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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Reference made by Three Member Bench in
Company Appeal (AT) (Insolvency) No. 385 of 2020

IN THE MATTER OF:

Bishal Jaiswal ...**Appellant**

Versus

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

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Sandeep Bajaj and Mr. Devansh Jain, Advocates.**

For Respondents: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Abhirup Das Gupta, Mr. Ishaan Duggal, Mr. Varun Gupta, Mr. Nishith Doshi, Ms. Ishita Sharan and Mr. Rishub Kappor, Advocates for R-1.**

Mr. Sanjeev Kumar, Mr. Anshul Sehgal, Mr. Abhishek Goyal, Advocates with Mr. Pankaj Dhanuka, IRP for R-2.

O R D E R

Per Justice Bansi Lal Bhat, Acting Chairperson

A three member Bench of this Appellate Tribunal, which heard Company Appeal (AT) (Insolvency) No. 385 of 2020, was of the view that the judgment rendered by a five member Bench of this Appellate Tribunal in *"V. Padmakumar Vs. Stressed Assets Stabilization Fund (SASF) & Anr.", in Company Appeal (AT) (Insolvency) No. 57 of 2020,* requires reconsideration. The issue formulated by

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the three member Referral Bench, as noticed in the order of reference, is as follows:-

> *"Hon'ble Supreme Court and various Hon'ble High Courts have consistently held that an entry made in the Company's Balance Sheet amounts to an acknowledgement of debt under Section 18 of the Limitation Act, 1963, in view of the settled law, V. Padmakumar's Case requires reconsideration."*

2. For better grasping of the issue confronting this five member Bench, reference to the facts of the Company Appeal (AT) (Insolvency) No. 385 of 2020 is inevitable notwithstanding the fact that we have deferred the hearing of the appeal and confined our consideration only to competence of reference.

3. Corporate Debtor (Corporate Power Ltd.), which had availed loan from the Consortium Lenders for setting up a coal-based power plant at Chandwa in Jharkhand defaulted in repaying the dues leading to recalling of the loan facility by Financial Creditor – State Bank of India and the Consortium Lenders issuing notices on 20th June, 2015 under Section 13(2) of the SARFAESI Act, 2002 demanding total amount of Rs.59,97,80,02,973/-. However, the Corporate Debtor failed to discharge its liability. The Lenders had assigned the debt in favour of 'Asset Reconstruction Company (India) Ltd.' (Respondent No. 1/ Financial Creditor), who filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation

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of CIRP against the Corporate Debtor which raised various issues including limitation. The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, on being satisfied that debt and default was established and the application had been filed within limitation period, admitted the application. Aggrieved thereof, Mr. Bishal Jaiswal, the Ex-Director of the Corporate Debtor filed appeal against the order of admission, primarily on the ground that the account of Corporate Debtor had been declared as NPA on 28th February, 2014 and since the application under Section 7 came to be filed in December, 2018, after a delay of around five years, same was barred by limitation. Financial Creditor, on the other hand, contended that the right to sue for the first time accrued to it upon classification of the account as NPA on 31st July, 2013 but thereafter, the Corporate Debtor had admitted, time and again, and unequivocally acknowledged its debt in the Balance Sheets for the years ending 31st March, 2015, 31st March, 2016 and 31st March, 2017. Hence, according to the Financial Creditor, the right to sue stood extended in terms of Section 18 of the Limitation Act, 1963.

4. After noticing the submissions of learned counsel for the parties, the Referral Bench declined to accept the argument advanced on behalf of Corporate Debtor that Section 18 of Limitation Act, 1963 is not applicable to Insolvency Cases and proceeded to record its reasons for reconsideration of *V. Padmakumar's Judgment,* in para 30 of the Referral Order, which is extracted hereinbelow:-

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"30. We are of the view that the Judgment in V. Padmakumar's Case (Supra) requires reconsideration on following reasons:-

I. There is consistent view of the Hon'ble Supreme Court and High Court of Allahabad, Calcutta, Delhi, Karnataka, Kerala and Telangana that the entries in the Balance Sheet of the Company be treated as an acknowledgement of debt for the purpose of Section 18 of Limitation Act, 1963. The majority view in V. Padmakumar's Case is just contrary to settled law.

