NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 525 of 2019

IN THE MATTER OF:

V Hotels Limited **...Appellant**

Vs.

Asset Reconstruction Company (India) Limited **...Respondent**

Present: **For Appellant: - Ms. Anju Jain, Mr. Hitesh Sachar and Ms. Namita Jose, Advocates.**
Mr. S.C. Das, Advocate.

For Respondent: - Mr. Harin Raval, Senior Advocate with Mr. Krishnendu Datta, Mr. Siddarth Rande, Ms. Shivani Rawat, Advocates for R-1.
Mr. Sanjeev Kumar and Mr. Anshul Sehgal, Advocates.

WITH
Company Appeal (AT) (Insolvency) No. 627 of 2019

IN THE MATTER OF:

Tulip Star Hotels Ltd. & Anr. **...Appellants**

Vs.

Asset Reconstruction Company (India) Limited & Anr. **...Respondents**

Present: **For Appellant: - Dr. Abhishek Manu Singhvi, Senior Advocate with Ms. Anju Jain, Mr. Hitesh Sachar and Ms. Namita Jose, Advocates.**

For Respondent: - Mr. Harin Raval, Senior Advocate with Mr. Krishnendu Datta, Mr. Siddarth Rande, Ms. Shivani Rawat, Advocates for R-1.
Mr. T.R. Sundaram, Advocate.
Mr. J. Manjuanand, Advocate.
Mr. Sanjeev Kumar and Mr. Anshul Sehgal, Advocates.

Mr. V. Seshagiri, Mr. Siddharth Sacchar and Mr. Shubhangi Mehrish, Advocates for R-5.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'Asset Reconstruction Company (India) Limited'- ('Financial Creditor') filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'V. Hotels Limited'- ('Corporate Debtor'). In the said petition, 'V. Hotels Limited'- ('Corporate Debtor') filed application raising question of maintainability of application under Section 7 preferred by 'Asset Reconstruction Company (India) Limited'- ('Financial Creditor') intimating that the matter is pending before the Debt Recovery Appellate Tribunal against the order passed under the 'Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002' ("SARFAESI Act, 2002" for short) and in a Writ Petition (L) No. 1046 of 2017 and Writ Petition No. 1100 of 2017, the Hon'ble Bombay High Court by an order dated 25th April, 2017 has restrained the 'Financial Creditor' from initiating any coercive steps subject to deposit of money by the 'Corporate Debtor', relevant portion of which reads as follows:

> *"….We direct that in the event the compliance is reported of the Tribunal's order and our direction*

issued today, the first petitioner shall not initiate any coercive measures during the pendency of the appeal before the Debt Recovery Appellate Tribunal"

2. The other objections were also raised. The 'Financial Creditor'- 'Asset Reconstruction Company (India) Limited' took plea that relief granted vide order dated 25th April, 2017 of the Hon'ble High Court is confined to SARFAESI proceedings and there is no bar to initiate Insolvency proceedings.

3. It was also submitted that the Insolvency proceedings is similar to winding up proceedings and is not a mode for recovery of debt or to coerce the 'Corporate Debtor' to make payments.

The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, admitted the application which has been challenged by 'Tulip Star Hotels Limited' in Company Appeal (AT) (Insolvency) No. 627 of 2019.

4. Similar plea has been taken by counsel for the Appellants relating to maintainability of the application under Section 7 in the matter where SARFAESI proceeding has been initiated. While so arguing, learned counsel for the Appellants raised the question of maintainability of the application under Section 7 on the ground of limitation.

5. The Respondent- 'Financial Creditor' while took similar plea that pendency of the SARFAESI proceeding cannot be a ground to reject application under Section 7, it was submitted that though the question of limitation was not raised but it is not barred by limitation. The 'Corporate Debtor' has acknowledged the debt. Reliance was placed on Section 18 of the Limitation Act, 1963 in support of such plea.

