NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(INS) No.1011 of 2019

(Arising out of Order dated (20.08.2019) passed by the (National Company Law Tribunal) Bengaluru Bench in C.P(IB) No 170/BB/2018)

IN THE MATTER OF:

M/s.Reliance Asset Reconstruction Company Ltd.
Reliance Centre, North Wing,
6th Floor, Off Western Express Highway,
Santacruz, Mumbai – 400 055 **...Appellant**

Versus

M/s.HotelPoonja International Private Limited.
Registered office at :
K.S.Rao Road, Hanpankatta,
Mangalore, Karnataka – 575 001 **...Respondent**

Present:

For the Appellant: **Mrs. Usha Singh and Mr. Vipin Meena Advocates.**

For the Respondent : **Mr. Sanjay R.Hegde, Senior Advocate and Mr. Abdul Azeem Kalebudde, Advocates**

J U D G M E N T

VENUGOPAL M.J.

1. The Appellant/Applicant/Financial Creditor has filed the instant Company Appeal being aggrieved against the order dated 20.08.2019 passed by the Adjudicating Authority ('National Company Law Tribunal') Bengaluru Bench in rejecting the Section 7 Application.

2. Earlier, the Adjudicating Authority ('National Company Law Tribunal') Bengaluru Bench while passing the impugned order dated 20.08.2018 at para 6 to 7 had observed the following:

> *" 6. In the present case we note that certain matters have been dealt with before the Hon'ble High Court of Karnataka viz. (i) W.P . 28437 of 2011, which has since been disposed off; (ii) W.P No. 3520 of 2018 which has granted an interim stay in respect of the DRT order dated 14.12.2017 and directed the repayment of rent to the Corporate Debtor and to that extent does not interfere with the order of the DRT in O.A 597 of 1988; (iii) W.P No. 39858 of 2018 filed by one Mr. Vinay Bhat in furtherance of DRT order O.A 547 of 1998 which has since been disposed off and the said order has not been submitted before us; and (iv) W.P No. 17390 of 2017 filed by the Corporate Debtor in respect of the DRT order dated 15.03.2017 which again deals with the rent payable vide DRT order in DCP 2691 of 2017 dated 15.03.2017 and the same stands currently adjourned.*
>
> *7.It is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, has inter alia held*

that IBC, 2016 is not intended to be substituted to a recovery forum. In another judgment rendered in Transmission Corporation of A.P.Ltd. Vs. Equipment Conductors and Cables Ltd., Supreme Court of India, it is, interalia held that existence of undisputed debt is sine qua non of initiation CIRP."

And ultimately rejected the 'Application'.

3. The Learned Counsel for the Appellant submits that the Respondent/Corporate Debtor with an intention to expand its business, approached the Assignor Bank 'Vijaya Bank during the year 1986 for certain credit facilities which were sanctioned by the 'Assignor Bank' vide its Sanction Letter dated 20.05.1986 for a Term Loan of Rupees Forty Lakhs along with Corporation Bank. As a matter of fact, the Respondent/Corporate Debtor through its authorised Directors & Guarantor had executed the Loan documents in favor of the 'Assignor Bank' for obtaining the aforesaid credit facilities.

4. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the Respondent had mortgaged the immovable properties for securing the said credit facilities:

All that piece and parcel of land and building held on Muli right situated in Market Ward of Mangalore City Casaba Bazar, village Sub-District South Canara & bearing

Sl No.	R S No.	T.S No.	Kissam	Which portion	Extent A.cent
01	597/1A	217/1A	Ground rent	Eastern	0.79.83
02	578/2A2	216/2A2	-Do-	Western	0.00.17

5. It is represented on behalf of the Appellant that the Corporate Debtor failed to repay the loan of the 'Assignor Bank' and the said Bank declared the account of the Corporate Debtor as 'Non-performing Asset' on 01.04.1993. Hence, Vijaya Bank ('Assignor Bank') projected the Original Application bearing No. 547 of 1998 for recovery of outstanding amount aggregating to Rs. 2,61,88,403.05 from the Respondent.

