NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

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

IN THE MATTER OF:

V. Padmakumar ...Appellant

Vs.

Stressed Assets Stabilisation Fund (SASF) & Anr. ...Respondents

Present: For Appellant: - Mr. Jayesh Dolia, Mr. R. Chandrachud and Mr. Nitin Thukral, Advocates.

For Respondents:- Mr. Abhijeet Sinha, Ms. Anju Bhushan Gupta and Mr. Kanishk Rana, Advocates for R-1.

Mr. Parthasarathy Bose, Mr. Mayank Kshirsagar and Ms. Pankhuri, Advocates for R-2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'M/s. Stressed Assets Stabilization Fund (SASF)'- ('Financial Creditor') filed an 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 'M/s. Uthara Fashion Knitwear Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, by impugned order dated 21st November, 2019 admitted the application.

2. 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 21st November, 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.

3. On notice, the Respondents appeared and relied on decision of the three Hon'ble Members of this Appellate Tribunal dated 22nd January, 2020 in ***"M/s. Ugro Capital Limited v. M/s. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)– 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 22nd May, 2015, held that non-payment of debt thereafter amounts to "committed default" in terms of Section 3(12) of the 'I&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&B Code' three years from the date the right to apply accrued for the first time from the date of default in terms of decree.

4. As the Judgment was doubted, the matter was referred to Larger Bench to decide the issue.

5. The brief facts of the case are as follows:

At the request of the 'Corporate Debtor', the 'Industrial Development Bank of India' ('IDBI' for short) granted financial assistance of Rs.600 lacs by way of Term Loan Agreement dated 2nd March, 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 24th August, 2000. The account of the 'Corporate Debtor' was classified as "Non-Performing Asset" on 29th May, 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' (OA No. 289 of 2003 now re-numbered as O.A. No. 413 of 2007). It was decreed on 19th June, 2009 and Recovery Certificate was issued on 31st August, 2009, which was reflected in the Balance Sheet dated 31st March, 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 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 Private Limited Vs. Parag Gupta and Associates–(2019) 11 Supreme Court Cases 633"***, the Hon'ble Supreme Court held that for the purpose of Section 7, the Limitation Act,

1963 is applied from the date of inception of the Code. The Hon'ble Supreme Court noticed Section 238A, inserted by 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 Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal.

However, as Section 238A does not deal with application under Sections 7, 9 or 10 of the 'I&B Code', the decision of the Hon'ble Supreme Court in ***"B.K. Educational Services Private Limited Vs. Parag Gupta and Associates"*** (Supra) being law of land under Article 141 of the Constitution of India, Article 137 of the Limitation Act, 1963 will be applicable to application under Sections 7, 9 or 10 of the 'I&B Code' since the date of inception of the Code (commencement of the Code i.e. 1st December, 2016).

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

> *"13. Dr Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of*

limitation or having extended it, insofar as the winding-up proceeding was concerned. Thus, in Hariom Firestock Ltd. v. Sunjal Engg. (P) Ltd., a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding-up petition being filed, opined:

> *"8. … To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and dehors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second*

point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

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

> *"12. … In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding-up proceeding. The debt having become time-barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under Section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of Opposite Party 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of Section 434. Therefore, since the debt of the petitioner Company has become time-barred*

and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt."

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

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

xxx xxx xxx

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay

its debts. Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434."

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

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

"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank

of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.

2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.

3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-72011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

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

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

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

4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

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

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

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods

provided by the Limitation Act can be arbitrary in nature.

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

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

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

"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

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

> *"xxx xxx xxx*
>
> *Following this judgment, it is clear that when the recovery certificate dated 24-12-2001 was issued, this certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking"*

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

> "17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the 'Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.
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> xxx xxx xxx
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> *19. Section 13(2) of the 'SARFAESI Act, 2002' reads as follows:*
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> > *"**13. Enforcement of security interest**.— ……(2) Where any borrower, who is under a*

liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

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

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

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

23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in

writing by the 'Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgment of liability in respect of debt payable to the 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') signed by the 'Corporate Debtor' or its authorised signatory.