6. One of the questions arise for consideration is whether application under Section 7 was barred by limitation or not.

7. The brief history of the case has been pleaded and noticed by the Adjudicating Authority as follows:

> *"3. The Financial Creditor is the assignee of Bank of India, one of the original lenders to the Respondent, under BOI Assignment Agreement dated 31.12.2008. Bank of India along with Punjab National Bank, Union Bank of India, Vijaya Bank, Canara Bank and Indian Bank, together forming a consortium led by Bank of India, had sanctioned a loan collectively to the extent of Rs. 129 Crores vide Loan Agreement dated 08.03.2002.*
>
> *4. The Corporate Debtor, on 05.06.2003 entered into an ECB arrangement for USD 29,000,000/- with Abu Dhabi Commercial Bank (ADCB) to repay the loan under the Loan Agreement. In lieu of repayment, the Bank of India converted the facility under the Loan Agreement into non-fund based Bank guarantees for*

the same amount by way of a sanction letter dated 23.08.2003. The Loan Agreement was varied and converted into a non-fund based bank guarantee facility vide a Deed of Variation dated 15.09.2003.

5. Subsequently, in terms of the Deed of Variation, the amount disbursed by Bank of India, under the Loan agreement was repaid in the year 2003 out of the funds disbursed to the Corporate Debtor by ADCB.

6. In the year 2008, the bank guarantee issued by Bank of India was invoked by ADCB and Bank of India made payment of Rs. 24,49,59,208/- on 02.09.2008. This amount constituted the debt claimed herein which was admittedly disbursed on 02.09.2008.

7. The Financial Creditor submits that on account of persistent defaults in payment of principal and interest instalments, the account of the Corporate Debtor with Bank of India was classified as a Non-Performing Asset on 01.12.2008.

8. Subsequently, the facilities granted by the Bank of India were assigned to the Financial Creditor U/s 5 of the SARFAESI Act, 2002 vide BOI Assignment Agreement dated 31.12.2008.

9. Thereafter settlement talks were initiated between the parties and considerable payments were made vide certain settlement proposals, their revisions and their extensions. A sum of Rs. 17,50,00,000/- was left to be repaid out of the agreed Rs. 35,00,00,000/- payable by 31.05.2013. Consequently, vide letter

dated 17.06.2013, the Petitioner revoked the settlement and rate of interest was revised to 22% under the Deed of Variation. The Financial Creditor exercised its rights under Section 13 (2) of the SARFAESI in order to enforce its security interest over the assets of the Corporate Debtor. The Corporate Debtor sought stay in DRT proceedings, which was granted, vide order dated 28.01.2014, on the condition of payment of Rs. 25,00,00,000/- within eight weeks thereafter. In terms of the order dated 28.01.2014, the Corporate Debtor paid Rs. 25,00,00,000/- to the Financial Creditor to give effect to the stay.

10. The Aggregate Assigned Debt as on 06.05.2014 inclusive of principal and interest @ 22% was Rs. 235,46,34,381/-. The Financial Creditor invoked the personal guarantee of Mr. Ajit Kerkar, Managing Director of the Corporate Debtor on 06.05.2014.

11. The correspondences between the Financial Creditor and the Corporate Debtor have been produced on record wherein the Corporate Debtor has acknowledged its liability time and again. One such example is letter dated 17.03.2012 sent by the Corporate Debtor acknowledging the outstanding settlement amount of Rs. 192.89 crores along with the interest accrued @ 22% p.a. at monthly rests, to be payable on 31.12.2013.

