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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI Company Appeal (AT) (Insolvency) No. 1406 of 2019

[Arising out of Order dated 20th September, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai in CP/1352/IB/2018]

IN THE MATTER OF:

A. Balakrishnan, Residing At
F. No. 201, Nector Gardens,
Lilly Blocks,
Madhapur, Hyderabad 500033 **....Appellant**

Versus

1. Kotak Mahindra Bank Limited. No. 39, I Floor, Ceebros Centre, Montieth Road, Egmore, Chennai, Tamil Nadu – 600008 **...Financial Creditor/ Respondent No.1**

2. M/s Prasad Properties and Investments Pvt. Ltd.
No. 2, Sarangapani St.,
T. Nagar, Madras,
Chennai – 600017
Through Its IRP
Mr. L.V. Shyam Sundar,
Having Office at,
Also at
3rd Floor, No. 17, Gandhi Road,
Alwarthunagar,
Chennai- 600087. **...Corporate Debtor By IRP/Respondent No. 2.**

For Appellant: **Mr. Gautam Singh and Mr. Abhijeet Sinha, Advocates.**
For Respondent: **Mr. Sanjay Bhatt, Advocate for R-1.**

JUDGMENT

(24th November, 2020)

Justice A.I.S. Cheema.

This Appeal has been filed by Appellant who is Director of the Corporate Debtor namely M/s. Prasad Properties and Investments Pvt. Ltd. (Respondent No. 2) by IRP. The Respondent No. 1/Kotak Mahindra Bank Ltd. filed Application CP/1352/IB/2018 against the Corporate Debtor before Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC in Short). The Adjudicating Authority by Impugned Order dated 20th September, 2019 admitted the Application and initiated Corporate Insolvency Resolution Process (CIRP in short). Thus the present Appeal.

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2. When this Appeal was filed and it came up before this Tribunal, Learned

(i) Whether the Application was filed and CIRP initiated, fraudently or with malicious intent or purpose other than Resolution of Insolvency and Liquidation of the Corporate Debtor?

(ii) Whether the Application under Section 7 filed was within Limitation?

3. The Appeal claims that the Corporate Debtor had created a charge in favour of Indbank Merchent Banking Services Ltd. (IBMBS) and secured an amount of Rs. 2 lakhs plus interest etc. This was done on 01st August, 2001.

The Appeal claims that on 27th June, 2004 Corporate Debtor issued a Letter and created second charge in favour of Indbank Housing Ltd. (IBHL) and secured amounts mentioned as below:

(a) ICD facility of Rs. 350 Lakhs placed by IBHL with M/s. Gemini Arts Pvt. Ltd.;

(b) ICD facility of Rs. 350 Lakhs placed by IBHL for M/s. Green Gardens Pvt. Ltd.; and

(c) ICD facility of Rs. 350 Lakhs placed by IBHL with M/s. Mahalaxmi Properties and Investments Pvt. Ltd.

It was aggregating to Rs. 1050 Lakhs with interest etc. payable by the three companies to IBHL (The three Companies mentioned above may be referred as Borrower Entities). The contents of the Appeal show that IBMBS and IBHL by assignment deeds assigned their debts on 13th October, 2006 to Respondent No. 1/Kotak Mahindra Bank Ltd. (who may be referred as Financial Creditor)

4. The Impugned Order shows and the Reply Filed by Respondent No. 1/Kotak Mahindra Bank Ltd. (Diary No. 18053) before this Tribunal shows that IBHL had sanctioned separate financial assistance/credit facilities to the above Borrower Entities and the Respondent No. 2 Corporate Debtor stood as corporate guarantor/mortgagor and mortgaged its immovable property situated at Guttala Begampet Village in Rangareddy District of Andhra Pradesh by deposit of title deeds to secure the aforesaid credit facilities/financial assistance sanctioned to the Borrower Entities. Respondent No. 1/Financial

