A M/S. RADHA EXPORTS (INDIA) PVT. LIMITED

v.

K.P. JAYARAM & ANR.

(Civil Appeal No. 7474 of 2019)

AUGUST 28, 2020

B **[ARUN MISHRA AND INDIRA BANERJEE, JJ.]**

Insolvency and Bankruptcy Code, 2016 – s.7 – Companies Act, 1956 – Limitation Act, 1963 – Clauses (19) to (21) of Part II of the Schedule – The respondents filed a petition on 25.04.2018 u/s.7 of the IBC, as 'Financial creditor', claiming principal amount C *of Rs.2.10 crores together with interest – According to the appellant company, Rs.80,40,000/- was repaid to the respondents between 2003 to 2004 – Further, respondents requested to convert Rs.90,00,000/- from the outstanding loan as share application money for issuance of shares in the appellant company in name of* D *respondent no. 2, which was later requested to be treated as the said share application of 'MK' and to treat the same as loan from respondent no. 2 – Also, during the period from 2004 to 2006, the appellant company paid Rs.43,25,000/- to the respondents and with that payment the loan liability was completely liquidated – The NCLT vide its judgment and order dated 19.12.2018 held that the* E *respondents were not Financial creditors of the appellant company and the claim of the respondents was barred by limitation – Further, it was held that the respondents had failed to prove that there was any debt due from the appellant company to the respondents, observing that the appellant company had produced proof of* F *payments – By the impugned judgment and order dated 02.09.2019 the Appellate Tribunal set aside the order dated 19.12.2018 of the NCLT – On appeal, held: Under clauses (19) to (21) of Part II of the Schedule of the Limitation Act 1963, the period of limitation for initiation of a suit for recovery of money lent, is three years from the date on which the loan is paid – In the instant case, the last loan* G *was advanced in 2004-2005 – Apparently, the debt was barred by limitation even in the year 2012, when winding up proceedings of the appellant company were initiated in the Madras High Court by the respondents – The NCLT rightly refused to admit the application u/s. 7 of the IBC, holding the same barred by limitation – The*

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Appellate Tribunal erred in law in reversing the judgment and order of the earlier Adjudicating Authority – Disputes as to whether the signatures of the respondents are forged or whether records were fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings u/s. 7 of IBC – Even otherwise, the application u/s. 7 of the IBC was not maintainable – As the payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt – The NCLT rightly held that there was not financial debt in existence – Thus, impugned judgment and order of the Appellate Tribunal is set aside and the order of the Adjudicating Authority dismissing application is restored.

Allowing the appeal, the Court

HELD: 1. It was for the applicant invoking the Corporate Insolvency Resolution Process, to *prima facie* show the existence in his favour, of a legally recoverable debt. In other words, the respondent had to show that the debt is not barred by limitation, which they failed to do. [Para 36][286-E]

2. Under clauses (19) to (21) of Part II of the Schedule of the Limitation Act 1963, the period of limitation for initiation of a suit for recovery of money lent, is three years from the date on which the loan is paid. The last loan amount is said to have been advanced in 2004-2005. In the winding up petition, there is not a whisper of any agreed date by which the alleged loan was to be repaid to the Respondents. In the instant case, apparently the debt was barred by limitation even in the year 2012, when winding up proceedings were initiated in the Madras High Court. [Para 37][286-E-G]

3. The NCLT rightly refused to admit the application under Section 7 of the Insolvency Bankruptcy Code, 2016, holding the same to be barred by limitation. The Appellate Tribunal has erred in law in reversing the judgment and order of the earlier Adjudicating Authority. The Adjudicating Authority rightly rejected the application as barred by limitation. The Appellate Authority patently erred in law in reversing the decision of the adjudicating authority and admitting the application. [Para 38][286-G]

4. As recorded in the said order dated 19th December, 2018 passed by the NCLT Chennai, the Respondent Nos. 1 and 2 jointly addressed the letter dated 11th January, 2011 to the Income Tax Department confirming that the Respondent No.1 had requested the Appellant Company to transfer a sum of Rs.90 lakhs to his wife, the Respondent No.2 for allotment of shares in the Appellant Company and further acknowledged that the amount outstanding from the erstwhile firm to the Respondent was Rs.1,39,60,000/- as on 31st March, 2004. The said letter has been extracted in full in Paragraph (9) of the judgment and order dated 19th December, 2018 of NCLT. [Para 39][287-A-C]