12. One Securitisation application filed by the Corporate Debtor before the DRT was dismissed vide order dated 23.03.2016. The order was appealed to in

DRAT, Allahabad, wherein DRAT vide order dated 17.05.2016, recorded the payment of Rs. 42 Crores paid on various dates between 01.07.2010 and 30.06.2013 as well as deposit made by the Corporate Debtor of Rs. 25 Crores as per interim order dated 28.01.2014. The DRAT also reduced the rate on interest to 14.85% per annum with monthly rest from 22% per annum with monthly rest for the period from 01.07.2010 to 30.06.2013 in the said order. The DRAT issued a demand notice dated 10.07.2013 U/s 13 (2) of the SARFAESI Act, 2002 for an aggregate sum of Rs. 235,46,34,381/- in respect of the "loan taken" by the Corporate Debtor from four banks, out of which Rs. 90,15,22,069/- is the principal amount. In compliance of the above order, on 16.06.2016, the Corporate Debtor deposited Rs. 5,04,30,672/-. Therefore, an amount of Rs. 72,54,30,672/- has been paid by the Corporate Debtor out the principal amount as aforesaid. Thereafter, MA No. 856 of 2016 was filed by the Financial Creditor on 27.06.2016 for dismissal of the appeal filed due to non-compliance of order dated 17.05.2016. The Financial Creditor claimed interest on Rs. 150,75,83,970/- contrary to the demand notice dated 10.07.2013 in the above said MA. It came to notice during the course of the arguments in the above said MA that apparent error and mistake has crept in the order dated 17.05.2016 in not specifying the recovery of Rs. 42.50 Crores during the period from 01.07.2010 to 30.06.2013 and the amount of "loan taken" on which the interest at the rate of 14.85% per annum is to be calculated.

13. Thereafter, a review application was filed but was time barred. Hence, rejected vide order dated 05.04.2017 due to the fact that the application for condonation of delay in filing review application [MA No. 246 of 2017] was filed but rejected. The order dated 05.04.2017 was challenged by filing Writ Petition (L) No. 1046 of 2017.

14. Meanwhile, on 11.04.2017, MA No. 856 of 2016 was allowed dismissing the appeal, filed by the Corporate Debtor for non- compliance of order dated 17.05.2016. Thereafter, the Corporate Debtor filed a Writ Petition (L) No. 1100 of 2017. Both the Writ Petitions above said were disposed off vide order dated 25.04.2017 by the Division Bench of the Hon'ble Bombay High Court directing the Corporate Debtor to deposit an amount of Rs. 34 Crores in instalments by. 31.07.2017. It was further ordered that, "We direct that in the event the compliance is reported of the Tribunal's order and our direction issued today, the first petitioner shall not initiate any coercive measures during the pendency of the appeal before the Debt Recovery Appellate Tribunal." The Corporate Debtor deposited the entire sum of Rs. 34 Crores as directed by the Hon'ble High Court by 21.07.2017.

15. The Corporate Debtor had filed MA 693/2018 praying for dismissal of the said petition on the ground of maintainability. The main contention of the Corporate Debtor therein was that this petition has been filed in defiance of order passed by the Hon'ble

High Court of Judicature at Bombay on 25.04.2017 wherein it was directed that no coercive measures shall be initiated during the pendency of Appeal before DRAT. Subsequently, MA was dismissed with a view that initiation of Insolvency and Bankruptcy proceedings is not a coercive measure because the object of the Code itself is the maximisation of value of the assets of the Corporate Debtor."

8. In ***"B.K. Educational Services Private Limited V. Parag Gupta and Associates– (2018) SCC OnLine SC 1921"***, the Hon'ble Supreme Court held that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the 'I&B Code' from the inception of the Code, and as such Article 137 of the Limitation Act gets attracted.

9. The Limitation Act, 1963 was also made applicable by insertion of Section 238A of the 'I&B Code'.

10. The question of limitation fell for consideration before the Hon'ble Supreme Court in ***"Jignesh Shah and Another v. Union of India and Another– (2019) SCC OnLine SC 1254"*** wherein the Hon'ble Supreme Court while noticed the introduction of Section 238A into the Code and the decision in ***"B.K. Educational Services Private Limited V. Parag Gupta and Associates"*** (Supra) observed:

*"**8.** In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:*

*"**7.** Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:*

"28. APPLICATION OF LIMITATION ACT, 1963

28.1 The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.[1] In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred,[3] and

there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is "to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or latches"[4]. Though the Code is not a debt recovery law, the trigger being 'default in payment of debt' renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