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Creditor in Reply has put up the case that the Borrower Entities defaulted in repayment of dues and subsequently IBHL classified all the facilities availed by the Borrower Entities as Non-Performing Assets (NPA) in November, 1997. Financial Creditor claims that pursuant to this IBHL filed: (i) Civil Suit No. 33 of 1999 (ii) Civil Suit No. 1023 of 1998 and (iii) Civil Suit No. 52 of 1999 before the Hon'ble High Court of Madras against the Borrower Entities respectively with the Corporate Debtor as the corporate guarantor/mortgagor to recover the debt. According to the Financial Creditor, during the pendency of these suits IBHL by deed of assignment dated 13th October, 2006 unconditionally and absolutely assigned its rights, title, interest etc. with regard to the debts due from the borrowing entities, in favour of Respondent No. 1/Financial Creditor. It is further claimed that in the above suits the Financial Creditor and Borrower Entities entered into a compromise on 07th August, 2006 and the compromise was recorded by the Hon'ble High Court of Madras in common Judgment dated 26th March, 2007, between the parties to the suit and consent decree was passed in each of the suits which included the Corporate Debtor as Guarantor/Mortgagor. The Financial Creditor further claims that the Borrower Entities failed to make payments as per the compromise/consent decree and thus the Financial Creditor issued Demand Notice dated 26th September, 2007 under Section 13 (2) of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the Borrower Entities as well as the Corporate Debtor. Financial Creditor claims that the Borrower Entities as well as the Corporate Debtor defaulted in payment of the

demanded amount and thus the Financial Creditor issued Possession Notice dated 10th January, 2008 to Borrower Entities and Corporate Debtor, under Section 13 (4) of SARFAESI Act. Reply states that – "Since, the Borrower entities and the Corporate Debtor neglected to make the payments" the Financial Creditor issued Winding up Notice dated 06th May, 2008 under Section 433 and 434 of the Companies Act, 1956 to the Corporate Debtor.

5. The case further put up by the Financial Creditor (Respondent No 1) in Reply is that the Borrower Entities and Corporate Debtor failed to make payment and the Financial Creditor filed Applications under Section 31(A) of the Recovery of Debts Due to Banks and Bank Institutions Act, 1993 (DRT Act) before Debt Recovery Tribunal to issue Debt Recovery Certificates in terms of the compromise/consent decree dated 26th March, 2007 in the suits mentioned above which were filed against the borrowing entities and the Corporate Debtor. Financial Creditor claims that the following OA were filed:

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(i) O.A No. 46 of 2008 against M/s. Gemini Arts Pvt. Ltd. and the Corporate Debtor.

(ii) O.A No. 47 of 2008 against M/s. Green Gardens Pvt. Ltd. and Corporate Debtor.

(iii) O.A No. 48 of 2008 against M/s. Mahalaxmi Properties and Investments Pvt. Ltd. and the Corporate Debtor.

Financial Creditor claims that DRT allowed the above OAs on 31.03.2017, 30.06.2017 and 30.03.2017 and issued separate Recovery Certificates dated 07th June, 2017 against each of the said Borrower Entities

and Corporate Debtor as per the DRT Act. The Reply has annexed copies of the Recovery Certificates which have been issued. According to the Financial Creditor, on the basis of such Recovery Certificates dated 07th June, 2017, the Financial Creditor filed Application under Section 7 of IBC on 05th October, 2018 and sought initiation of CIRP against the Corporate Debtor claiming Rs. 835,93,52,369/- which Application has been admitted on 20th September, 2019 by the Impugned Order.

The above history of developments is not in controversy.

6. The Appeal claims that when Financial Creditor filed the Application before Adjudicating Authority the Application Form-I did not disclose any date of default in the Application. The date of default cannot be said to be within three years. It is claimed that the amount claimed by the Financial Creditor in the Application has also been claimed by the Financial Creditor in the claims filed before Resolution Professional in CIRPs which have been initiated against M/s. Gemini Arts Pvt. Ltd. and M/s. Green Gardens Pvt. Ltd. based on the Debt Recovery Certificates No. 145/17 and 245/17 respectively and this was suppressed from Adjudicating Authority. It is claimed and argued that the Financial Creditor could not have filed Application under Section 7 as the said amount had already been claimed in other CIRP Process and thus the Application filed was not with intention to bring about Resolution of the Corporate Debtor.

7. When this Appeal had come up before us for arguments, the Learned Counsel for the Appellant did not argue or raise questions that the CIRP was

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initiated fraudently or with malicious intention (as was raised when the Appeal had come up for admission on 06th December, 2019). The issue does not appear to have been duly raised with required particulars and averments in the Appeal and thus we need not go into that aspect.