6. In this connection, the contention of the Appellant is that the Respondent had acknowledged and admitted its debt obligation and approach the Vijaya Bank to settle the claim for Rs. One Crore (including Rupees Twenty Lakhs) which the Respondent had already paid to the Vijaya Bank and agreed to pay Rupees Seventy Five Lakhs alongwith interest at 12.50 % p.a. in Nine monthly equal instalments commencing from 30.06.2011. In reality a Joint Compromise Terms was filed by the parties before the DRT, Bengaluru and order was passed on 27.03.2003.

7. The Learned Counsel for the Appellant proceeds to point out that the 'Assignor Bank' became entitled to recover the decretal amount from the Respondent because of the reason that Respondent/Corporate Debtor had failed to pay the settlement amount and filed the Application before the Debt Recovery Tribunal, Bengaluru for the recovery of decretal sum of Rs. 2,61,88,403.05 and a Recovery Certificate was already issued by the Tribunal.

8. Expatiating his submission, the Learned Counsel for the Appellant contends that the 'Assignment Agreement' dated 03.05.2011 was executed between the Vijaya Bank and the Appellant and the Substitution Application of the Appellant was allowed by the DRT, Bengaluru and a Recovery Certificate was

amended. Resultantly, the Appellant continued the recovery proceedings against the Respondent.

9. The main plea taken on behalf of the Appellant is that inasmuch as the 'Recovery Certificate' was issued based on the 'Compromise Terms' and the said 'Recovery Certificate' became final and binding upon the Respondent. That apart, it is the case of the Appellant that the Respondent, inspite of numerous opportunities provided to it, had neglected and intentionally defaulted in repayment of its dues. Further, It is stand of the Appellant that the Respondent had acknowledged its 'Debt' payable to Appellant in its financial statements filed under the Companies Act, 2013.

10. Moreover, the Appellant filed the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the Adjudicating Authority for initiation of Corporate Insolvency Resolution Process ('CIRP in short') because of the fact that the Respondent Company could not repay the decretal debt to the Appellant/Financial Creditor.

11. The Learned Counsel for the Appellant takes a stand that the Respondent Company had no cash flow to repay the certificate debt of Rs. 145, 44,46,651.32/-. Also that the impugned order of the Adjudicating Authority dated 20.08.2019 in rejecting the Application was passed without applying its judicial mind and also not adhering to the basic principles of 'Natural Justice'.

12. The Learned Counsel for the Appellant submits that the Assignor Bank declared the Account of the Respondent/Corporate Debtor as 'Non-performing Asset' on 01.04.1993. It comes to be known that the 'Assignment Agreement' was executed between the Assignor Bank and the Appellant on 03.05.2011 based on which the 'Recovery Certificate' was issued. Further, it is the

submission of the Appellant that 'pendency of any proceedings in any Court is no bar' to initiate and proceed as per Section 238 of the I&B Code.

13. As regards the plea taken by the Respondent/Corporate Debtor relating to delay and laches of the Appellant, it is version of the Appellant that the Respondent had approached the 'Assignor Bank' during the 1986 for certain credit facilities which were sanctioned by the Bank as per Sanction letter dated 20.05.1986 for a Term Loan of Rupees Forty Lakhs together with Corporation Bank. Besides this, a pari-passu agreement was executed between the Corporation Bank, Vijaya Bank (Appellant Assignor)and the Corporate Debtor, a pari-passu charge was created on the moveable and immovable properties of the Corporate Debtor. Thereafter repeated defaults were committed by the Respondent and that the Respondent had approached the Appellant time and again for settlement and in this connection the Appellant refers to the two Judgments of the Hon'ble Supreme Court (i) *B.K.Educational Services Private Limited v. Parag Gupta and Associates in Civil Appeal No. 23988 of 2017* and (ii)*TJSB Sahakari Bank Ltd. V. Unimetal Castings Ltd., CP(IB) – 3622/I&BP/MB/2108 dated 25.01.2019*.