28.3 <u>Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise</u>

> *their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy."*
>
> *(emphasis supplied)*

11. The Hon'ble Supreme Court in ***"Jignesh Shah and Another v. Union of India and Another"*** (Supra) further noticed the arguments observed and held:

> *"**13.** Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding up proceeding was concerned. Thus, in Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd., (1999) 96 Comp Cas 349, a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding up petition being filed, opined:*

*"**8** …To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and 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."*

***14.** Likewise, a Single Judge of the Patna High Court in Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd., (2000) Comp Cas 426 also held:*

> *"**12....** In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner-company against opposite party 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-company 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."*

16. *In Dr. Dipankar Chakraborty v. Allahabad Bank, 2017 SCC OnLine Cal 8742, the fact situation was that a suit had been filed by the petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:*

> *"**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such section permits a plaintiff to present the same suit, if the Court of the first instance, returns*

a plaint from defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in Transcore (supra), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section

36 of the Act of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

xxx xxx xxx

25. The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice."

12. Finally the Hon'ble Supreme Court held:

> *"**21.** The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement 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."*

13. Learned counsel appearing on behalf of the Respondent- 'Financial Creditor' submitted that in addition to rehabilitate and revive the 'Corporate Debtor', one of the purposes of filing the insolvency application was to enforce the payment of money secured by a mortgage of immovable property. Article 62 of Schedule I of the Limitation Act, 1963 provides that the limitation period for enforcement of payment of money secured by a mortgage of immovable property is twelve years from when the

money becomes due. In the instance case, as admitted by the 'Corporate Debtor' that first it defaulted in the year 2008 when its account was declared as NPA. The present insolvency application was filed on 3rd April, 2018 i.e. less than 10 years when the money became due. Therefore, it is stated, the Adjudicating Authority has correctly held that the limitation period is twelve years.

14. However, such submissions cannot be accepted 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 whereinafter 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.

15. In the aforesaid case, the same very 'Asset Reconstruction Company (India) Ltd.' took plea that limitation begin running for the purposes 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 in 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 the 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 purposes 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, 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. Banerjee'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 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.*

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

16. The present case of 'Asset Reconstruction Company (India) Limited' (Applicant of Section 7 application) is similar to its earlier case in ***"Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Another"*** (Supra).

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

18. 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') cannot derive any benefit of the action taken under 'SARFAESI Act, 2002' which is guided by separate provisions of limitation.

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

> *"**13. Enforcement of security interest.**— ……(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as 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).*

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

21. Section 18 of the Limitation Act, 1963 deals with *'effect of acknowledgment in writing'* as follows:

> *"**18. Effect of acknowledgment in writing.**—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or*

right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

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

Explanation.—For the purposes of this section,—

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

> *is addressed to a person other than a person entitled to the property or right,*
>
> *(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and*
>
> *(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."*

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

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

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

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

25. In fact, the case of ‘Asset Reconstruction Company (India) Ltd.’- (‘Financial Creditor’) is covered by its own decision in ***“Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Another”*** (Supra).

26. The Adjudicating Authority having failed to appreciate the aforesaid fact, the impugned order dated 1st May, 2019 rejecting the objections of the ‘Corporate Debtor’ and the impugned order dated 31st May, 2019 passed by the Adjudicating Authority admitting the application under Section 7 are set aside. ‘V. Hotels Limited’- (‘Corporate

Debtor') is released from all the rigours of law and is allowed to function independently through its Board of Directors from immediate effect. The 'Interim Resolution Professional'/ 'Resolution Professional' will submit its fees and costs of 'Corporate Insolvency Resolution Process' before the Adjudicating Authority who will determine the same and amount as is payable is to be paid by 'Asset Reconstruction Company (India) Ltd.' who moved application under Section 7 which was not maintainable. The 'Interim Resolution Professional' will hand over the management, assets and records to the Board of Directors.

Both the appeals are allowed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI
11th December, 2019

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