8. We are thus required to look into the question of Limitation which has been raised by the Learned Counsel for the Appellant.

9. When we have gone through the Impugned Judgment/Order passed by the Adjudicating Authority what we have noticed is that in Paragraphs 1 to 7 of the Impugned Order, the Adjudicating Authority referred to case put up by Financial Creditor and various proceedings which took place between the parties (To which we have referred above) and then in Paragraphs 8 and 9 observed as under:

> *"8.The Corporate Debtor have filed reply and raised an objection with regard to the authorization for the purpose of filing Application and further objected that the Applicant is not a Financial Creditor to the Corporate Debtor and the Corporate Debtor is liable to offer only the mortgaged assets, in the event if it is held liable to pay. The Corporate Debtor has also stated in its Reply that the Financial Creditor has expressly denied the existence of any security and they are attempting to play a fraud on the Courts and this Tribunal. Based on this, it has been submitted that the Financial Creditor is not entitled to any of the reliefs.*
>
> *9. Besides this, there does not appear any valid defence to be raised by the Corporate Debtor. The issues which have been raised by the Corporate Debtor are an afterthought*

> *and are not substantiated with any of the documentary evidence. The defence is mere bluster, spurious and only to derail the process of adjudication. Therefore, the defence projected by the Corporate Debtor is completely hollow and stands rejected. On the other hand, the Counsel for the Financial Creditor has placed all the relevant documentary evidence on record by which the default on the part of the Corporate Debtor is ascertained."*

The Adjudicating Authority proceeded to admit the application and pass consequential orders. Thus the above only is that observation of Adjudicating Authority with regard to merits. Paragraph 9 of the Impugned Order makes it clear that the Adjudicating Authority has hardly recorded any reasons and proceeded to admit the Application under Section 7 of IBC.

10. At the time of arguments, the Learned Counsel for the Appellant referred to the developments of various matters between the parties to submit that when the accounts of the Borrower Entities were classified as NPA in 1997 even if the suits were filed in the High Court within time, the filing of the suit or filing of the OAs before DRT would not extend the period of Limitation. It is argued that although the Winding up Notice was issued on 06th May, 2008 under Section 433 and 434 of the Companies Act, 1956, no Winding up proceedings were filed. Thus, according to the Learned Counsel the Application filed under Section 7 on 05th October, 2018 was time-barred and Adjudicating Authority should have dismissed the Application on this ground alone. It is argued referring to the copy of the Application under Section 7 (Annexure A11)

Page 181 that the format did not mention the date of default and this was because the debt was already in default since November, 1997 and the Application was time-barred. According to the Learned Counsel on the strength of Recovery Certificate obtained in 2017, the Application under Section 7 could not have been maintained for default which was more than three years old considering the Article 137 of the Limitation Act, 1963.

11. Against this, the Learned Counsel for the Respondent No. 1/Financial Creditor referred to Judgment in the matter of *Innoventive Industries Ltd. vs. ICICI Bank & Anr. (2018) 1 SCC 407* to submit that the Hon'ble Supreme Court has held that the "debt" means liability of obligation in respect of a "claim" and "claim" means a right to payment even if it is disputed. It is argued that the Adjudicating Authority was required to only see whether there is a debt in default which is of more than Rs. 1 lakh. Ld. Counsel referred to Judgment of Hon'ble Supreme Court of India in "B.K. Educational Services (P.) Ltd. Vs. Parag Gupt" (MANU/SC/1160/2018) to submit that Hon'ble Supreme Court has held that the Limitation Act is applicable from the inception of the Code, and Article 137 of the Limitation Act gets attracted; that, "right to sue" accrues when a default occurs. Learned Counsel has further submitted that the Hon'ble Supreme Court in the matter of *Vashdeo R Bhojwani vs Abhyudaya Co-operative Bank Ltd* & *Anr*. (2019) 9 SCC 158 held that the right to suit is triggered when the Recovery Certificate was issued and non-payment of debt after issuance of the Recovery Certificate would not be regarded as a continuing wrong so as to give a continuing cause of action. It is argued that

the Judgment in the matter of *Vashdeo R Bhojwani vs. Abhyudaya Co-operative Bank Ltd* & *Anr*. shows that the right to suit got triggered from the date of issuance of Debt Recovery Certificate. Learned Counsel argued that such Certificate was issued on 20th June 2017 and thus the Application filed in 2018 was within Limitation.