24. In ***"Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679"****, the Hon'ble Supreme Court observed that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgment, even after the completion of the period of limitation i.e. December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under Section 7 is barred by limitation, the accounts of the 'Corporate Debtor' having declared NPA on 1st December, 2008."*

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 and another vs. Union of India and another – (2019) 10 SCC 750"***, the Hon'ble Supreme Court noticed the decision of the Hon'ble Patna High Court in ***"Ferro Alloys Corpn. Ltd. v. Rajhans Steel Ltd."***, 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 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, 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 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 and another vs. Union of India and another***" (Supra) 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 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 cannot be 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 Civil Court/ Debt 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&B Code'.

19. In ***"M/s. Ugro Capital Limited v. M/s. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)– 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 the 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 F.Y. 2011-2012 & 2012-2013 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 ***"Sh. G Eswara Rao v. Stressed Assets Stabilisation Fund– Company Appeal (AT) (Insolvency) No. 1097 of 2019"***. In the said case, this Appellate Tribunal by Judgment dated 7th February, 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 Debt 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:

> *"12. The date of default can be forwarded to a future date only under Section 18 of the Limitation Act, 1963, which reads as follows: -*
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> > ***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."

13. As the Decree passed by DRT on 17th August, 2018 cannot be said to be an acknowledgement 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 2016-2017 to suggest that the

'Corporate Debtor' admitted the liability in its Independent Auditor's Report and Balance Sheet.

14. 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—*
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> *(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;*
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> *(b) its shares, debentures and other securities and shareholding pattern;*
>
> *****
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> *(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".

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(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 lakh 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 lakh rupees."

15. As the filing of Balance Sheet/ Annual Return being mandatory under Section 92(4), failing of which attracts penal action under Section 92(5) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor'

cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963.

16. If the argument is accepted that the Balance Sheet / Annual Return of the 'Corporate Debtor' amounts to acknowledgement 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."

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

(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) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor' cannot be treated to be an acknowledgement 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 acknowledgement 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.

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

24. For the said reasons, we are not remitting the matter to the Bench for fresh decision on facts. The impugned order dated 21st November, 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&B Code' is dismissed. 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 cost.

[Justice S.J. Mukhopadhaya]
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

(Justice Venugopal M.)
Member(Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

12th March, 2020

/AR/

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

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

IN THE MATTER OF:

V. Padmakumar **...Appellant**

Versus

Stressed Assets Stabilisation Fund (SASF) & Anr. **...Respondents**

J U D G E M E N T

(12th March, 2020)

A.I.S. Cheema, J. :

1. I have had the opportunity to go through the draft of erudite Judgement by the Hon'ble Chairperson. With great respect and all humility at my command I have reservations regarding part of the Judgement where it relates to Annual Returns/audited Balance Sheets.

2. I am not recording here particulars of how the Appeal has arisen and facts of the case and why present Bench of Chairperson and 4 Members was required to be constituted as it is dealt with in the Judgement crafted by Hon'ble Chairperson.

3. I have gone through Judgement in the matter of **"V Hotels Limited Vs. Asset Reconstruction Company (India) Limited"** – Company Appeal (AT) (Insolvency) No. 525 of 2019 and its finding in Para – 23 that "Books of Account" cannot be treated as acknowledgement. I have also gone through the Judgement in the matter of **"Sh G Eswara Rao Vs Stressed**

Assets Stabilisation Fund" in Company Appeal (AT) (Insolvency) No. 1097 of 2019 dated 7th February, 2020, especially, Paragraphs – 15 and 16 of that Judgement which is also relied on, and the finding recorded in Para – 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) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor' cannot be treated to be an acknowledgement 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 acknowledgement 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."

4. With respect, I am unable to agree. I find that there are various Judgements passed by 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 "acknowledgement of debt" and even accepted the same for the purpose of Section 18 of the Limitation Act, 1963.

