitation from the time when the acknowledgment of debt signed before the expiration of the prescribed limitation period. The prerequisite for application of section 18 of the Act would be that the acknowledgment must be made within the original prescribed period or before expiration of validly extended period. This principle has been applied by the Adjudicating Authority in *Union Bank of India* v. *U. P. State Spinning Co. Ltd.* [2020] 220 Comp Cas 335 (NCLT). In this case the debt of the corporate debtor was declared a non-performing asset on March 7, 2013 in terms of the statement of the corporate debtor. Even after the declaration of the debtor's account as a non-performing asset, there was correspondence between the financial creditor and corporate debtor regarding the payment of the debt, which the corporate debtor had admitted by filing the counter affidavit and lastly on July 30, 2018 by sending the letter, acknowledging the debt of the financial creditor. Therefore, in view of section 18 of the 1963 Act, it was held that a fresh period of limitation would start from July 30, 2018 and not from March 7, 2013 the date on which the corporate debtor claimed its account was declared as a non-performing asset. In *C. Shivakumar Reddy* v. *Dena Bank* [2020] 9 Comp Cas-OL 339 (NCLAT), the petition under section 7 of the Code was held to be time-barred as there was nothing on record to suggest that the corporate debtor had acknowledged the debt. A petition under section 9 of the Code was dismissed by the Adjudicating Authority on a finding that the date of default of the debt due to the petitioner was July 8, 2013 and no acknowledgment of debt or any other circumstances were shown to extend the period of limitation beyond the period of 3 years expiring on July 8, 2016 (*Bhawani Industries P. Ltd.* v. *Inderjit Forgings P. Ltd.* [2020] 220 Comp Cas 357 (NCLT)). In *Bank of Baroda* v. *Pithampur Poly Products Ltd.* [2020] 220 Comp Cas 300 (NCLT), the petition was held to be within limitation on the ground that the corporate debtor had been acknowledging that the debt was due to the financial creditor which was evident from their offer of 4 one-time settlement proposals to the financial creditor in 2019, though the same were rejected by the financial creditor for the offer of lower amount compared to their claimed amount. Taking a contrary view, the Appellate Tribunal in *Bimalkumar Manubhai Savalia* v. *Bank of*

India [2020] 220 Comp Cas 546 (NCLAT), has held that one-time settlement offer not accepted by the financial creditor could not be treated as an acknowledgment of debt. Since there was no acknowledgment issued by the corporate debtor prior to expiry of 3 years or from the date of default, the order of admission of the Adjudicating Authority in *Bank of India* v. *Radheshyam Agro Products P. Ltd.* [2020] 220 Comp Cas 535 (NCLT) was reversed. Interestingly, in *Uniword Telecom Ltd.* v. *Taurus Exports P. Ltd.* [2020] 220 Comp Cas 4 (NCLT), the Adjudicating Authority took note of section 25(3) of the Indian Contract Act, 1872. According to section 25(3) of the 1872 Act, an agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract. Illustration (e) thereunder provides that "A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract". In this case the last invoice was issued on January 11, 2011. Thereafter, on July 20, 2015 and August 3, 2016 the corporate debtor had admitted the past dues, which were beyond the threshold of limitation. Subsequently, both parties had executed a memorandum of understanding on August 16, 2018 whereby the debtor had agreed to make payment within 6 months, i. e., by February 15, 2019. The Adjudicating Authority was of the view of the section 25(3) of the 1872 Act would overshadow section 18 of the 1963 Act. It was held that the matter was within the purview of the law of limitation under article 137 thereof.

Exclusion of period of stay : In *Bank of Baroda* v. *Pithampur Poly Products Ltd.* [2020] 220 Comp Cas 300 (NCLT), the corporate debtor had filed a writ petition before the High Court and the High Court had granted stay against any coercive action. The stay was vacated only on March 7, 2018 and the financial creditor was permitted to take appropriate steps for recovery. The financial creditor filed the petition on August 21, 2018. It was held that the The petition had been filed within the limitation period as a clear cause of action arose only after vacation of the stay by the High Court on March 7, 2018.

Corona effect on limitation : The Supreme Court invoking its powers under article 142 of the Constitution of India and taking suo motu notice of challenge faced by the country on account of the Covid-19 virus and resultant difficulties that might be faced by litigants across the country in filing their petitions, applications, suits or appeals and all other proceedings

within the period of limitation prescribed under the general law of limitation or under special laws (both Central or State), ordered that irrespective of the limitation prescribed under the general law or special laws, whether condonable or not, the period of limitation in all such proceedings, shall stand extended with effect from March 15, 2020 till further orders to be passed by the Supreme Court. The unexpected and unprecendented epidemic faced by the Country and the world required such an order of exception (*Cognizance for Extension of Limitation, In re* [2020] 220 Comp Cas 447 (SC)). The Appellate Tribunal in *Suo Motu, In re* [2020] 220 Comp Cas 449 (NCLAT), taking note of the above order of the Supreme Court also passed similar orders. It held that the period of lockdown ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the corporate debtor was located, should be excluded for the purpose of counting of the period for resolution process under section 12 of the Code in all cases where "corporate insolvency resolution process" had been initiated and pending before any Bench of the National Company Law Tribunal or in appeal before the Appellate Tribunal. It was further ordered that any interim order or stay order passed by this Appellate Tribunal in any one or the other appeal under the Code was to continue till next date of hearing to be notified later. The Appellate Tribunal also relied on the decision in *Quinn Logistics India P. Ltd.* v. *Mack Soft Tech P. Ltd.* [2018] 208 Comp Cas 432 (NCLAT), wherein it was held that it was always open to the Adjudicating Authority or the Appellate Tribunal to exclude certain period for the purpose of counting the total period of 270 days for completion of the insolvency resolution process, if the facts and circumstances justify exclusion, in unforeseen circumstances. Covid-19 pandemic is definitely one such unforeseen circumstances.