5. There are, as observed above cogent records including etters signed by the Respondent Nos. 1 and 2 which evince that on 6th October, 2007, Respondent No.2 resigned from the Board of the Appellant Company and at that time the Respondent No.2 requested the Appellant Company to treat the share application money of Rs.90,00,000/- as share application money of 'MK' and to issue shares for aforesaid value to 'MK'. The amount was to be treated as a personal loan from the Respondent No.2 to 'MK'. A personal Loan to a Promoter or a Director of a company cannot trigger the Corporate Resolution Process under the IBC. Disputes as to whether the signatures of the Respondents are forged or whether records have been fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under Section 7 of the IBC. [Para 40][287-C-E]

6.1 Even otherwise, the application under Section 7 of the IBC was not maintainable. As rightly held by the NCLT there was no financial debt in existence. [Para 42][287-G-H]

6.2 The payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt. Shares of a company are transferable subject to restrictions, if any, in its Articles of Association and attract dividend when the company makes profits. [Para 43][290-F]

Innoventive Industries Ltd. v. ICICI Bank and Anr. **(2018) 1 SCC 407 : [2017] 8 SCR 33;** *B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates* **(2019) 11 SCC 633 : [2018] 12 SCR 794 – relied on.**

Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. **(2019) 9 SCC 158 : [2019] 12 SCR 75 – referred to.**

Case Law Reference

[2017] 8 SCR 33	**relied on**	**Para 32**
[2018] 12 SCR 794	**relied on**	**Para 34**
[2019] 12 SCR 75	**referred to**	**Para 35**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7474 of 2019.

From the Judgment and Order dated 02.09.2019 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT)(INS) No. 224 of 2019.

C. A. Sundaram, Sr. Adv., P. I. Jose, Prashant K. Sharma, Jenis Francis, Ramakrishnan N., Abhishek Gupta, Ms. Rohini Musa, Zafar Inayat, Anupam Mishra, Advs. for the Appellant.

M. K. S. Menon, Sashank Menon, Ms. Malini Poduval, Advs. for the Respondents.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

1. This appeal, under Section 62 of the Insolvency and Bankruptcy Code, 2016, is against a judgment and order dated 2nd September, 2019 of the National Company Law Appellate Tribunal (NCLAT), New Delhi, hereinafter referred to as "the Appellate Tribunal", allowing Company Appeal (AT) (INS) No.224 of 2019 against an order dated 19th December, 2018 passed by a Division Bench of the National Company Law Tribunal (NCLT) at Chennai, rejecting the application filed by the Respondents under Section 7 of the Insolvency and Bankruptcy Code, 2016, *inter alia,* on the ground that the alleged claim of the Respondents was barred by limitation, on the date on which the said application had been filed.

2. It is the case of the Appellant Company, that the Respondents were closely acquainted with one Mr. M. Krishnan, and Mrs. Radha Gouri, who were the promoters of the Appellant Company.

3. Between 1st November, 2002 and 12th September 2003, the Respondents had advanced an aggregate sum of Rs.2.10 crores, in tranches, to M/s Radha Exports, a proprietorship concern of Mrs. Radha Gouri, for its business purposes.

A 4. In 2004-2005, the Respondents advanced a further sum of Rs.10 lakhs to the said proprietorship concern, M/s Radha Exports. The said M/s Radha Exports thus obtained total loan of Rs.2.20 crores from the Respondents, during the period between 2002 and 2004. The loan was unsecured and free of interest.

B 5. According to the Appellant Company, M/s Radha Exports repaid Rs.80,40,000/- to the Respondents between 1st October, 2003 to 18th March 2004. As recorded in the judgment and order dated 19th December, 2018 of the NCLT, the Respondent Nos. 1 and 2 jointly wrote a letter dated 11th January, 2011 to the Deputy Commissioner of Income Tax, Company Circle V (3), Chennai, where they stated that, as on 31st March, C 2004, the said proprietorship concern M/s Radha Exports had a loan liability of Rs.1,39,60,000/- (Rs.2,20,00,000/- less Rs.80,40,000/-) to the Respondents. The Respondents have, in the aforesaid letter, stated that they had given a further loan of Rs.10 lakhs to M/s Radha Exports, between 2004 and 2005. The said letter is reproduced in full, in the D judgment and order dated 19th December, 2018, of the NCLT.