II. In V. Padmakumar's Case minority view is in the line of settled law that Balance Sheet of the Company, be treated as acknowledgement of debt for the purpose of Section 18 of the Limitation Act, 1963. In the majority Judgment no reasons have been assigned for disagreement with this view.

III. In support of majority Judgment in V. Padmakumar's Case none of the precedent cited before us.

IV. In V. Padmakumar's Case, it is discussed that the Balance Sheet of the Company is prepared pursuant to Section 92 of Companies Act, 2013 and filing of

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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) and (6) of the Act. In our humble opinion Balance Sheet is not Annual Return but is a Financial Statement. Financial Statement is defined under Section 2(40) of the Companies Act, 2013.

V. In V. Padmakumar's Case it is held that the Balance Sheet is required to be prepared under the obligation casted under Section 92 of the Companies Act, 2013. Therefore, it cannot amount to an acknowledgement for Section 18 of the Limitation Act, 1963. The compulsion of law or with the threat of any penalty/ punishment. Hon'ble Calcutta High Court in the case of Bengal Silk Mills Co. (Supra) and Hon'ble High Court of Delhi in the case of South Asia Industries Pvt. Ltd. (Supra) held that merely on the ground that the Balance Sheet of the Company is prepared under the compulsion of law or in discharge of statutory duty, it cannot be held that the Balance Sheet of the Company cannot amount to an acknowledgement of liability.

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VI. *The Balance Sheet is a material document attached with sanctity that must be submitted to ROC and is used for obtaining a business loan or investments. Relevant provisions in regard to Balance Sheet of the Company provided in Section 129, 130, 131, 134, 137, 143 and 397 of the Companies Act. Section 130 and 131 provides that a Company cannot reopen its Books of Account and Financial Statement without the Order made by the Court of Competent Jurisdiction or the Tribunal. Directors of the Company after making Judgments and estimates that are reasonable and prudent cannot resile without permission of Tribunal.*

VII. *Section 397 of the Companies Act and Rules made thereunder by a Company with the Registrar shall be admissible in any proceedings thereunder. Without proof or production of original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible."*

5. Shri Ramji Srinivasan, Sr. Advocate representing Respondent No. 1 - 'Asset Reconstruction Company (India) Ltd.' supporting the reference submits that ordinarily a judgment of a Larger Bench is binding on a Smaller Bench.

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However, several judgments of the Constitution Bench of Hon'ble Apex Court hold that a Smaller Bench may disagree with a previous judgment of a Larger Bench. Reliance is placed on the observations of Hon'ble Apex Court in *"Pradip Chandra Parija & Ors. Vs. Pramod Chandra Patnaik & Ors.", reported in (2002)1 SCC 1,* wherein their Lordships have held that judicial discipline and propriety would demand that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is *'so very incorrect that in no circumstances can it be followed'*, the proper course for it would be to refer the matter before it to a Bench of three learned Judges setting out the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of the Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges would be justified. Reference was also made to *"Chandra Prakash & Ors Vs. State of Uttar Pradesh & Anr.", (2002)4 SCC 234,* wherein Hon'ble Apex Court, while referring to an earlier judgment rendered in *Raghubir Singh's Case* holding that a pronouncement of law by a Division Bench of Hon'ble Apex Court is binding on a Division Bench of the same or smaller number of Judges, observed that the judgments of Supreme Court not only decide the rights of the parties and resolve disputes between them but also declare law operating as a binding principle in future cases which promotes certainty and consistency in judicial decisions. It was further held that it is only if the Bench of two learned Judges concludes that an earlier

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judgment of three learned Judges is *'so very incorrect that in no circumstances can it be followed*', the proper course would be to refer the matter to a Bench of three learned Judges setting out the reasons for disagreement with the earlier judgment and if the Bench of three learned members comes to conclusion that earlier judgment of three members was incorrect, reference to a Bench of five members would be justified. It accordingly expressed its agreement with the enunciation of law made in judgments rendered in '*Raghubir Singh's Case'* and '*Pradeep Chandra Parija's Case'*. Learned counsel for Respondent No. 1 also referred to *"Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr.", reported in (2005) 2 SCC 673*, wherein the Hon'ble Apex Court after taking note of the earlier decisions, summed up the legal position in the following terms:-

> *"12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-*
>
> *(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.*

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(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. ***It will be open only for a Bench of co- equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co- equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.***

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench

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of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra).