Financial debt

The amount borrowed for commercial purpose would be a financial debt in terms of section 5(8)(f) of the Code. In *Sangita Fiscal Services P. Ltd.* v. *Duncans Industries Ltd.* [2020] 220 Comp Cas 470 (NCLT), a petition filed under section 7 of the Code was challenged by the corporate debtor on the ground that no time value of money was involved and that there being no fixed schedule for repayment of loans and, therefore, it was not a financial debt. The Adjudicating Authority took into consideration that (i) in the written deeds of agreement had been executed wherein the creditors had been addressed as lender, (ii) that the term "finance" was defined as "temporary finance" to be granted by the lender to the corporate debtor against

their present or future stock of tea in terms of the discharge schedule forwarded by the company, (iii) that a resolution under section 293(1)(d) of the Companies Act, 1956 had been passed by the shareholders of the corporate debtor to enable the company and its directors to borrow loans not exceeding Rs. 1,200 crores and avail of temporary finance within the limit of borrowing of the corporate debtor, (iv) that the financial creditors were approached by the corporate debtor and that disbursement could be made in intervals or instalments, (v) that interest element also existed. It held that the transactions of loan or advance were specifically covered under section 5(8) of the Code as these had been borrowed against interest. It was not in dispute that the amount had been given as advance. The effect in the hands of the corporate debtor was that it amounted to a borrowing for commercial purpose. Therefore, in terms of section 5(8)(f) of the Code the transaction had the trappings and commercial effect of a borrowing. Hence, for this reason also it was held to be a financial debt.

Petition by home buyer

Though a home buyer has been included within the definition of a financial creditor under section 5(7) of the Code, the petition has to be bona fide. The provision of the Code cannot be invoked without any default on the part of the promoter/builder. It cannot be used to seek refund of money. A petition filed by a home buyer was dismissed by the Adjudicating Authority in *Aaj Finance and Credit Ltd.* v. *Keltech Infrastructures Ltd.* [2020] 220 Comp Cas 36 (NCLT), it was held that in terms of the agreement dated October 1, 2016 between the parties, the promoter was required to complete the building within 12 months from the date of signing the agreement or within further a grace period of 180 days. The execution of the agreement dated October 1, 2016 was not denied by the parties. The agreement was to be the fresh bargain as entered into between the parties thereby giving a go by to the earlier memorandum of understandings as well as the loan transaction of Rs. 50 lakhs. Since under the terms of the agreement the possession of the flat booked was to be given on April 1, 2018 as the agreement dated October 1, 2016 stipulated that possession would be given within 18 months, i. e., 12 months plus grace period of 6 months. The petition filed on January 4, 2018 was found to be well before the period fixed under the agreement dated October 1, 2016. The petition was dismissed as premature as on the date of filing of the petition no default was established, especially when possession also seemed to have been offered before the completion of the date for possession as given in the agreement. This order was affirmed by the Appellate Tribunal in *Aaj Finance and Credit Ltd.* v. *Keltech Infrastructures Ltd.* [2020] 220 Comp

Cas 43 (NCLAT). A petition filed by the allottee for refund of money on the ground of delay was dismissed by the Adjudicating Authority as on the facts it was found that the occupation certificate was applied for by the corporate debtor on July 5, 2018 and it was received on May 31, 2019 and the e-mail for the termination of the agreement was sent on December 8, 2018 which was 5 months after the occupation certificate was obtained from the authorities by the corporate debtor. Hence the corporate debtor had fulfilled its obligation of applying for the occupation certificate within the time frame. Also by letter dated June 14, 2019 the corporate debtor had written to the financial creditor stating that the apartment was ready for possession. *Parvesh Magoo* v. *IREO Grace Realtech P. Ltd.* [2020] 220 Comp Cas 116 (NCLT) affirmed in *Parvesh Magoo* v. *IREO Grace Realtech P. Ltd.* [2020] 220 Comp Cas 120 (NCLAT).

Petition against tea company

The Supreme Court in *Duncans Industries Ltd.* v. *A. J. Agrochem* [2019] 217 Comp Cas 320 (SC), considering the overriding effect of the Code and the provision in section 16G(1)(c) of the Tea Act, 1953, inter alia, held that no prior consent of the Central Government before initiation of the proceedings under section 7 or section 9 of the Code in respect of a tea company would be required and even without such consent of the Central Government, the insolvency proceedings under section 7 or section 9 of the Code initiated by the operational creditor shall be maintainable. Following this decision the Adjudicating Authority in *Sangita Fiscal Services P. Ltd.* v. *Duncans Industries Ltd.* [2020] 220 Comp Cas 470 (NCLT) held that the application challenging the maintainability of the petition due to conflict between the provisions of the Code and the 1953 Act was infructuous.