14. The counsel for the Appellant refers to the Para 14 of the Respondent's Reply filed before the then Adjudicating Authority and submits that the Respondent had averred due to certain unavoidable circumstances and instances beyond its control, the regularity of repayment of loan instalment was lost and the repayment became irregular and it made an endeavour to settle the matter. Further, it is pointed out that as on 31.03.1998 the Respondent had accrued and assessed loss of Rs.1.8/- Crore.

15. In response, it is the submission of the Learned Counsel for the Appellant that in Form No.1 of the Application by the Financial Creditor to initiate Corporate Insolvency Resolution Process under the Code dated 27.07.2018 against the Respondent, in Part IV, mentions the particulars of the Financial Debt. However, the debt of default was not mentioned and the date of Loan as 'Non-performing Asset' was mentioned as 01.04.1993.

16. The Learned Counsel for the Respondent cites the decision of *Hon'ble Supreme Court in the case of B.K.Educational Services Private Limited V. Parag Gupta and Associates [2018 (14) SCALE 482],*wherein it is laid down as under:

> *" 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".*

17. The Learned Counsel for the Respondent cites the decision of *Hon'ble Supreme Court in Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And others. [(2019) 152 CLA 309 (SC),* wherein it is observed and held as under:

> "*Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that*

it would not apply to suits. The present case being " an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned Counsel appearing on behalf of the Appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time barred. So far as Mr. Banarjee's reliance on para 7 of the B.K.Educational Services Private Limited (Supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life of debts which are already time-barred".

18. The Learned Counsel for the Respondent refers to the judgment of this Tribunal dated 11.12.2019 in *V.Hotel Limited v. Asset Reconstruction Company (India) Limited [Com. App. (AT) (Insolvency) No. 525/2019* wherein at para 14 & 15, it is held as follows:

"Para 14. .....in view of the decision of the Hon'ble Supreme Court in "Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And Another – 2019 SCC Online Sc 1239". In the said case, the 'Corporate Debtor' was declared NPA on 21st July, 2011 hereinafter the 'State Bank of India' filed two O.As in the Debt Recovery Tribunal in 2012 in order to recover a total debt of 50 Crores of Rupees. In the meanwhile, by an assignment dated 28th March, 2014, the 'State Bank of India'

assigned the aforesaid debt to 'Asset Reconstruction Company (India) Ltd.', who is also Appellant in the present case.

Para 15. In the aforesaid case, the same very 'Asset Reconstruction Company (India) Ltd.' Took plea that limitation begin running for the purpose of limitation only on and from 1st December, 2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. The National Company Law Tribunal had reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation. However, the Hon'ble Supreme Court taking into consideration the fact that the ' Corporate Debtor' was declared as NPA on 21st July, 2011 held that the application was not maintainable. The said judgment is quoted below as the present Appellant was also the Applicant under Section 7 of the aforesaid case:

"In the present case, the Respondent No.2 was declared NPA on 21.07.2011. At that point of time, the State Bank of India filed two O.As in the Debt Recovery Tribunal in 2012 in order to recover a total debt of 50 Crores of rupees. In the meanwhile, by

an assignment dated 28.03.2014, the State Bank of India assigned the aforesaid debt to Respondent No.1. The Debt Recovery Tribunal proceedings reached judgment on 10.06.2016, the Tribunal holding that the O.As filed before it were not maintainable for the reasons given therein.

2.As against the aforesaid judgment, Special Civil Application Nos. 10621- 10622 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 25.03.2017.