6. The Appellant Company was incorporated under the Companies Act, 1956 on or about 19th July, 2004, to take over the business of the proprietorship concern, M/s Radha Exports, along with its assets and liabilities. The Appellant Company states that as on 19th July, 2004, the proprietorship concern, M/s Radha Exports had a loan liability of E Rs.1,11,85,350/-, which was taken over by the Appellant Company.

7. On 19th July, 2004, when the Appellant Company was incorporated as a Private Limited Company, to take over and continue the business of the proprietorship concern, M/s Radha Exports, the Respondents requested the Appellant Company to convert a sum of F Rs.90,00,000/- from out of the said outstanding loan as share application money for issuance of shares in the Appellant Company, in the name of the Respondent No.2, and the same was confirmed by the Respondents, by their aforesaid letter dated 11th January, 2011 addressed to the Deputy Commissioner of Income Tax, Company Circle V(3), Chennai. The said letter, a copy of which is enclosed to the Paper Book, reads: G

> "*..I have requested to transfer a sum of Rs. 90,00,000/- (Rupees Ninety Lakhs) to my wife A/c. Mrs. Shoba Jayaram for allotment of shares in Radha Exports (I) Pvt. Ltd...*"

8. Accordingly, a sum of Rs.90,00,000/- was adjusted by the Appellant Company, as share application money, for issuance of shares H

in a Appellant Company in the name of the Respondent No.2. Thereafter, the balance loan liability of the company was Rs.21,85,350/-.

9. According to the Appellant Company, during the period from 27th July, 2004 to 23rd March, 2006, the Appellant Company paid Rs.43,25,000/- to the Respondents, which included the balance loan of Rs.21,85,350/- payable by M/s Radha Exports. The loan liability, which the Appellant Company had taken over from the proprietorship concern was, according to the Appellant Company, completely liquidated by March, 2006. Particulars of the payments have been given in detail in paragraph (12) of the judgment and order of the NCLT dated 19th December, 2018 and are supported by Bank Statements being Annexure A1 filed before the NCLT. The last payment appears to have been made on 23.03.2006.

10. On or about 6th October, 2007, the Respondent No.2 resigned from the Board of the Appellant Company. At the time of resignation, the Respondent No.2 requested the Appellant Company to treat the share application money of Rs.90,00,000/- as share application money of Mr. M Krishnan and to issue shares of the value of Rs.90,00,000/- in the name of Mr. M. Krishnan. The amount of share application money of Rs.90,00,000/- transfered to Mr. M. Krishnan, was to be treated as a personal loan from the Respondent No.2 to the said Mr. M. Krishnan.

11. By another letter dated 11th January, 2011 addressed to the Deputy Commissioner of Income Tax, Company Circle V(3), Chennai, being Annexure A-4 to the reply filed by the Appellant Company, the Respondent No.2 confirmed that she had requested the Appellant Company to allot shares in the name of the said Mr. M. Krishnan against her share application money, which the said M. Krishnan had agreed to treat, as his personal loan from the Respondent No.2 and pay her the amount at a later date.

12. The Appellant Company claims to have issued shares of the value of Rs.90,00,000/- in the name of Mr. M. Krishnan in 2008. According to the Appellant Company, there is thus, no further liability to be discharged by the Appellant Company to the Respondents. After 23rd March, 2006, there had been no financial transaction between the Appellant Company and the Respondents.

13. However, by a legal notice dated 19th November, 2012, the Respondents called upon the Appellant Company to repay to the Respondents a sum of Rs.1,49,60,000/- alleged to be the outstanding

A debt of the Appellant Company, repayable to the Respondents as on 19th July, 2004.

14. By a letter dated 5th December, 2012, the Appellant Company refuted the claim of the Respondents, whereupon the Respondents filed petition being CP No.335 of 2013 in the High Court of Madras under Sections 433 (e) & (f) and 434 of the Companies Act 1956, for winding up of the Appellant Company. The said petition was transferred to the Chennai Bench of NCLT and re-numbered TCP/301/(IB)/2017.