Petition against guarantor

A financial debt includes a debt owed to a creditor by the principal borrower and the guarantor. A just omission or failure on the part of a guarantor to pay the financial creditor, when the principal sum is claimed will come within the scope of default under sections 3 and 12 of the Insolvency and Bankruptcy Code, 2016. The proceedings under section 7 of the Code can be initiated by a financial creditor who had taken a guarantee in respect of debt against the guarantor for failure to repay the money borrowed by the principal borrower. In *Union Bank of India* v. *Surana Metals Ltd.* [2020] 220 Comp Cas 54 (NCLT), the Adjudicating Authority admitted a petition against a corporate debtor who was the guarantor to a loan granted to an individual. On default by the individual the debtor-principal

borrower, the financial creditor had filed the petition as against the corporate debtor as it had undertaken to repay the debt in case of default by the original borrower. The Appellate Tribunal in *Laxmi Pat Surana* v. *Union Bank of India* [2020] 220 Comp Cas 59 (NCLAT) affirmed this decision of the Adjudicating Authority.

Admissibility of petition as against individual guarantors : The Code is divided into four parts. The provisions of Part I and Part II were brought into effect from December 1, 2016 the provisions of Part III were not notified immediately. Certain portion of Part III were notified with effect from December 1, 2019 by Notification No. 4126, dated November 15, 2019. Part III of the Insolvency and Bankruptcy Code pertains to fresh start, insolvency and bankruptcy of individuals and firms where the amount of default is not less than one thousand rupees. However, by this notification only part relating to the personal guarantors to the corporate debtors have been given effect to from December 1, 2019. These provisions could not be invoked prior to this date. Any personal guarantor can be proceeded against under the Code only from December 1, 2019 and not prior thereto. Considering this position the Adjudicating Authority dismissed the petitions filed against the personal guarantors of the corporate debtors in *L and T Infrastructure Finance Co. Ltd.* v. *Dineshchand Surana* [2020] 220 Comp Cas 366 (NCLT) and *State Bank of India* v. *Vijaraj Surana* [2020] 220 Comp Cas 379 (NCLT).

Dispute in relation to operational debt

In *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC), the Supreme Court in pages 373 and 374 of 205 Comp Cas has observed that :

> "It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under section 9(5)(ii)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the 'existence' of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the 'dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that the defence is

likely to succeed. The court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Applying the ratio of this decision of the Supreme Court, the Adjudicating Authority in *Transmec India P. Ltd.* v. *Saflow Products P. Ltd.* [2020] 220 Comp Cas 280 (NCLT), held that the petition was to be dismissed as pre-existing dispute existed. The Adjudicating Authority took note of the fact that the corporate debtor by e-mails dated November 1, 2017 and November 13, 2017 had clearly raised a dispute regarding the delay in delivery of goods which was prior to the issuance of the demand notice dated August 5, 2018. However, the dispute must in relation to quality of goods supplied or services rendered. It cannot be vague. Where the e-mail relied on by the corporate debtor at the most indicated some disputes but did not disclose what it was, the order admitting the petition in *Capedge Consulting P. Ltd.* v. *India Techs Ltd.* [2020] 220 Comp Cas 482 (NCLT) was upheld. The Appellate Tribunal observed that for the purpose of section 9 of the Code, the relevant issue would be whether there was dispute regarding the quality of services rendered. Since the corporate debtor was not able to show any dispute with regard to the quality of services rendered by the creditor, it refused to interfere with the order of admission (*George Vinci Thomas* v. *Capedge Consulting P. Ltd.* [2020] 220 Comp Cas 490 (NCLAT)).

Moratorium

The effect of declaration of a moratorium was that a prohibition was enforced for recovery against the corporate debtor. The prohibition was also towards institution of any suit or execution of any judgment, decree or order of any court of law, Tribunal, arbitration panel, etc. In *Videocon Industries Ltd.* v. *State Bank of India* [2020] 220 Comp Cas 76 (NCLT), the Adjudicating Authority admitted a petition under section 7 of the Code and also declared a moratorium in terms of section 14 of the Code. A notice dated October 22, 2018 was thereafter issued by the Ministry of Petroleum and Natural Gas (Exploration Division) demanding allocation of 100 per cent. of the sale proceeds in favour of the Government with immediate effect for recovering the provisional sum of US $314 million together with applicable interest towards the unpaid Government share of profit petroleum. On the application by the resolution professional the Adjudicating Authority held that the effect of declaration of "moratorium" was that prohibition was enforced for recovery against the corporate debtor. Prohibition was also towards institution of any suit or execution of any judgment,

decree or order of any court of law, Tribunal, arbitration panel, etc. Once the "moratorium" was declared such an action on the part of the GoI, Ministry of Petroleum, was not legal as far as the Code was concerned now fully applicable on the corporate debtor. The concerned Government authority was directed not to press or implement the impugned notice dated October 22, 2018 during the commencement of the insolvency proceeding and as long as the "moratorium" was applicable on this corporate debtor. It observed that the most, the Ministry of Petroleum could lodge its claim of any legally enforceable right of recovery to the appointed resolution professional, being not rendered remediless, as prescribed under the Code.