3.An independent proceeding was then begun by Respondent No.1 on 03.10.2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 Crores of rupees. In the Form –I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of NPA i.e. 21.07.2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:-

Description of suit	Period of limitation	Time from which period begins to run

To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	Twelve years	When the money sued for becomes due

4. Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purpose of limitation only on and from 01.12.2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

5. Mr. Aditya Parolia, learned counsel appearing on behalf of the Appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K.Educational Services Private Limited v. Parag Gupta and Associates, 2018 SCC OnLine SC 1921 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

6. Mr. Debal Banerjee, learned Senior Counsel appearing on behalf of the respondents,

countered this by stressing, in particular, para 7 of the B.K.Educational Services Private Limited (Supra) and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

7. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, beings to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr.Banarjee's reliance on para 7 of B.K Educational Services Private Limited (Supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

8. This being the case, we fail to see how this para could possibly held 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 often time periods provided by the Limitation Act can be arbitrary in nature.

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

19. The Learned Counsel for the Respondent contends that the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 was filed by the Appellant/Financial Creditor against the Respondent/Corporate Debtor on 27.07.2018 in regard to the loan which was declared as 'Non-Performing Asset' by the Vijaya Bank on 01.04.1993 and that the Application is not maintainable either in Law or on Facts.

20. The Learned Counsel for the Respondent refers to the Assignment Agreement dated 03.05.2011 entered into between Vijaya Bank and the Appellant and according to the learned Counsel for the Respondent in Clause 4.1.(u) of the Assignment Agreement categorically states that the recovery proceedings in respect of the present loan availed by the Respondent is still pending before the DRT, Bengaluru and the same as under:

"4.1. xxxxxxxx

(u) no sui has been filed or other proceedings initiated by the Seller against the Borrower before any Court, Tribunal, Statutory Authority or regulatory body other then those disclosed by the seller to the purchaser (i.eO.A No. 547/1998 filed by the seller against M/s. Hotel Poonja International (P) Ltd. Before the DRt, Bangalore which has been decreed and

Recovery proceedings DCP No. 2691 is pending before the Recovery officer, DRT, Bangalore.)"

21. The Learned Counsel for the Respondent submits that the Appellant before the Adjudicating Authority by projecting an application is trying to recover the loan which is pending before the Debt Recovery Tribunal, Bengaluru thereby substituting the Adjudicating Authority under IBC, 2016 for recovery of the Loan which was not the intention of the Parliament in enacting the IBC, 2016.

22. The Learned Counsel for the Respondent refers to the decisions of the *Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited [C.A No. 9597/2018 dated 23.10.2018 (2018) 147 CLA 112 [SC],* following its earlier judgment in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 SCC 353],* had observed as under:

"In a recent judgment of this Court in Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353, this court has categorically laid down that IBC is not intended to be substitute to a recovery the forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked…"

23. Lastly, it is stand of the Respondent that the Adjudicating Authority had rightly dismissed the application filed by the Appellant which need not be interfered with by this Tribunal.

24. It is to be pointed out that as per Section 238 of the I&BC, the provisions of the Code shall have an overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being enforce or any instrument having effect by virtue of any such law.

25. As per Section 60(4) of the I&BC, an Adjudicating Authority (NCLT) is vested with the powers of the Debt Recovery Tribunal as specified in Part II of the Code for the purpose of Section 60(2) of the Code and hence, it is for the National Company Law Tribunal (Adjudicating Authority) to consider the entire gamut of the matter and to pass appropriate orders thereto.

26. It is not in dispute that the Certificate Holder Bank had assigned the rights of the Judgment Debtor Hotel Poonja International to Reliance ARC dated 03.06.2011 of the Recovery officer of the Debt Recovery Tribunal. Admittedly, the Recovery Certificate was amended on 13.12.2012.