15. The averments made in the winding up petition *ex facie* show that the claim of the Respondents was hotly disputed. In that the Respondents claimed that letters attributed to them, even letters addressed by them to the Income Tax Authorities were forged. Some of the averments are extracted hereinbelow:

"6. …….*The petitioners state that the respondent's directors who pretended to be the well-wishers of the petitioners, knew all the facts and stopped paying the interest intermittently till 2007. Adding insult to the injury, the respondent's company created a fraudulent sale deed and the sale consideration is a circuitous fraudulent transaction which will clearly prove the fraud, cheating, forgery and various other criminal offences of the respondent. The respondent have illegally grabbed the residential house of the petitioners. The petitioners had already filed a Civil Suit in C.S. No.66 of 2013 in the Original Side of the Hon'ble High Court of Judicature at Madaras.*

7. The Petitioners issued a statutory notice of demand on 19.11.2012 for claiming the amount from the respondent company and its directors and they gave a reply on 05.12.2012 making unwanted, unnecessary and defamatory allegations against the 1st petitioner, who had helped the directors of the respondent company for purchasing a flat in which they presently reside and for the entire capital for running the respondent company. In para 3 of the said reply, the respondent asked for details of the payments made by the petitioners to the respondent. But in para 12, the respondent company had stated that the transactions have been placed before the Income Tax Department, for which the petitioners had signed the affidavits. The allegations are contradictory

to each other and it reveals rank forgery committed by the respondents to 1 to 3.

8. The Petitioners had not signed any documents or blank papers or any affidavits to the respondent or its directors. The directors of the respondent company are capable of forging the signatures of the petitioners, which has been proved on various occasions..."

xxx xxx xxx

10. The petitioners state that from the reply notice given by the advocate, it is clearly understood that the respondent and its directors had forged the signatures of the petitioners to the Income Tax Department....

11. The petitioners states that the petitioners had verified the records of the Registrar of Companies, Chennai and found that the 2nd petitioner's signature had been forged in the resignation letter, which has been forged immediately after the fraudulent sale deed. The respondent company and directors had even forged the signatures in the application for Director's Identification Number and the forgery is the peak of fraud and cheating committed by the respondent company and its directors not only against the petitioners, but also against the Government Departments.

15. The petitioner states that the directors of the respondent company had forged the signatures of the 2nd petitioner. In all the documents submitted to the Registrar of Companies from the inception of the respondent company including the resignation and the DIN Application form and obtained DIN number to remove the 2nd petitioner from the directorship, which the directors of the respondent company made the 2nd petitioner as a director to their convenience."

16. Allegations of forgery and fraud are not decided in proceedings under Sections 433 and 434 of the Companies Act 1956 for winding up of a company. Such disputes necessarily have to be adjudicated in a regular suit, on the basis of evidence, including forensic examination reports.

17. By an order dated 4th August 2017 the NCLT dismissed the said winding up petition, on the ground that the Respondents had failed to comply with the provisions of Section 7(3)(b) of the Insolvency and

A Bankruptcy code, 2016, hereinafter "IBC", with the liberty to file a fresh petition, if so advised.

18. On 7th December 2017, the Respondents issued a fresh demand notice to the Appellant Company. By a letter dated 14th December 2017, the Appellant Company refuted the claims in the demand notice dated
B 7th December 2017, *inter alia* claiming that all amounts due and payable by the Appellant Company or its predecessor-in-interest to the Respondents, had duly been paid within 2007 and 2008.

19. The Respondents, thereafter, filed a petition being CP/77/(IB)/CB/2018 under Section 9 of the IBC, in the NCLT (Chennai Bench) claiming to be an operational creditor of the Appellant Company, within
C the meaning of Section 9 of the IBC and claiming from the Appellant Company Rs.2.10 Crores as principal and Rs.2,31,60,000/- towards interest at the rate of 24% per annum , from the year 2007.

20. For the purpose of this appeal, it is not necessary for this Court to examine the discrepancies between the claim in the winding up
D petition and the claim in the petition under Section 9 of the IBC.

21. By an order dated 12th April 2018, a Single Bench of NCLT dismissed CP/77/(IB)/CB/2018 filed by the Respondent No.1, claiming himself to be an 'Operational Creditor' under Section 9 of the IBC, as withdrawn, with liberty to file a fresh petition in accordance with law.