Effect on proceedings under the Prevention of Money-Laundering Act, 2002 : A resolution professional appointed under the Code does not have any personal stake in the resolution process. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of section 14 of the Code cannot come in the way of the statutory authority conferred by the Act on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A contrary view would defeat the objective of the Prevention of Money-Laundering Act, 2002 by opening an escape route. After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason that such assets are not lawfully his to claim. The objective of the legislation in the Act being distinct from the purposes of the three other enactments, viz., the Recovery of Debts and Bankruptcy Act, 1993 (in its original form and moniker Recovery of Debts Due to Banks and Financial Institutions Act, 1993), Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 and the 2016 Code, the latter cannot prevail over the former. There was no inconsistency. The purpose, the text and context are different (*Deputy Director, Directorate of Enforcement of Delhi* v. *Axis Bank* [2020] 220 Comp Cas 147 (Delhi)).

Effect on compromise decree : A compromise decree was passed in a suit filed against the corporate debtor by the petitioner. Since the company failed to pay the amount in terms of the decree, the petitioner filed a contempt petition before the civil court. The company contended that it was prevented by operation of law from paying the balance amount to the petitioner in satisfaction of the compromise decree as its petition under section 10 of the Code had been admitted and a moratorium had been declared. The Delhi High Court was of the view that since the power and manage-

ment of the board of the company now vested in the interim resolution professional, preferential treatment could not be given to the petitioner, over the other financial and operational creditors, to discharge their liability under the compromise decree. The disbursement of payments by the company to clear the liabilities towards its creditors, including the petitioner, would be governed by the proceedings under the Code. It held that the company and its directors were prevented by law from satisfying the decree in favour of the petitioner and there was no wilful disobedience of the compromise decree. The court was of the view that any direction by the court in the contempt proceedings would virtually amount to overriding the proceedings under the Code which were the appropriate proceedings for determining the settlement of claims of the petitioner in the order of priority amongst the list of claimants therein.

Insolvency commencement date

Section 12 of the Code provides that the corporate insolvency resolution process should be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. The period can be extended but not exceeding ninety days. The Insolvency and Bankruptcy Code (Amendment) Act, 2019 inserted a proviso to section 12(3) with effect from June 6, 2018. The proviso provided that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor. In sections 7, 9 or 10 of the Code it is not enjoined upon the Adjudicating Authority to appoint the interim resolution professional simultaneously with the admission of the application or on the same date, on which the admission order was passed. Section 16 of the Code says that the Adjudicating Authority shall appoint the interim resolution professional within 14 days from the insolvency commencement date, that means 14 days time is given to the Adjudicating Authority to appoint an interim resolution professional even from the insolvency commencement date. This is a time space given to the Adjudicating Authority to appoint the interim resolution professional depending upon the facts and circumstances of the case. In a given case, if the Adjudicating Authority is not in a position to appoint the interim resolution professional in the order admitting the application, then, it can appoint the interim resolution professional within 14 days. In such cases only the proviso to section 12 of the Code would come into operation, i. e., where the interim resolution professional is not appointed in the

admission order. In case, if the interim resolution professional is appointed subsequently, i. e., within 14 days from the date of admission, then the insolvency commencement date shall be the date on which interim resolution professional is appointed by the Adjudicating Authority. The insolvency commencement date is very crucial for calculation of various time period in the Code. Especially since one of the objects of the Code is time bound resolution of corporate insolvency. In *IDBI Bank Ltd.* v. *Anuj Jain* [2020] 220 Comp Cas 313 (NCLT), the Supreme Court by an order dated August 9, 2018 directed recommencement of the resolution process from the stage of appointment of the insolvency resolution professional and extended the period prescribed by another 180 days from the date of the order. The question arose as to what would be the insolvency commencement date for the purpose of calculating the quantum of claim amounts for all types and classes of creditors : August 9, 2017 being the date of admission order passed by the Adjudicating Authority or August 9, 2017 being the date of the Supreme Court's order. The Adjudicating Authority held that the Supreme Court in its decision had clearly said that the recommencement of the resolution process was from the stage of appointment of the interim resolution professional by the order dated August 9, 2017. Therefore, a conjoint reading of section 5(12) and section 16 of the Code and the Supreme Court's order clearly showed that the insolvency commencement date, was August 9, 2017. It was of the view that reviving of the period prescribed under the statute by another 180 days commencing from August 9, 2018 could not be equated with the insolvency commencement date. The Supreme Court considering the fact that the home buyers were treated as financial creditors and they had to be included in the committee of creditors and the entire process had to be undertaken, exercising its powers under article 142 of the Constitution of India, had extended the statutory period of 180 days from August 9, 2018. According to the Adjudicating Authority it could not be said that the insolvency commencement date itself was August 9, 2018. Especially since the admission order passed by the Authority on August 9, 2017 or the appointment of the interim resolution professional was not set aside by the Supreme Court. It was of the view that the statutory definition of insolvency commencement date given in section 5(12) of the Code was not disturbed. The interim resolution professional had not been prevented by the Supreme Court from taking claims and therefore, the claim amounts should be calculated taking August 9, 2017 the insolvency commencement date as the cut-off date. Interest would also be calculated only till the cut-off date on the claims preferred by the various classes of creditors.