27. In the impugned order dated 20.08.2019 of the Adjudicating Authority, it was mentioned that in WP. No. 3520 of 2018 and interim stay was granted in respect of the DRT order dated 14.12.2017 and also that the Writ Petition No. 39858 of 2018 filed assailing the order O.A No. 547 of 1998 before the Hon'ble High Court of Karnataka and repeatedly disposed of, but the copy of the said order was not submitted before the Adjudicating Authority. Further, it was mentioned that Writ Petition No. 17390 of 2017 filed by the Respondent/Corporate Debtor in regard to the order of the Debt Recovery

Tribunal, Bengaluru dated 15.03.2017 relating to the rent payable (i.e. DRT in DCP 2691 of 2017 dated 15.03.2017) stood adjourned.

28. An Adjudicating Authority, prior to an admission of an application preferred by a' Financial Creditor', in terms of the ingredients of Section 7(4) of the Insolvency and Bankruptcy Code, 2016 is to find out the existence of default within 14 days from the date of receipt of the application based on the subjective of satisfaction that a default had occurred, in which event, an application under Section 7 of the Code be admitted, subject to rectification of defects being cured within 7 days of the receipt of such notice from the Authority by the Applicant as per Section 7(5) of the I&B Code.

29. Any sum which is due and payable by a Corporate Debtor to the Bank (Financial Creditor) is a 'Financial Debt' as per Section 5 (8) (a) of the Code. With a view to sustain an Application under Section 7 of the I&BC, 2016 an Applicant is to establish an 'Existence of Debt', which is due from the 'Corporate Debtor'. A dispute is to be a bona fide, reasonable/genuine one, of course, based on tangible materials. The 'Debt'is not due, if it is not payable in law or on facts. A Corporate Debtor has an option to point out that the 'Default' had not occurred (inclusive of a disputed 'claim' and the same is not due. An 'Adjudicating Authority' is to ascertain whether the record is complete or otherwise, whether there is a 'Debt' and 'Default' was committed by the 'Corporate Debtor'. It is an established fact that existence of an 'Undisputed Debt' is a condition precedent for commencement of 'Corporate Insolvency Resolution Process.'

30. Be it noted, that in the judgment of this Tribunal dated 11.12.2019 *V.Hotels Limited V. Asset Reconstruction Company (India) Limited in Company Appeal (AT) (Insolvency) No. 525 of 2019* at para 23 and 24, it is observed as under:

> *"Para 23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in writing by the 'Corporate Debtor' or its authorized person acknowledging the liability in respect of debt. The Books of account cannot be treated as an acknowledgment of liability in respect of debt payable to the 'Asset Reconstruction Company (India) Ltd.' – ('Financial Creditor') signed by the 'Corporate Debtor' or its authorized signatory.*
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> *24. In "Sampuran Singh and Ors. V.Niranjan Kaur and Ors. – (1992) 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."*

31. In order to claim an exclusion of time spent bona fide in prosecuting the proceedings under Section 14 of the Limitation Act, 1963, the essential factor is that the matter was prosecuted before Court suffering from defect in jurisdiction. Also that, the benefit of Section 14 of the Act, 1963, can be availed of only when there is initial want of 'Jurisdiction'.

32. In the decision Yeshwant V. Walchand AIR 1951 Supreme Court Page 16, it is observed that there can be no exclusion of time spent in the 'Insolvency Proceedings' (under Section 14 of the Limitation Act, 1963) against the

judgment debtor, calculating the limitation period for a 'Decree' against him, since the proceedings are not for securing the same relief.

33. In the decision Ajab Enterprises V. Jayant Vegoiles and chemicals AIR 1991 BOM Page 35, it is held that the time taken by the plaintiff to prosecute the winding up Petition before Company Court cannot be excluded in computing of limitation period for a suit against the Company for recovery of debt because the matter in issue is not the same. Also, in the decision Anil Partap Singh v. Onida Savak Ltd., AIR 2003 Delhi at page 252 it is held that benefit of Section 14 of the Limitation Act, cannot be availed by the plaintiff even when the winding up petition was dismissed on merits and not because of any defect in jurisdiction or defect or objection of like nature.