13. So far as the present case is concerned, there is no reference made by any Bench of any strength at any time for hearing by a larger Bench and doubting the correctness of the Constitution Bench decision in the case of Sardar Syedna Taher Saifuddin Saheb's case (supra). The order dated 18.3.1994 by two-Judge Bench cannot be construed as an Order of Reference. At no point of time the Chief Justice of India has directed the matter to be placed for hearing before a Constitution Bench or a Bench of seven-Judges.

14. In the facts and circumstances of this case, we are satisfied that the matter should be placed for hearing before a Constitution Bench (of five Judges) and not before a larger

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> *Bench of seven Judges. It is only if the Constitution Bench doubts the correctness of the law laid down in Sardar Syedna Taher Saifuddin Saheb's case (supra) that it may opine in favour of hearing by a larger Bench consisting of seven Judges or such other strength as the Chief Justice of India may in exercise of his power to frame a roster may deem fit to constitute."*

Based on the aforesaid judicial pronouncements, learned counsel for Respondent No. 1 submits that the reference is maintainable and deserves to be answered.

6. Shri Abhijeet Sinha, Learned counsel for Appellant opposing the reference submits that the most recent judgment in *"Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr.",* clearly lays down that a Bench of lesser strength cannot disagree with the decision of a Larger Bench. It is submitted that a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength. In case of doubt, the Bench of lesser quorum can invite the attention of the Chief Justice and request for the matter being placed before a Bench larger than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength. It is further submitted that a case may be referred to a Larger Bench only when the statute provides for a

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power to refer matters, a Bench of lesser strength is of opinion that the earlier judgment of Larger Bench is *per incurium*, there is difference of opinion between Members on the same Bench such that there is no clear majority decision, there are divergent views taken by Coordinate Benches of the same strength or the superior court of record considers it necessary to determine for itself questions about its own jurisdiction. It is submitted that none of these tests are satisfied by the Reference Order. It is submitted that there is no infirmity in the five member Bench judgment. It is not the case of Referral Bench that on the earlier occasion some patent aspects of the question remained unnoticed or that the attention of court was not drawn to any relevant or material statutory provision or that a previous decision of Hon'ble Apex Court on the point was not noticed. It is submitted that an earlier view if considered mistaken, can be reversed in exceptional circumstances only so that the law remains certain. Reference is made to *"Supreme Court Advocates on Record Association Vs. Union of India", reported in (2016)5 SCC 1* in this regard. It is further submitted that the Reference Order has created uncertainty as it failed to notice that the law laid down in *'V. Padmakumar'* has been followed and applied by this Appellate Tribunal in subsequent judgments. It is submitted that the decision in '*V. Padmakumar'* itself was a result of reference to a Larger Bench to resolve conflicting decisions of Coordinate Benches. Therefore, question of another reference to decide the same question of law cannot arise. It is further submitted that the law laid down in *'V. Padmakumar'* is the subject of consideration before Hon'ble Apex Court in as

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many as five Civil Appeals and it is not open for this Appellate Tribunal to reconsider the same. Lastly, it is submitted that the judgments relied upon in the Reference Order do not deal with voluntary acknowledgement and none of these judgments are in the realm of I&B Code. It is submitted that in *"Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminum Industries Ltd. & Anr., Civil Appeal No. 6347 of 2019"*, the Hon'ble Apex Court held that Section 18 of the Limitation Act, 1963 does not apply to applications under I&B Code. Therefore, question of Balance Sheet amounting to acknowledgment of liability is no longer relevant. It is accordingly submitted that the reference is incompetent and the appeal is required to be remitted back to the three Member Bench with direction to decide the same on merit by applying the law laid down in *'V. Padmakumar'*.

7. Having noticed the Order of Reference and submissions of learned counsel for the parties, we shall now proceed to have a thorough conspectus of the circumstances attending upon constitution of the Larger Bench, the issues before it, the case law noticed and the decision rendered by the five Member Bench.