Committee of creditors to be independent

The purport and object of section 5(24), (24A) read with proviso to sub-section (2) of section 21 of the Code is that a party which has vested interest/relation with the corporate debtor should not become a part of the committee of creditors for the reasons that the decisions of the committee must remain independent, as the committee is the pivot of the insolvency and resolution process. The decision of the committee has far reaching consequences, which will have effect on the corporate debtor for its survival or liquidation and realization of the debt of the creditors. Therefore, the institution of the committee needs to be completely independent and free from any kind of influence based on vested interest either of the promoters or their close relatives who may have stakes being creditors with respect to the corporate debtor. The provisions of section 5(24), (24A) of the Code appear to be incorporated to fulfil the said purport and object. The provisions of section 5(24), (24A) of the Code cannot said to be exhaustive but are inclusive. Therefore, the terms "related party" used in the said provisions with respect to purposive and contextual interpretation so that intended object could be achieved. A "related party" to the corporate debtor shall have no right of representation, participation or voting in the meeting of the committee of creditors of the corporate debtor. These words of the Adjudicating Authority in page 334 in *Asset Reconstruction Co. (India) Ltd.* v. *Gopal Krishna Raju* [2020] 220 Comp Cas 327 (NCLT) sufficiently explains as to why a committee of creditors have to be an independent body.

Resolution plan

Scope of review by Adjudicating Authority : Section 31(1) of the Code provides for approval of resolution plan upon satisfaction that the resolution plan as approved by the committee of creditors meets the requirements as referred to in section 30(2). The effect of approval would make the resolution plan binding on the corporate debtor and its employees, members, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, creditors, guarantors and other stakeholders involved in the resolution plan. It is also necessary that the Adjudicating Authority to ensure that the plan contains provisions of effective implementation. Requirements in terms of section 30(2) are that (a) the plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor ; (b) that it provides for the payment of debts of

operational creditors in such manner as may be specified by the Board which shall not be less than—(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53 ; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor ; (c) that it provides for the management of the affairs of the corporate debtor after approval of the resolution plan ; (d) that the implementation and supervision of the resolution plan ; (e) that it does not contravene any of the provisions of the law for the time being in force ; and (f) that it conforms to such other requirements as may be specified by the Board. Thus, apart from the provisions of effective implementation, the Adjudicating Authority's review is only limited to check if the above points had been taken care of by the committee of creditors. the commercial wisdom of the committee of creditors in approving or rejecting a resolution plan was essentially based on a business decision, which involved evaluation of the resolution plan based on its feasibility besides the committee of creditors being fully informed about the viability of the corporate debtor. This point has been explained in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC), wherein the Supreme Court held that the discretion of the Adjudicating Authority (National Company Law Tribunal) is circumscribed by section 31 of the Code to scrutinise the resolution plan "as approved" by the requisite percentage of voting share of financial creditors. Even in that enquiry, the grounds on which the Adjudicating Authority can reject the resolution plan are in reference to matters specified in section 30(2) of the Code, when the resolution plan does not conform to the stated requirements. This point was also approved by the Supreme Court in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC) wherein it has observed that after a resolution plan is approved by the requisite majority of the committee of creditors, the plan must then pass muster of the Adjudicating Authority under section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by section 30(2) of the Code. Only a limited judicial review is available, which can in no circumstance trespass upon a business decision of the majority of the committee of creditors. It has to be within the four corners of section 30(2) of

the Code, in so far as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, in so far as the Appellate Tribunal is concerned. In *Rai Bahadur Shree Ram and Co. P. Ltd.* v. *Bhuvan Madan, Resolution Professional of Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 110 (NCLAT), taking note of the above points, the Appellate Tribunal held that the appellants could not question the commercial wisdom of the committee of creditors in rejecting the settlement proposal emanating from the appellants, with the requisite majority and in approving the resolution plan. No material irregularity in the corporate insolvency resolution process before the resolution professional had been demonstrated. The fact that the Adjudicating Authority had declined to direct reconsideration of the settlement proposal of the appellants which had already been rejected did not impinge upon the legality and conformity of the approved resolution plan with the conditions stated in section 32 of the Code. In *Rural Electrification Corporation* v. *Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 518 (NCLT), the Adjudicating Authority while approving the resolution plan has observed that the decision of the committee of creditors in the approval of the resolution plan was paramount and the Adjudicating Authority had no power to go into the evaluation aspects of the resolution plan. Since the plan was approved by the committee of creditors after evaluation and after giving all participants equal opportunity, the plan was approved by the Adjudicating Authority. The Appellate Tribunal affirmed this decision in *IMR Metallurgical Resources AG* v. *Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 528 (NCLAT).

Power to rectify resolution plan : The Adjudicating Authority allowed an application for rectification of the resolution plan presented by two resolution applicants jointly which had already been approved and implemented. This order was set aside by the Appellate Tribunal in *QVC Exports P. Ltd.* v. *United Tradeco FZC* [2020] 220 Comp Cas 128 (NCLAT) held that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of resolution plan and make substantial changes in the plan, after a lapse of 13 months of the completion of the corporate insolvency resolution process, even after the approval and implementation of the resolution plan, on the pretext of rectification of clerical or typographical error in the order. Since the appellant and respondent No. 1 were joint resolution applicants, any application for rectification of the resolution plan could have been moved by both the resolution applicants. The Adjudicating Authority had no jurisdiction to allow amendment in the resolution plan, submitted by the appellant and respondent No. 1 as co-applicants in the resolution process, without there being any consent on

the part of the appellant. Taking note of section 60(5) of the Code, the Appellate Tribunal in page 138 of 220 Comp Cas observed that :

> "Since rectification of the resolution plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code, therefore it is not permitted to modify the resolution plan under the guise of inherent powers of the Tribunal."