34. Dealing with the aspect of that effect of an 'Acknowledgment' in writing as per Section 18 of the Limitation Act, 1963 it cannot be gain said that 'Acknowledgment of Liability' is to be in writing, signed by a person against whom the property or right is claimed and the same must be within the period of Limitation. Suffice it for this Tribunal to relevantly point out that to bring an acknowledgment within the meaning of Section 18 of the Limitation Act, 1963, it ought to be an unqualified one which gives a fresh cause of action.

35. As per Article 62 of the Limitation Act, 1963, a suit to enforce the mortgage is to be filed within Twelve years from the date when money fell due, unless the limitation period is extended in terms of any provision of the Limitation Act as per decision of Hon'ble Supreme Court Manimala V. Indubala reported AIR 1964 SC at Page 1295.

36. In the decision Prabhakaran and Others V. M.Azhagiri Pillai (Dead) by lrs. And Ors. (2006) 4 SCC at page 484 at special page 497 it is observed as follows:

"……In a mortgage, both the mortgagor and the mortgagee, have certain rights and obligations against each other. The rights/obligations of a mortgagor or a mortgagee co-exist, like the two sides of a coin. The mortgagor's right of redemption is co-extensive with the mortgagee's right of sale or foreclosure (where such right is recognized in law). Any statement by either, admitting the jural relationship with the other, will extend the limitation for a suit by that other, against the person acknowledging. It follows that when a mortgagee makes a statement about his right to recover the mortgage amount, such statement impliedly acknowledges the corresponding right of redemption of the mortgagor. Further, a statement admitting jural relationship, need not refer to or reiterate the rights and obligations flowing therefrom. Where a party to the mortgage, by his statement, admits the existence of the mortgage or his rights under the mortgage, he admits all legal incidents of the

mortgage including rights and obligations of both parties, that is mortgagee and mortgagor.

37. Also, at the aforesaid decision at Para 23 at Page No. 498 it is mentioned as under:

".....It sets out the circumstances in which a fresh period of limitation can be computed for a suit. If the suit is one for recovery of the amount due under an on-demand promissory note, no doubt, only an acknowledgement by the debtor can extend the period of limitation. But in regard to mortgages, T.P. Act has created and recognized rights as well as obligations both in the mortgagor and the mortgagee (vide Chapter IV of the Transfer of Property Act, in particular, Sections 60 and 67). Section 18 of the new Act provides that where before the expiry of the prescribed period for a suit in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made by the party against whom such property or right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. An acknowledgement under Section 18 can, therefore, be by a mortgagee also,

and such acknowledgement will extend the limitation for a suit against the mortgagee in respect of the property or right claimed against him."

38. Section 65 of I&BC speaks of 'Fraudulent or Malicious Initiation of Proceedings'. The word 'Fraudulent' as per Black's Law Dictionary (Fourth Edition) means based on fraud; proceedings from or characterized by fraud; tainted by fraud; done, made or effected with a purpose or design to carry out fraud. In fact, the word 'Malice' means the presence of some improper and wrongful motive with an intent to utilise a legal process in issue for some other purpose, than for proper object. It cannot be forgotten that no penalty can be fastened as per Section 65 (1) or Section 65 (2) of the Code on a person, without forming a prima facie opinion that a case is made out in this regard. An affected person in law is to expound his position and he must be provided with an opportunity of hearing by the Adjudicating Authority, before taking a final call in the matter.

39. As far as the present case is concerned, that Debt granted by the Assignor Bank ('Vijaya Bank') to the Respondent was Rupees Forty Lakhs being a term loan sanctioned on 20.05.1986. The outstanding Amount as on 18.07.2018 was of Rs. 145,44,46,651.32 (Principal outstanding amount of Rs. 40,00,000+ interest of Rs. 145,04,46,651.32). The date of 'Non-Performing Asset' is 01.04.1993. The Assignor Bank filed O.A No. 547 of 1998 before the DRT, Bengaluru for recovery of the dues aggregating to Rs. 2,61,88,403.05. While O.A No. 547 of 1998 was pending a 'Joint Compromise Term' was filed by the parties based on which an order dated 27.03.2003 came to be passed by the