12. We have heard the Learned Counsel for the parties in detail with regard to the issue of Limitation.

In Judgment dated 11.10.2018 in the matter of "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates" (Manu/SC/1160/2018) Hon'ble Supreme Court of India looked into the scheme of IBC and in Paragraph 27 observed as under:

> *"27. 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."*

13. In Judgment dated 18.09.2019 in the matter of *Gaurav Hargovindbhai Dave vs Asset Reconstruction Company (I) Ltd. & Anr. (2019) SCC Online SC 1239,* the facts of that case show that in that matter of *Gaurav Hargovindbhai Dave vs Asset Reconstruction Company (I) Ltd. & Anr.* the Respondent No. 2 was

declared NPA on 21.07.2011. At that point of time State Bank of India filed two OAs in DRT in 2012 to recover the total debt due in that matter. State Bank of India assigned its debt in 2014 to the Respondent No. 1/Asset Reconstruction Company. DRT by Judgment dated 10th June, 2016 held that the OAs were not maintainable. Against this, Applications were filed before Gujrat High Court. The High Court remanded the matter. The SLP filed in Supreme Court came to be dismissed. Thereafter the Respondent No. 1 on 03rd October, 2017 filed Application under Section 7 of IBC. The date of default was shown as 21.07.2011. NCLT applied Article 62 of Limitation Act relating to mortgage to hold the matter in Limitation. This was challenged before NCLAT and this Tribunal had held that Limitation would run only from 01st December, 2016 when IBC came into force and dismissed the Appeal. With such set of facts, the observations of the Hon'ble Supreme Court in Paragraph 7 of the Judgment were as under:

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> *"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."*

It can be seen that in spite of filing of OAs within Limitation, the Hon'ble Supreme Court accepted the submissions that the time of Limitation when it began running on 21.07.2011, the Application under Section 7 filed on 03.10.2017 was time-barred. Thus, it appears to us that the filing of OAs and pendency of the same did not extend the time for the Financial Creditor, in independent proceeding under IBC.

14. Then, there is Judgment in the matter of *Jignesh Shah. Vs. Union of India (2019) SCC Online SC 1254.* In Paragraph 4 of the Judgment, the Hon'ble Supreme Court of India initially referred to the controversy as was arising in the Writ Petition No. 455 of 2019.

14.1. Briefly the facts may be referred from the Judgment. What appears is that on 20th August, 2009 a Share Purchase Agreement was executed between Multi Commodity Exchange India Ltd. (MCX), Multi Commodity Stock Exchange Ltd. (MCX-SX) and IL&FS whereby IL&FS had agreed to purchase 442 lakh equity shares of MCX Stock Exchange Ltd. from MCX. Pursuant to the Agreement La-Fin Group Company of MCX issued "Letter of Undertaking" on 20th August, 2009 stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX Stock Exchange after a period of one year but before a period of three years, from date of investment. Hon'ble Supreme Court of India observed that on facts, this period of three years would expire in August, 2012.

14.2. It was noticed that IL&FS by Letter dated 03rd August, 2012 exercised the option to sell its entire holding of shares to MCX Stock Exchange and called upon La-Fin to purchase the shares as per the "Letter of Undertaking". On 16th August, 2012 La-Fin replied that it was under no legal or contractual obligation to buy the said shares.

14.3. Subsequent to this, on 19th June, 2013 IL&FS filed suit before Bombay High Court showing cause of action as dated 16.08.2012. On 3rd November, 2015 Statutory Notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS to La-Fin and on 21st October, 2016 a Winding up Petition came to be filed under Section 433 (e) of the Companies Act, 1956.

14.4. IBC came into force on 01st December, 2016 and as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the Winding up Petition was transferred to NCLT as a Section 7 Application indicating the date of default as on 19th August, 2012. The Application came to be admitted and the Appeal to this Tribunal was dismissed holding that bar of limitation would not be attracted as Winding up Petition was filed within three years of the date on which the Code came into force. Against such Judgment of this Tribunal matter was carried to the Hon'ble Supreme Court.