8. Application under Section 7 of I&B Code filed by M/s Stressed Assets Stabilization Fund (SASF) – Financial Creditor came to be admitted by the Adjudicating Authority (National Company Law Tribunal), Single Bench Chennai in terms of order dated 21st November, 2019 which was assailed in Company Appeal (AT) (Insolvency) No. 57 of 2020 primarily on the ground that

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demand notice was not served before passing of the admission order otherwise the Appellant would have shown that the application was barred by limitation as the account of Corporate Debtor had been declared as NPA in the year 2009 and decree came to be passed in the year 2013. Respondents appeared to contest the appeal and relied upon a three Member judgment of this Appellate Tribunal rendered on 22nd January, 2020 in *"M/s. Ugro Capital Limited Vs. M/s. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE) – Company Appeal (AT) (Insolvency) No. 984 of 2019"* to suggest that issue of limitation will start on the basis of the date of decree. From the minutes of proceeding recorded on 3rd February, 2020, this Appellate Tribunal, upon noticing that the aforesaid decision rendered in *Company Appeal (AT) (Insolvency) No. 984 of 2019* was in conflict with an earlier three member Bench decision of this Appellate Tribunal dated 11th December, 2019 passed in *Company Appeal (AT) (Insolvency) No. 525 of 2019 - "V Hotels Limited Vs. Asset Reconstruction Company (India) Limited"* referred the matter to a Larger Bench of five members to resolve the conflict.

9. In '*V. Padmakumar's Case*', IDBI had advanced financial assistance of Rs.600 Lakhs by way of Term Loan Agreement dated 2nd March, 2000 to the Corporate Debtor and the loan was duly secured. The account of Corporate Debtor was classified as NPA on 29th May, 2002. IDBI Bank initiated recovery proceedings by filing OA No. 289 of 2003, later renumber as OA No.413 of 2007. It was decreed on 19th June, 2009 leading to issuance of Recovery

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Certification on 31st August, 2009 which was reflected in the Balance Sheet dated 31st March, 2012. The Appellant, basing its plea on the aforestated facts, raised the contention that the application filed under Section 7 of I&B Code in the year 2019 was barred by limitation. This Appellate Tribunal noticing the judgments delivered by Hon'ble Apex Court in "Jignesh Shah and another vs. Union of India and another – (2019) 10 SCC 750", *"Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572", "Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Limited and another – (2019) 9 SCC 158", and decision of this Appellate Tribunal in "V. Hotels Limited Vs. Asset Reconstruction Company (India) Limited- Company Appeal (AT) (Insolvency) No. 525 of 2019", decided on* 11th December, 2019, was of the view that for the purpose of computing the period of limitation for application under Section 7 the date of default is NPA and hence a crucial date. In para 18 of the Judgment it held:-

> *"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'."*

It is of vital significance to notice that the five Member Bench specifically dealt with the view taken in '*M/s Ugro Capital Ltd.' (Supra)* and observed as under:-

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> *"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."*

This finding recorded by the five Member Bench after noticing a plethora of judicial precedents of the Hon'ble Apex Court leaves no room for doubt that the conflict of decisions in the two above referred judgments of this Appellate Tribunal in '*V. Hotel's Case*' and *'M/s Ugro Capital Ltd.'s Case'* arose as the judicial precedents of Hon'ble Apex Court noticed hereinabove were not brought to the notice of three Member Bench hearing the '*M/s Ugro Capital Ltd.'s Case*' and in view of the same decision rendered therein could not be cited as a precedent.

10. The five Member Bench next dealt with the acknowledgement of claim in the audited Balance Sheet of Corporate Debtor to arrive at a finding as to whether such acknowledgement would fall within the ambit of Section 18 of Limitation Act, 1963.Taking note of the issue having already been dealt with by this Appellate Tribunal in "Sh. G Eswara Rao Vs. Stressed Assets Stabilisation Fund— Company Appeal (AT) (Insolvency) No. 1097 of 2019", the five Member Bench, while summing up its findings held as under:-

> *"22. In view of the aforesaid findings, agreeing with the decisions aforesaid, at the cost of repetition, we hold: (i) As*

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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."