Tribunal. The decretal amount of Rs. 2,61,88,403.05 and a Recovery Certificate was already issued by the DRT, Bengaluru on 27.03.2003 and that the Recovery Certificate was amended on 13.12.2012, based on the Assignment Agreement executed dated 03.05.2011 between the Vijaya Bank and the Appellant. The 'Statement of Account' of Vijaya Bank, the trust name is mentioned as 'Reliance ARC – VB Pilve Trust' and the Respondent's is described as 'Borrower'. The 'Statement of Account' dated 18.07.2018 mentioned the amount due as Rs.1,45,44,46,651.32 and that the 'Opening Balance' as per 'Recovery Certificate' dated 27.03.2003 was Rs. 2,61,88,403.05 etc. Although, the Appellant has placed reliance on 'Statement of Account' of the Respondent, the said 'Statement of Account' is not to be treated as an 'Acknowledgment of Liability in respect of debt payable to the Appellant/Financial Creditor, in the absence of any acknowledgment in writing by the Respondent/Corporate Debtor or its Authorized Signatory. It is to be remembered that the I&B Code is not a substitute for 'Debt Enforcement Procedure'. Under the Code, an 'Adjudicating Authority' does not a money claim or suit.

40. It is to be borne in mind Article 137 of the Limitation Act, 1963 not only applies to the Civil Procedure Code but also to the Special Acts. As a matter of fact, Article 137 constitutes a Residuary Article pertaining to 'Applications'. As such it can be safely and securely be said that Article 137 will apply to the Civil Procedure Code or in respect of any other special statute. What Article 113 of the Limitation Act, 1963 relates to suit, the Article 137 of the Limitation Act, pertains to 'Application'.

41. In view of the foregoing detailed upshort, and also, this Tribunal taking note of the cumulative factors like (i) that the term loan was sanctioned to the Respondent/Corporate Debtor on 20.05.1986, (ii) The date of determination of 'Non-performing Asset' was on 01.04.1993, (iii) O.A No. 547 of 1998 being filed by the Vijaya Bank (Assignor Bank) on 03.09.1998 against the Respondent, in which an order was passed on 27.03.2003 (Based on Comprised Terms), (iv) the right of Judgment Debtor/Respondent being assigned by the Bank to the Appellant later (03.05.2011) (v) the Recovery Certificate being amended on 13.12.2012 (vi) That the Recovery Certificate issued by the Tribunal is still pending and also keeping in mind that the Application under Section 7 of I&BC, 2016 was filed by the Appellant/Financial Creditor before the Adjudicating Authority on 27.07.2018 (vii) the Writ Petition No. 17390 of 2017 filed by the Corporate Debtor in regard to the Debt Recovery Tribunal order dated 15.03.2017 (pertaining to the rent payable by means of order in DCP No. 2691 of 2017 dated 15.03.2017 stood adjourned (as made mention of in the impugned order by the Adjudicating Authority) and (viii) that since the default had occurred well over three years before the date of filing of Section 7 Application and that the 'Non-Performing Asset' was declared on 01.04.1993 without any haziness comes to an escapable exclusion that the Application under Section 7 of I&BC filed by the Appellant before the Adjudicating Authority (NCLT, Bengaluru Bench) is clearly barred by 'Limitation'. As such, the present appeal is devoid of merits. Consequently, the present Appeal is dismissed without costs. Before parting with the case, it is made abundantly clear that the dismissal of the Appeal filed by the Appellant before this Tribunal will not preclude it from

pursuing / seeking appropriate remedy before the Competent Forum for redressal of its grievances, if it so desires/advised, in accordance with Law.

[Justice Venugopal M.]
Member (Judicial)

(V P Singh)
Member(Technical)

New Delhi

5th February, 2020

RK