5. In Judgement in the matter of **"Gautam Sinha Versus UV Asset Reconstruction Company Limited and others"** in Company Appeal (AT)

(Ins) No.1382 of 2019 dated 25th February, 2020 passed by this Tribunal by a Bench also comprising myself, I had the occasion to deal with some of the Judgements relating to Balance Sheets/Annual Returns/Entries in books of accounts. I will extract portion of the analysis of those Judgements which I recorded in that Judgement of ours in "Gautam Sinha" (supra). The said portions are as under:-

> 7. Before us, the learned Counsel for the Respondent No.1 (Respondent – in short) referred to the Judgements in the matters of **"Sheetal Fabrics versus Coir Cushions Ltd."** reported as 2005 SCC OnLine DEL 247; **"The Commissioner of Income Tax-III v. Shri Vardhman Overseas Ltd."** reported as 2011 SCC OnLine DEL 5599 and **"M/s Mahabir Cold Storage Versus C.I.T., Patna"** reported as 1991 Supp (1) Supreme Court Cases 402. The argument is that acknowledgement of debt in the Balance Sheet also amounts to acknowledgement under Section 18 of the Limitation Act.
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> 8. The Judgement in the matter of "The Commissioner of Income Tax" (supra) was in the context of provisions of the Income Tax Act. In Para – 17 of the Judgement, it was observed:-
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> > 17. 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 31st March, 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 acknowledgement in writing. It says where before the expiration 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 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 acknowledgement was so signed. In an early case, in England, in *Jones* v.

Bellgrove Properties, (1949) 2KB 700, it was held that a statement in a balance sheet of a company presented to a creditor- share holder of the company and duly signed by the directors constitutes an acknowledgement of the debt. **In *Mahabir Cold Storage* v. *CIT*** (1991) 188 ITR 91, the Supreme Court held:

"The entries in the books of accounts of the appellant would amount to an acknowledgement 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 Judgements.*

9. In the Judgement in the matter of "Sheetal Fabrics" (supra), Hon'ble High Court of Delhi referred to Judgement in the matter of "**In re. Padam Tea Company Ltd."** AIR 1974 Calcutta 170 and referred to the said Judgement as under:-

"10. Let me first deal with the case of *Padam Tea Co. Ltd.* (supra). This case relied upon by learned Counsel for the respondent company in support of his plea that acknowledgement 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 the 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 acknowledgement. There is no dispute about this proposition of law. However, in that case,

the Court refused to accept entry in the balance sheet as acknowledgement 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. Private Ltd. and Caritt, Moran and Co. Pvt. 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 acknowledgement 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 acknowledgement 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 acknowledgement 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 ***L.C. Mills v. Aluminium Corpn. of India Ltd.***, (1971) 1 SCC 67 : AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgement did not create a new right of action but merely extended the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question must, however, relate to a present subsisting liability and indicate the existence of a jural relationship between the parties such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not, however, be in express terms and could be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course did not mean that where a statement was made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. In order to find out the intention of the document by which acknowledgement was to be construed the document as a whole must be read and the intention of the parties must be found out from the total effect of the document read as a whole."

10. Then the High Court after referring to the Judgement in the matter of "Padam Tea Company" 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 High Court or in the balance sheet, was without any conditions or any strings attached."

[Emphasis supplied]

6. Thereafter, this Tribunal in Judgement in the matter of "Gautam Sinha" discussed facts regarding the Balance Sheet as was relied on in that matter and concluded as under:-

> "14. We have already referred to the Judgements in the matters of "Sheetal Fabrics" and "Padam Tea" 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 acknowledgement 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 acknowledgement by Company under Section 18 of the Limitation Act."

7. In the above reference to Judgement in the matter of "Gautam Sinha" while referring the Judgement of the Hon'ble High Court of Delhi in the matter of **"The Commissioner of Income Tax-III v. Shri Vardhman Overseas Ltd."** reported as 2011 SCC OnLine DEL 5599, only part of Para – 17* of that Judgement was reproduced. In Judgement in the matter of **"Commissioner of Income Tax"** (supra), the Hon'ble High Court of Delhi after referring to Judgement of the Hon'ble Supreme Court in "M/s Mahabir Cold Storage Versus C.I.T." (supra) and the legal positon in Para – 17, observed that in several Judgements of the High Court, the legal position has been accepted and added:-

> "In Daya Chand Uttam Prakash Jain vs. Santosh Devi Sharma 67 (1997) DLT 13, S.N. Kapoor J. applied the principle in a case where the primary question was whether a suit under Order 37 CPC could be filed on the basis of an acknowledgement. In Larsen & Tubro Ltd. v. Commercial Electric Works 67 (1997) 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 acknowledgement within the meaning of Section 18 of the Limitation Act. In Rishi Pal Gupta v. S.J. Knitting & Finishing Mills Pvt. Ltd. 73 (1998) DLT 593, the same view was taken. The last two decisions were cited by Geeta Mittal, J. in S.C. Gupta v. Allied Beverages Company Pvt. Ltd. (decided on 30/4/2007) and it was held that the acknowledgement 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. Ahmedabad v. CIT Gujarat (1964) 54 ITR 167, it was further held that a debt shown in a balance sheet of a company amounts to an acknowledgement for the purpose of Section 19 of the Limitation Act and in order to be so, the balance sheet in which such acknowledgement 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 31st March, 2002 of the accounts of the sundry creditors amounts to an acknowledgement 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."