Liquidation

The object of the Code is to be provide for insolvency resolution of corporate persons, firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. Liquidation of the corporate person is to considered only if it is not possible to revive the corporate debtor despite efforts. In *Edelweiss Asset Reconstruction Co. Ltd.* v. *Falcon Tyres Ltd.* [2020] 220 Comp Cas 346 (NCLT), despite the efforts of the resolution professional and the committee of creditors to revive the operations of the corporate debtor, the company could not be revived. The Adjudicating Authority had also exercised its discretion in granting sufficient time in order to exhaust all possibility of getting solution to the issues. Therefore, there was no other alternative for the Adjudicating Authority except to initiate the liquidation proceedings, as per extant provisions of the Code, in respect of the corporate debtor.

CONVERSION OF A PUBLIC TRUST INTO SECTION 8 COMPANY

Dr. M. Govindarajan[1]

Trust

The term "trust" has not been defined in the Companies Act, 2013. But rule 2(i) of the Companies (Authorized to Register) Rules, 2014 defines the term "trust" as an irrevocable public charitable or religious trust registered under any law for the time being in force and represented by its trustees, in whom the trust property is vested, as members.

Rule 2(k) defines the expression "Registrar of Trusts" as including a Charity Commissioner, an Inspector-General of Registration or such other authority having the duty of registering trusts in a State.

The public trust is to register with the Registrar of Trusts as defined above.

Features of trust

The salient features of a trust are as below :

- It is an agreement between parties, whereby one party holds the ownership of property for the benefit of another party.
- The document required for registration of a trust is trust deed.
- The legal title of the properties of the trust is vested on the trustees.
- Trust can be registered as Non-Governmental Organization or Non-profit Organization.
- Private trusts are governed under the Trusts Act, 1882 but the Public Trusts are governed under general law. In Maharashtra, Gujarat separate Public Trust Acts were enacted.
- Minimum number of members required for registration of a trust is two.
- The Registrar is of the local area is the authority for registration of a trust.
- There is no subsidy for a trust from the Government.
- The cost is very less when compared to the cost of other types of entities.
- A trust can registered under the Income-tax Act, 1961 under section 12AA (now section 12AB) for getting exemption from income-tax of their donations received.
- Preference in case of the Foreign Contribution Regulation Act (FCRA) registration is not much preferred.

1. Practising Company Secretary.

• There is some annual compliance requirement depending on whether the trust is private trust or public trust.

Section 8 company

Section 8(1) of the Companies Act, 2013 provides that where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company :

• has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object ;

• intends to apply its profits, if any, or other income in promoting its objects ; and

• intends to prohibit the payment of any dividend to its members,

the Central Government may, by licence issued in such manner as may be prescribed, and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this section.

The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies. A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

Other features of section 8 company are as follows :

• The Registrar of Companies is the registering authority for section 8 companies.

• Minimum 2 shareholders and 2 directors are required. Same person can be shareholder as well as director of company.

• Key documents are memorandum of association and articles of association.

• The company is a perpetual entity having the power to sue and be sued.

• The cost factor is more than the cost of a trust.

• Registration under the Income-tax Act, 1961 is allowed.

• Preference in case of the Foreign Contribution Regulation Act registration is mostly preferred.

• Annual compliance of filing of accounts and filing of annual return of section 8 company, with the Registrar of Companies.

Conversion of a trust into section 8 company

The first question come before us is whether a trust can be converted into section 8 company. Any person or an association of persons intending to register a limited liability company for objects specified below can opt to apply for registration of section 8 company. The term "person" is not defined in the Companies Act, 2013. However it is defines in section 2(41) of the General Clauses Act, 1897. The term "Person" shall include any company, or association or body of individuals, whether incorporated or not. Therefore, such a person can be natural or a legal person. Since a trust is a person it can be converted into section 8 company. Further section 366(1) of the Companies Act, 2013 provides that the term the word "company" includes any partnership firm, limited liability partnership, co-operative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

Conditions

A trust which has not filed the annual or other returns, statutorily required to be filed with the Registrar of Societies, shall not be eligible to apply for registration under section 366 of the Act.

Upon registration of a trust as a section 8 company under the Act, no application for conversion into a company of any other kind, except conversion from a private company to a public company or vice versa, shall be made till the expiry of a period of 10 years from the date of incorporation under the Act.

No application for registration as a company under the Act shall be made by a trust during the pendency of any proceedings under section 92 of the Code of Civil Procedure, 1908.

Section 92(1) of the Code of Civil Procedure provides that in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the court may institute a suit, whether contentious or not, in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a Aectee :

- removing any trustee ;
- appointing a new trustee ;
- vesting any property in a trustee ;
- directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property ;

• directing accounts and inquires ;

• declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ;

• authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged ;

• settling a scheme ; or

• granting such further or other relief as the nature of the case may require.