E 22. Thereafter, on 25th April 2018, the Respondents filed a fresh petition being WC.P. No.770/IB/CB/C-II/2018 before the NCLT (Chennai Bench) under Section 7 of the IBC, as "Financial Creditor", claiming principal amount of Rs.2.10 Crores together with interest @ 24% per annum from 2007, amounting to Rs. 4,41,60,000/-. The Appellant
F Company filed its counter statement in CP No.770/IB/2018 before the NCLT.

23. By a judgment and order dated 19th December 2018, the NCLT meticulously recorded details of the payments made by the Appellant Company and/or its predecessor in interest to the Respondents, considered the letters written by the Respondents to the Income Tax
G Authorities and dismissed CP No. 770/IB/CB/2018, being the petition filed by the Respondents under Section 7 of the IBC, *inter alia,* holding that the Respondents were not Financial Creditors of the Appellant Company, and in any case the claim of the Respondents was hopelessly barred by limitation. The NCLT held that the Respondents had failed to
H prove that there was any debt due from the Appellant Company, to the

Respondents, observing that the Appellant Company had produced proof of payments.

24. The relevant parts of the said judgment and order of the Chennai Bench of NCLT are extracted herein below for convenience.

"9. To prove that Rs.90,00,000 was treated as share application money, the Corporate Debtor filed a letter (Annexure-A2) these Applicants together addressed to the Income Tax Department on 11.01.2011 confirming the first applicant requesting the corporate debtor to transfer a sum of Rs.90,00,000 to his wife (Second Applicant) for allotment of shares in the Corporate Debtor. Not only about this request, the corporate debtor counsel says, the Applicants themselves stated that they advanced monies to M/s. Radha Exports during the Financial Years 2001-2002, 2002-2003 and 2003-2004 and amount outstanding from the said the partnership firm on 31.03.2004 is Rs.1,39,60,000. The letter dated 11.01.2011 addressed by the Applicants to the Deputy Commissioner of Income Tax is as follows:..."

10. In addition to the above letter, the Corporate Debtor has also placed another letter dated 11.01.2011 Second Applicant addressed to the Deputy Commissioner of Income Tax confirming that she requested the Corporate Debtor to allot shares in the name of First Applicant against her share application money Rs.90,00,000 on the agreement that her husband would pay that money to her later. The corporate debtor has annexed this letter as Annexure-A4 to the reply affidavit filed by the Corporate Debtor.

....

17. Now going through the observations we have noted, now the points for consideration are, as to whether any financial debt is in existence in between the parties as on the date of filing petition u/s 7 of the Code and as to whether, assuming the financial debt is in existence, the debt is barred by limitation or not.

18. It is evident from the facts that first Applicant advanced Rs.2,10,00,000/- Rs.2,20,00,000/- as the case may be, to a partnership firm during the period in between 2002 and 2003. It is also evident on record by 4.07.2004, the same partnership

firm repaid Rs.1,08,14,650. To show that it has been paid, the Corporate debtor has placed proof by submitting copies of the statement of the statement of accounts of various banks reflecting payments made to these Applicants, on the contrary, these Applicants have not placed any material showing as to whether these payments were made or not.

25. In this case, if we go by the case of the Applicant, it is a claim made basing on the money disbursed by way of cheque payment in the year 2002 & 2003. This money was also not disbursed to this Corporate Debtor, it was given to a partnership firm.

26. This Applicant, has not even placed any material disclosing how this debt is still alive after lapse of three years from the date of disbursement. Whenever any claim is made, when it is beyond three years period as envisaged under Article 136 of the Limitation Act, the person making claim is bound to disclose and explain as to how the debt claim is not barred by limitation. No such effort has been made by these Applicants to prove that this is within limitation. Assuming that filing of this Company Petition is continuation to the winding up proceedings filed before the Hon'ble High Court i.e. 15.02.2013, then also, since these Applicants have claimed money was disbursed in the year 2002 to 2003, if the limitation period is computed from the date of disbursement, filing of winding up proceedings would be beyond the period of limitation from the date of disbursement.

27. Given the historical facts available on record, even if the Corporate Debtor statement is taken as true, the limitation would start running from the year 2007. Since the winding up petition was filed in the year 2013, even from the year 2007, these Applicants could have filed winding proceedings within three years from thereof, not in the year 2013, Conceding everything as stated by the applicants, then also the debt claim would remain barred by limitation.