14.5. In this matter of *Jignesh shah. Vs. Union of India* the Learned Sr. Advocate Dr. Abhishek Manu Singhvi raised issue of the statutory bar of Limitation. The Hon'ble Supreme Court has recorded submissions of the Counsel in Paragraph 5 of the Judgment. Part of the submissions may be reproduced for context. The same are as under:

> *"…….Inasmuch as the Winding up Petition that has been transferred to the NCLT was filed on 21st October,2016, i.e. beyond the period of three years prescribed (as the cause of action had arisen in August, 2012), it is clear that a time-barred Winding up Petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the Code filed within time, by virtue of the transfer of such petition……"*

14.6. After referring to arguments of Advocates for IL&FS the Hon'ble Supreme Court first adverted to the decision in the matter of *B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates* in which Section 238 A of the Code relating to the Limitation was considered. The Hon'ble Supreme Court in Paragraph 8 to 11 of the Judgment in the matter of *Jignesh Shah Vs. Union of India* reproduced portion from Judgment in the matter of *B.K. Educational Services Pvt. Ltd.* and after referring to the said Judgment observed in Paragraph 12 and 13 as under:

> *"12. This Judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238 A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up Petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238 A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the*

Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL&FS, default in repayment had occurred, it is barred by time.

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."

(Emphasis Supplied)

14.7. The Hon'ble Supreme Court in Paragraphs 13 to 20 of the Judgment in the matter of *Jignesh Shah Vs. Union of India* made brief reference to those Judgments in context as underlined above and Paragraph 21 observed as under:

"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."*
>
> *(Emphasis Supplied)*

14.8. It was then observed and held in Paragraph 27 of the Judgment as follows:

> *"27. It is clear that IL&FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL&FS, in repayment of which default has taken place."*

For such and other reasons, the Hon'ble Supreme Court allowed the Appeal which was filed before it and held that Winding up Petition filed on 21st October, 2016 being beyond the period of three years mentioned in Article 137 of the Limitation Act was time-barred and cannot be proceeded with any further.

15. It is quite clear from the above that although the suit was filed in time the Winding up Petition was beyond three years of the default and when such Winding up Petition was transferred in view of the Rules to the NCLT to convert the same into a proceeding under Section 7 of IBC, it was found that as the Winding up Petition itself was time-barred from the date of default, the same could not be proceeded further as Application under Section 7.

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16. Keeping the above Judgment in view, when developments in the present matter are seen, if IBHL classified the Borrower Entities as NPA in November, 1997, even if the suits were filed in 1998 and 1999, that would not be relevant or helpful to extend time of Limitation for the purpose of filing of Application under Section 7 of IBC which is independent proceeding required to be filed as per Article 137 of the Limitation Act within three years of default. When time begins to run it can only be extended in the manner provided in the Limitation Act, has been held. Proceedings under the IBC are not execution proceedings either for the decree which was obtained or for execution of the Certificates of Recovery which have been issued by DRT. The Learned Counsel for the Financial Creditor has not shown under which provision of Limitation Act, time which had started running in November, 2007, could be extended. If filing of Suit or O.A. does not extend time, or give right to exclude period for a Winding up Proceeding, it can not extend period for an independent right under IBC. Consequently passing of Decree or issue of Recovery Certificate will not give fresh right to trigger IBC.

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17. It has been argued by the Learned Counsel for the Respondent that present matter had triggered point from the date of issue of Debt Recovery Certificates. It would be appropriate to reproduce portion of Reply (Diary No. 18053) to see as to what is the argument being raised. In reply Paragraph 5 (c) it is stated as under:

> *"c) In the present case, the Answering Respondent, the Borrower Entities and the Corporate Debtor, as its Corporate Guarantor/Mortgagor, entered into a*

compromise/consent, wherein the Corporate Debtor guaranteed the repayment of the dues of the Borrower Entities. Pursuant thereto, the Hon'ble Madras High Court, in the CS No. 52/1999, CS No. 33/1999, and CS No. 1023/1998, vide a common judgment and consent decree dated 26.03.2007, recorded the compromise between the parties to the Suits. Since the Corporate Debtor and/or the Borrower Entities failed to make payments under the compromise/consent decree to the Answering Respondent, the Answering Respondent, issued a Demand Notice dated 26.09.2007 under Section 13 (2) of the SARFAESI Act to the entities and the corporate debtor. Thereafter, the Answering Respondent issued a Possession Notice dated 10.01.2008 to the entities and the Corporate Debtor under Section 13 (4) of the SARFAESI Act. Since, the entities and the corporate debtor neglected to make the payments, the answering respondent issued a Winding up Notice dated 06.05.2008 under Sections 433 and 434 of the Companies Act, 1956 to the corporate debtor. Thereafter, since the entities and/or the corporate debtor failed to make payments, the answering Respondent filed Applications under Section 31(A) of the DRT Act before the Ld. DRT, for issuance of Debt Recovery Certificates in terms of the compromise/consent Decree dated 26.03.2007 in CS No. 52/1999, CS No. 33/1999, and CS No. 1023/1998 . The Ld. DRT allowed all the said three OAs and has issued Recovery Certificates dated 20.06.2017 against the said entities and the Corporate Debtor under the provisions of the DRT Act. Hence, the right to sue, in the present case, triggered from the date of issuance of the Debt Recovery Certificates i.e. on 20.06.2017. The answering Respondent

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seeks to rely upon the judgment of the Hon'ble Supreme Court of India ***in Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.*** *wherein the Hon'ble Apex Court while holding an Application under Section 7 of the Code seeking initiation of CIRP as time barred has held that the right to sue is triggered when the recovery certificate was issued and that non-payment of debt after the issuance of the recovery certificate would not be regarded as a continuing wrong so as to give rise to a continuing cause of action."*

(Emphasis Supplied)

18. The Reply itself shows that the Financial Creditor has constantly referred to defaults after defaults on the part of the Corporate Debtor right from November, 1997. The IBHL classified Borrower Entities as NPA in November, 1997. It is stated that there were defaults which led to filing of Civil Suits in 1998 and 1999. There was compromise on 07th August, 2006 which was recorded in High Court on 26th March, 2007. In spite of the decrees which were passed there was failure to make payment (and thus again, alleged default) which led to issue of Demand Notice under Section 13 (2) of SARFAESI Act. In spite of the Notice, there was default and thus Possession Notice was issued on 10Th January, 2008 under Section 13 (4) of SARFAESI Act. Reply shows that Financial Creditor claimed that still Corporate Debtor neglected to pay and so Winding up Notice dated 06th May, 2008 was issued under Section 433 and 434 of Companies Act, 1956. Still there was failure and so under Section 31 (A)

of the DRT Act DRT was moved in 2008 leading to certificates being issued in 2017.

19. It has already been held by the Hon'ble Supreme Court that when there is default and the Account is classified as NPA the time would start running. When this is so, if filing of the suit or filing of OAs did not extend the time, the question is whether consequential issuing of Recovery Certificate would trigger a fresh cause of action for filing Application under Section 7 of IBC. Clearly this is not so keeping in view above Judgments. The Learned Counsel for the Respondent No. 1 appears to be not properly reading the Judgment in the matter of *Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.* To complete the narration it would be appropriate to reproduce the Judgment as it is, as the same is not very long. The Judgment in the matter of *Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.* reads as under:

> *"1. In the facts of the present case, at the relevant time, a default of Rs. 6.7 Crores was found as against the Respondent No. 2. The Respondent No. 2 had been declared a NPA by Abhyudaya Co-operative Bank Limited on 23.12.1999. Ultimately, a Recovery Certificate dated 24.12.2001 was issued for this amount. A Section 7 petition was filed by the Respondent No. 1 on 21.07.2017 before the NCLT claiming that this amount together with interest, <u>which kept ticking from 1998</u>, was payable to the respondent as the loan granted to Respondent No. 2 had originally been assigned, and, thanks to a merger with another Cooperative Bank in 2006, the respondent became a Financial Creditor to whom these moneys were owed. <u>A petition under Section 7</u>*

was admitted on 05.03.2018 by the NCLT, stating that as the default continued, no period of Limitation would attach and the petition would, therefore, have to be admitted".