Section 92(2) of the Code provides that save as provided by the Religious Endowments Act, 1863 or by any corresponding law in force in the territories which, immediately before November 1, 1956 were comprised in Part B states, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with provisions of that sub-section.

Section 92(3) of the Code provides that the court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied in one or more the following circumstances :

• where the original purposes of the trust, in whole or in part :

➢ have been, as far as may be, fulfilled ; or

➢ cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust ;

• where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust ; or

• where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes ; or

• where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes ; or

• where the original purposes, in whole or in part, have, since they were laid down—

➢ been adequately provided for by other means, or

➢ ceased, as being useless or harmful to the community, or

➢ ceased to be, in law, charitable, or

➢ ceased in any other way to provide a suitable and effective method of

using the property available by virtue of the trust, regard being had to the spirit of the trust.

Obligations of trusts

The following are the obligations put up on the trust after conversion into section 8 company :

• For the purpose of clause (b) of section 374 of the Act, every "company" seeking registration under the provision of Part I of Chapter XXI shall publish an advertisement about registration under the said Part, seeking objections, if any within twenty one clear days from the date of publication of notice and the said advertisement shall be in Form No. URC-2, which shall be published in a newspaper in English and in any vernacular language, circulating in the district in which the trust, is situated.

• A copy of the notice, as published and the copy of the notice served on Registrar along with proof of service shall be attached with Form No. URC-1.

• The Registrar shall, after considering the application and the objections, if any, received by him within thirty days from the date of publication of advertisement, and after ensuring that the company has addressed the objections, suitably decide whether the registration should or should not be granted.

• If the Registrar in satisfied on the basis of documents and information filed by the applicants, decides that the applicant should be registered, he shall issue a certificate of incorporation in Form No. INC-11.

• Where a trust has obtained a certificate of registration under section 367 of the Act, intimation to this effect shall be given within 15 days of such registration to the concerned Registrar of Trusts, under which it was originally registered, along with documents for its dissolution as a trust.

• Statement of accounts prepared not later than 15 days preceding the date of seeking registration and certified by the Auditor together with the Audited Financial Statements of the previous year, wherever applicable shall be attached with Form No. URC-1.

• If the assets of the existing trust during the immediately preceding 3 years are revalued for the purpose of vesting of its assets with the company to be incorporated under this Act, the surplus arising out of such revaluation shall not be deemed to have been credited to the capital account or current account of partners.

• Notice shall be given to the Registrar of Trusts, under which it was originally registered and shall require that objections, if any to be made by such Registrar of Trusts, to the Registrar, shall be made within a period of 21 from the date of such notice, failing which it shall be presumed that they

have no objection and the notice shall disclose the purpose and substance of matters in relation to objections.

• In case a trust intending to register as a company under section 366 of the Act is registered under section 12A of the Income-tax Act, 1961 for claiming exemption on its income, intimation in this regard shall be sent to the income-tax authorities and proof of its service shall be attached with Form No. URC-1.

Requirements

The provisions of Chapter II of the Act relating to incorporation of company and matters incidental thereto shall be applicable mutatis mutandis for such registration. In case of an application by a trust for registration as a company limited by guarantee under section 8 :

• a list showing the names, addresses and occupations of all persons, who on a day, not being more than 6 clear days before the day of seeking registration, were trustees of the trust with proof thereof ;

• a list showing the particulars of persons proposed as the first directors of the company, along with DIN, passport number, if any, with expiry date, residential addresses and their interests in other firm or body corporate along with their consent to act as directors of the company ;

• a certified copy of the certificate of registration of the trust and the trust deed ;

• written consent or no objection certificate from all the secured creditors of the applicant ;

• written consent from the majority of members whether present in person or by proxy at a general meeting agreeing for such registration, and the resolution shall also provide for declaration of the amount of guarantee ;

• an undertaking that the proposed directors shall comply with the requirements of the Indian Stamp Act, 1899 (2 of 1899) as applicable ;

• a copy of the latest income-tax return of the trust ;

• details of the objects of the company along with a declaration from all the members that the restrictions and prohibitions as mentioned in clause (b) and clause (c) of sub-section (1) of section 8 of the Act shall be complied.

Where an application is made by trust for registration as a company limited by guarantee and it has been proved to the satisfaction of the Registrar that the proposed company has its objects in accordance with clause (a) of sub-section (1) of section 8 of the Act and it intends to comply with the restrictions and prohibitions as mentioned respectively in clause (b) and clause (c) of that sub-section, the Registrar shall issue a license in Form No. INC-16 to allow such society or trust to be registered as a limited company without the addition to its name of the word "Limited", or as the

case may be, the words "Private Limited" and thereupon issue a certificate of incorporation in terms of sub-rule (4) of rule 4 on an application submitted under Chapter II of the Act for incorporation of a company.

An undertaking from all the members or partners or trustees providing that in the event of registration as a company under Part I of Chapter XXI of the Act, necessary documents or papers shall be submitted to the registering or other authority with which the company was earlier registered, for its dissolution.

Name availability

For name reservation needs to be filed "Reserve Unique Name" (RUN) facility. The name of section 8 company shall include the words foundation, forum, association, federation, chambers, confederation, council, electoral trust, and the like, etc. Maximum 2 names at a time with 1 re-submission is allowed in RUN facility. The name can be reserved through Spice also.