25. On or about 13th February 2019, the Respondents filed Company Appeal (AT) (INS) NO.224/19 before the Appellate Tribunal, challenging the order dated 19th December 2018 passed by the NCLT, dismissing the petition of the Respondents under Section 7 of the IBC.

26. The Appellant Company filed a Counter Statement before the Appellate Tribunal, and the Respondents filed a Rejoinder thereto. Pursuant to the directions of the Appellate Tribunal, additional pleadings were also filed.

27. On 13.08.2019 the Appellant Company caused 'Notice to Produce Documents' to be issued to the Respondents calling upon Respondents to produce certified true copies of the Statement of Accounts of the Respondents maintained with HSBC Bank, Punjab National Bank and Indian Overseas Bank, from which the Respondents claimed to have advanced money to the Appellant Company and also certified true copies of the Statement of Accounts of the Banks, in which the cheques issued by M/s Radha Exports (proprietary concern) were deposited and encashed. It is alleged that the Respondents replied to the Notice to Produce Documents, but did not furnish the documents and/or the details called for by the Appellant Company.

28. On or about 20th August 2019, the Appellant Company filed an Additional Reply Statement, enclosing true copies of the Statement of Accounts of M/s Radha Exports (Proprietary concern), the Appellant Company and Mr. M. Krishnan reflecting the payments made to the Respondents. Under the direction of the Appellate Tribunal, the Appellant Company also filed a Correlation Statement of payment entries, reflected in the Bank Statements and the statements given in the Additional Counter Statement.

29. By the impugned judgment and order dated 2nd September 2019 the Appellate Tribunal allowed the appeal of the Respondents and set aside the order dated 19th December 2018 of the NCLT, dismissing the application under Section 7 of the IBC.

30. It appears that the Appellate Authority was not inclined to accept the submission of the Appellant Company, that the entire amount had been paid, for two purported reasons. The first reason was that the Correlation Statement showed payments of certain amounts amounting to Rs.53,05,000/- in favour of Customs, Chennai and payments amounting to Rs.1,75,000/- in favour of one Mr. Kulasekaran. The Respondents, as Financial Creditors had disputed that these payments were towards the dues of the Financial Creditors. The second reason was that, if the total amount had been paid, there was no reason for the Appellant Company to take the plea that the amount was not payable, the same being barred by limitation.

A 31. It is well settled in law that alternative defences are permissible to contest a claim. It was thus open to the Appellant Company, to refute the claim of the Respondents by taking the plea of limitation and also to contend that no amount was in fact due and payable by the Appellant Company to the Respondents.

B 32. In ***Innoventive Industries Ltd. v. ICICI Bank and Anr.***[1], the Supreme Court observed and held:-

> *"**27**. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is*
> C *defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of*
> D *"claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a*
> E *financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time*
> F *value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.*
>
> ***28**. When it comes to a financial creditor triggering the*
> G *process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-*

H [1] (2018) 1 SCC 407

section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

33. The proposition of law which emerges from ***Innoventive Industries Ltd.*** (supra) is that the Insolvency Resolution Process begins when a default takes place. In other words, once a debt or even part thereof becomes due and payable, the resolution process begins. Section 3(11) defines 'debt' as a liability or obligation in respect of a claim and the claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of Rs.1,00,000/- or more. Once the

A Adjudicating Authority is satisfied that a default has occurred, the application must be admitted, unless it is otherwise incomplete and not in accordance with the rules. The judgment is however, not an authority for the proposition that a petition under Section 7 of the IBC has to be admitted, even if the claim is *ex facie* barred by limitation.

B 34. On the other hand, in ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates***[2]**,** this Court held:-

> *"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."*

D 35. The judgment in ***B.K. Educational Services Pvt. Ltd.*** (supra) was referred to and relied upon by the Court in ***Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd.***[3]**.**

36. It was for the applicant invoking the Corporate Insolvency E Resolution Process, to *prima facie* show the existence in his favour, of a legally recoverable debt. In other words, the respondent had to show that the debt is not barred by limitation, which they failed to do.

37. Under clauses (19) to (21) of Part II of the Schedule of the Limitation Act 1963, the period of limitation for initiation of a suit for F recovery of money lent, is three years from the date on which the loan is paid. The last loan amount is said to have been advanced in 2004-2005. In the winding up petition, there is not a whisper of any agreed date by which the alleged loan was to be repaid to the Respondents. In the instant case, apparently the debt was barred by limitation even in the year 2012, when winding up proceedings were initiated in the Madras G High Court.