8. Another Bench of this Tribunal has in the matter of **"Mr. Gouri Prasad Goenka Vs. Punjab National Bank and another"** in Company Appeal (AT) (Insolvency) No. 28 of 2019 reported as MANU/NL/0518/2019 held that letter emanating from Corporate Debtor in that matter, addressed to the Financial Creditor where Corporate Debtor agreed to settle all outstanding dues of the Financial Creditor on "One Time Settlement (OTS) basis" amounted to acknowledgment of outstanding debt in writing.

9. In Judgement in the matter of **"ITC Limited Vs. Blue Coast Hotels Ltd. and Ors."** dated 19th March, 2018 reported as MANU/SC/0263/2018, Hon'ble Supreme Court was dealing with question whether Sub-Section (3A) of Section 13 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI - 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, 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 25th November, 2013 and in Para – 35 of that Judgement observed:-

> **Letter of Undertaking "Without Prejudice"**
>
> 35. 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 acknowledgement 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 acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's 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 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:

> "But when a statement is used as acknowledgement for the purpose of Section 29 (5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement."

Therefore, the 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 supplied]

10. Carefully going through "ITC Ltd." Judgement, 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 "acknowledgement of debt".

11. Going through the Judgements of 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 acknowledgement or not. The above discussion of the Judgements 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 acknowledgement 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 acknowledgement 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 acknowledgement. This is clear from Para – 11 of the Judgement in the matter of "In re. Padam Tea Company Ltd." (referred supra in Para – 5). 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 Annual Return/Balance Sheet cannot be treated as if they are coercive and so should be treated as inadmissible.

12. Apart from Judgements of the High Courts, as referred, Judgement in the matter of "Mahabir Cold Storage" (supra) clearly recorded in Para – 12 that entries in the books of accounts would amount to an acknowledgement of the liability within the meaning of Section 18 of the Limitation Act, 1963. As such, I have difficulty with the Judgement in the matter of "V Hotels Limited" (supra) relied on where in Para – 23, the Bench of this Tribunal observed that "The books of accounts cannot be treated as an acknowledgement of liability in respect of debt ……." If books of accounts can be considered, I find it difficult to hold that the audited Balance Sheet prepared on the basis of books of accounts, needs to be ignored. Apart from the above, in Judgement in the matter of **"Kashinath Sankarappa Wani Vs. New Akot Cotton Ginning &; Pressing Co., Ltd."** reported as MANU/SC/0007/1958, while dealing with Resolution of Board of Directors and while considering Balance Sheet with regard to question of limitation, 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.

13. In the matter of **"A.V. Murthy Versus B.S. Nagabasavanna"** reported as (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, Hon'ble Supreme Court observed in Para – 5 as under:-

> "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 31-3-1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement 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 supplied]

14. Judgement in the matter of "A.V. Murthy" (supra) was relied on by the Hon'ble Supreme Court in the matter of **"S. Natarajan Vs. 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 acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made.

15. Thus, I find it is settled law appearing from the Judgements of the High Court of Delhi and other High Courts that Balance Sheets can be looked into to see if there is acknowledgement of debt. Perusing Judgements of Hon'ble Supreme Court I find that even Hon'ble Supreme

Court has looked into Balance Sheets and Books of Account to see if there is Acknowledgement of Liability. If the amount borrowed is shown in the Balance Sheet, it may amount to Acknowledgement. I find the Judgements of Hon'ble Supreme Court of India are binding and Balance Sheets cannot be outright ignored.

16. 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 acknowledgement under the Limitation Act.

16. 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 acknowledgements, so as to save limitation.

17. Except for the above aspects, I agree with the erudite Judgement of the Hon'ble Chairperson.

18. I direct accordingly.

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

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