2. An appeal filed to the NCLAT resulted in a dismissal on 05.09.2018, stating that since the cause of action in the present case was continuing no Limitation period would attach. It was further held that the Recovery Certificate of 2001 plainly shows that there is a default and that there is no statable defence.

3. Having heard learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in "B.K. Educational Services Private Limited vs. Parag Gupta and Associates", 2018 (14) Scale 482, para 27 of which reads as follows: -

> *"27. 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."*

4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which Limitation would be saved in the present case. This

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contention is effectively answered by a judgment of three learned Judges of this Court in "Balkrishna Savalram Pujari and Others vs. Shree Dnyaneshwar Maharaj Sansthan& Others", [1959] supp. (2) S.C.R. 476. In this case, this Court held as follows:

> *"... ... . In dealing with this argument it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterized as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the trustees, act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had*

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injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued…."
(At page 496)

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.
5. This being the case, and the claim in the present suit being time barred, there is no debt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. There will be no order as to costs."

(Emphasis supplied)

20. The Learned Counsel for Financial Creditor appears to us to be trying to misread the last part of the paragraph 4 of the above Judgment to submit that right to sue is triggered when Recovery Certificate is issued and non-payment of debt after issuance of the Recovery Certificate would not be regarded as a continuing wrong to give rise to continuing cause of action. We are unable to read the last part as saying that right to sue is triggered when recovery certificate is issued. It is rather speaking of cessation of right, rather than trigger. Perusal of the Judgment in the matter of *Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.* shows that in that matter the Respondent No. 2 had been declared NPA by the Co-operative Bank on 23rd December, 1999. Recovery Certificate dated 24th December, 2001 was issued

for such amount. Section 7 Application was filed on 21st July, 2017 claiming that the amount together with the interest which "Kept ticking from 1998" was payable. (Default in that matter appears to have been of 1998). It is these words which have reflected in the final part of the Judgment where it was observed that the Certificate injured effectively and completely the right of Appellant which "would have begun ticking" as a result of the Limitation Act, Rights, as a result of which Limitation "would have begun ticking" were injured effectively and completely when Recovery Certificate was issued. This is what appears to us from reading the Judgment.

21. Earlier in the matter of *Digamber Bhondwe Vs. JM Financial Asset Reconstruction in* Company Appeal (AT) (Ins.) No. 1379 of 2019 also the Learned Counsel therein had claimed that the date of NPA was to be ignored and Limitation was to be counted from the date of Recovery Certificate for Section 7 of IBC. We had at that time gone into details and for reasons recorded concluded that we are unable to accept the submissions that date of NPA was to be ignored and Limitation was to be counted from the date of Recovery Certificate. Even now, for reasons recorded by us in the Judgment of *Digamber Bhondwe Vs. JM Financial Asset Reconstruction,* when we have revisited the Judgment in the matter of *Vashdeo R Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Anr.* we are unable to agree that the Judgment gives a fresh date to trigger Application under Section 7 of IBC.

22. For the above reasons, we find that there is substance in the submissions made by the Learned Counsel for the Appellant that the Application in the present matter was hopelessly time-barred. The Adjudicating Authority failed to see that the Financial Creditor had not indicated date of default in the format. The Adjudicating Authority was duty bound under Section 3 of the Limitation Act, 1963 to suo motu consider if or not the Application under Section 7 of IBC was within Limitation by considering if or not the debt said to be in default was within Limitation.

23. For the above reasons, the Appeal is allowed. The Impugned Order is quashed and set aside. The CP/1352/IB/2018 filed by the Respondent No. 1/Financial Creditor is quashed and set aside. The Respondent No. 1 /Financial Creditor shall be liable to pay the fees and CIRP expenses incurred. The IRP/RP shall present particulars of the fees and CIRP expenses before the Adjudicating Authority and the Adjudicating Authority is requested to pass necessary orders to recover the same from Respondent No. 1/Financial Creditor/Kotak Mahindra Bank Ltd.

24. The IRP/RP will hand over the management and documents etc. of the Corporate Debtor back to the Directors of the Corporate Debtor.

No orders as to costs.

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

[V.P. Singh]
Member (Technical)

Basant B.