38. The NCLT rightly refused to admit the application under Section 7 of the IBC, holding the same to be barred by limitation. The Appellate Tribunal has erred in law in reversing the judgment and order

[2] (2019) 11 SCC 633

H [3] (2019) 9 SCC 158

of the earlier Adjudicating Authority. The Adjudicating Authority rightly rejected the application as barred by limitation. The Appellate Authority patently erred in law in reversing the decision of the adjudicating authority and admitting the application.

39. As recorded in the said order dated 19th December, 2018 passed by the NCLT Chennai, the Respondent Nos. 1 and 2 jointly addressed the letter dated 11th January, 2011 to the Income Tax Department confirming that the Respondent No.1 had requested the Appellant Company to transfer a sum of Rs.90 lakhs to his wife, the Respondent No.2 for allotment of shares in the Appellant Company and further acknowledged that the amount outstanding from the erstwhile firm M/s. Radha Exports to the Respondent was Rs.1,39,60,000/- as on 31st March, 2004. The said letter has been extracted in full in Paragraph (9) of the judgment and order dated 19th December, 2018 of NCLT.

40. There are, as observed above cogent records including letters signed by the Respondent Nos. 1 and 2 which evince that on 6th October, 2007, Respondent No.2 resigned from the Board of the Appellant Company and at that time the Respondent No.2 requested the Appellant Company to treat the share application money of Rs.90,00,000/- as share application money of Mr. M. Krishnan and to issue shares for aforesaid value to Mr. M. Krishnan. The amount was to be treated as a personal loan from the Respondent No.2 to Mr. M. Krishnan. A personal Loan to a Promoter or a Director of a company cannot trigger the Corporate Resolution Process under the IBC. Disputes as to whether the signatures of the Respondents are forged or whether records have been fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under Section 7 of the IBC.

41. It is, however, made clear that the observations made above, with regard to limitation are based on the pleadings and annexures in the winding up proceedings under Sections 433/434 of the Companies Act, 1956 filed in Madras High Court, which were transferred to the NCLT and also the pleadings in CP/77/ (IB)/CB/2018 and WCP No. 770/IB/CB/C-II/2018 filed before the Chennai Bench of NCLT. Any suit filed by the Respondents against Mr. Krishnan or against the company will be decided on its own merits without being swayed by the observations made in this judgment.

42. Even otherwise, the application under Section 7 of the IBC was not maintainable. As rightly held by the NCLT there was no financial debt in existence. In this context, it would be pertinent to refer to the following provisions of the IBC:-

A "3. **Definitions.-** In this Code, unless the context otherwise requires,—

…….

(8) "corporate debtor" means a corporate person who owes a debt to any person;

B …….

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) "debt" means a liability or obligation in respect of a claim C which is due from any person and includes a financial debt and operational debt;

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as D the case may be.

xxx xxx xxx

5. **Definitions.-** In this Part, unless the context otherwise requires,-

……..

E (7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money F and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or G the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; H

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

xxx xxx xxx

7. **Initiation of corporate insolvency resolution process by financial creditor.-** (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Govt. may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

xxx xxx xxx

8. **Insolvency resolution by operational creditor.-** (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, on record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt—

A (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

B Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred."

C 43. The definition of '*financial debt*' in Section 5(8) makes it clear that '*financial debt*' means a debt along with interest, if any, disbursed against **the consideration for time value of money** and would include money raised or borrowed against the payment of interest; amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent; **amount raised pursuant to any note** D **purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;** the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; receivables sold or E discounted other than any receivables sold on non-recourse basis or any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. Explanation to Section 5(8) which relates to real estate projects is of no relevance in the facts and circumstances of this case. The payment received for shares, duly issued to a third party at the request of the F payee as evident from official records, cannot be a debt, not to speak of financial debt. Shares of a company are transferable subject to restrictions, if any, in its Articles of Association and attract dividend when the company makes profits.

44. The appeal is, for the reasons discussed above, allowed. The G impugned judgment and order of the Appellate Tribunal is set aside and the order of the Adjudicating Authority dismissing the application, is restored.

Ankit Gyan Appeal allowed.