SPICe

The incorporation of section 8 company can be done through SPICe form. As such the procedure for giving licence by the Registrar of Companies is dispensed with. The SPICe form is duly filled all in aspects and the following documents are required to be filed along with the form :

- Proof of registered office like sale deed/lease deed/rent agreement, etc. ;
- PAN card of first directors and subscribers ;
- Aaadhar card of first directors and subscribers ;
- Memorandum of association in Form No. INC-13 ;
- Articles of association ;
- Consent and declaration by first directors in Form No. DIR-2 ;
- Declaration by first subscriber in Form No. INC-9 ;
- Latest utility bill of registered office i.e electricity, telephone ;
- NOC of owner/director if registered office is taken on rent/lease ;
- Declaration on stamp paper in Form No. INC-14 by CS/CA/CWA in practice ;
- Declaration on stamp paper by each of the persons making the application in Form No. INC-15 ;
- An estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure ;
- Declaration for no deposits ;
- Description of work proposed to done or already done ;
- Declaration for assets and liabilities for 3 years.

VODAFONE AND IDEA COMBINATION APPROVAL BY CCI WAS AN IDEAL COMBINATION REVIEW CASE

Dr. Souvik Chatterji[1]

Introduction

From the time, the combination review provision under sections 5 and 6 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, was notified, the CCI has reviewed many combinations. In the Indian perspective, mergers, acquisitions, amalgamations all are considered combinations. The Vodafone Idea companies combination was one such combination. CCI did a landmark review relating to their combination and approved their combination. The paper examines the review of the combination by CCI and the impact it created in India.

Combination review of Idea and Vodafone companies by Competition Commission of India

The competition regulator, that is Competition Commission of India approved the proposed merger between Vodafone India and Kumar Mangalam Birla-owned Idea Cellular Company in 2017, a key step in paving way for creation of India's largest telecom company by subscribers[2]. Idea Cellular Company confirmed the Competition Commission of India's approval to the merger under sub-section (1) of section 31 of the Competition Act[3]. Vodafone is a UK based cellular company. Idea Cellular Company is an Indian company.

Vodafone assured that it initially will hold 50 per cent. stake in the combined entity, Aditya Birla Group will hold 21 per cent. stake and public shareholders will hold 28.9 per cent. stake. It was also assured that Vodafone will divest 4.9 per cent. stake to the Aditya Birla Group.

One of the reasons of CCI allowing the combination was due to the added entity's market share remaining less than Jio Company and Airtel Company. In the present Indian scenario, Jio Company has the highest market share in mobile telecom operation that is 33.47 per cent. Airtel Company has the second market share with 28.31 per cent. market share. Vodafone Idea Company after combination also have 27.57 per cent. market share. BSNL has market share of 10.64 per cent. The National Company Law Tribunal also approved the combination[4].

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1. HOD, Law, JISU and Associate Professor in law.
2. *https://economictimes.indiatimes.com/news/company/corporate-trends/cci-gives-unconditional-nod-tovodafone-idea-merger/articleshow/59740614.cms?from=mdr*, last visited on July 12, 2020.
3. Section 31(1) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.
4. *https://www.livemint.com/Industry/2E0PXuw33i4eyhDtaQbMEN/NCLT-approves-IdeaVodafone-merger.html*, last visited on July 15, 2020.

Generally the following things are tested by CCI, market shares of the combining entities and market shares of competitors, market concentration post the combination, the number of competitors remaining post the combination, extent of barriers to entry, to mention a few[1].

Very significantly Vodafone kept its 42 per cent. stake in Indus Towers Ltd., out of the purview of the combination. One of the reasons why Competition Commission of India allowed such combination was due to the fact that Jio already was a market leader and with the combination of Idea and Vodafone, Jio prospectively faced more competition. That was one of the pro-competitive benefits. The SEBI, the other regulator, also approved the combination[2]. India has kept mandatory merger notification regime intact over the period of the years. As far as the justification for making notification of combinations (mergers and acquisitions) in India mandatory, the CCI had thought that with development of infrastructure in different sectors like electricity, telecom, roadways, airways, etc., a lot of combinations are destined to take place between Indian and foreign companies. In that perspective, the CCI can regulate combinations that cross the threshold limit created by the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007[3] ; only if the notification is made mandatory. If it was voluntary, many companies could have escaped the review of the CCI in spite of crossing the threshold limit.

At the same time the CCI does not want any of these big companies to gain that amount of market share from where they can control the market and abuse their dominance. Neither the CCI want the giant companies in entering into combinations and get involved in predatory pricing and driving out the rest of the companies from the market.

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, had been enacted after examining the competition laws of most of the other countries of the world, like US, UK, Canada, etc. Most of the countries had mandatory notification and India is no exception to it.

The Competition Commission of India (Amendment Regulations) 2011 and (Amendment Regulations) 2013

The CCI had brought in Amendment Regulations in 2011 and 2013 to amend the thresholds and process relating to combination review under

1. Section 20(4) of the Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007.
2. *https://www.firstpost.com/business/idea-vodafone-merger-sebi-exchanges-give-conditional-go-ahead-to-23-bn-deal-3906753.html*, last visited on July 4, 2020.
3. Section 5 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.