11. Having heard learned counsel for the parties on the limited issue of competence of reference made by the three Member Bench and after fathoming through the relevant material on record, we find that the Referral Bench failed to take note of the fact that the five Member Bench Judgment rendered in *'V. Padmakumar's Case'* with a majority of 4:1 was delivered to remove uncertainty arising out of the conflicting verdicts of Benches of co-equal strength in '*V. Hotel's Case'* and *'M/s Ugro Capital Ltd.'s Case'*. In view of this factual position, it was inappropriate on the part of the Referral Bench to doubt the correctness of the five Member Bench Judgment, which admittedly has not been appealed against and occupies the field till date. This is besides the fact

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that the five Member Bench has taken note of the authoritative pronouncements of the Hon'ble Apex Court relevant to the determinable issue. Therefore, relying upon Judgments of various High Courts on the subject is of no consequence. This Appellate Tribunal is not a Constitutional Court. It is the creation of a Statute viz. Companies Act, 2013. Therefore, this Appellate Tribunal has to apply the law as embodied in the Statutes and as laid down by the Hon'ble Apex Court. This Appellate Tribunal only interprets and applies the law as it is. Once a Larger Bench of this Appellate Tribunal came to be constituted in the wake of two conflicting judgments rendered by Benches of co-equal strength on the issue, one of the two Benches having failed to notice the judgment of the Hon'ble Apex Court on the subject, the issue raised by the Referral Bench can no more be said to be *res integra*, in so far as the jurisdiction exercised by this Appellate Tribunal under I&B Code is concerned. It was a matter of judicial discipline for the Referral Bench to follow the judgment of the five member Bench in *'V. Padmakumar's Case'* as a binding precedent and not question the correctness of the Judgment by adopting the 'cut and paste' methodology in branding the five Member Bench Judgment in *'V. Padmakumar's Case'* as 'so very incorrect', divorced of the context in which the Hon'ble Apex Court used this expression in '*Raghubir Singh's Case'* (supra) and '*Pradeep Chandra Parija's Case' (supra).* While expressing our shock on this aspect, we propose to first deal with the issue that is sought to be raised on the basis of gross misconception and misunderstanding of law before dealing with the aspect of judicial discipline.

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12. The five Member Bench in *'V. Padmakumar's Case'* has expressly referred to the judgment of Hon'ble Apex Court rendered in *"B. K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates, (2019)11 SCC 633"* wherein the Hon'ble Apex Court held that for purpose of Section 7 of I&B Code limitation Act, 1963 is applied from the date of inception of the Code. Article 137 of the Limitation Act would be applicable to applications under Section 7, 9 or 10 of the I&B Code. In *"Jignesh Shah & Anr. vs. Union of India & Anr., (2019)10 SCC 750"*, the Hon'ble Apex Court, after noticing various judgments, observed that when time begins to run it can only be extended in the manner provided in the Limitation Act. **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 proceedings.** Para's 21 and 28 of the aforesaid judgment dealing with the issue of limitation have been extracted in the five Member Bench judgment rendered by this Appellate Tribunal in *'V. Padmakumar's Case'*. The five Member Bench also took note of the Judgment delivered by the Hon'ble Apex Court in *"Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited & Another – (2019) 10 SCC 572"*, wherein the Hon'ble Apex Court noted **that the default having taken place and account having been declared NPA on 21st July, 2011, application filed under Section 7 of I&B**

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Code in 2017 being clearly beyond three years under Article 137 of Limitation Act was time barred. The five Member Bench also took note of the judgment rendered by Hon'ble Apex Court in *"Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Limited & Another – (2019) 9 SCC 158"*, which laid down that since Limitation Act is applicable to applications filed under Section 7 and 9 of the I&B Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. It is further **held that right to sue accrues when a default occurs**. The Hon'ble Apex Court relied upon its judgment rendered in *"B. K. Educational Services' Case"* (supra), wherein in para 42 it was observed that **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.** The five Member Bench of this Appellate Tribunal also noticed the judgment rendered by this Appellate Tribunal in 'V. Hotels' Case' (supra) wherein after noticing judgment of Hon'ble Apex Court in *"Vashdeo R. Bhojwani"*, this Appellate Tribunal made following observations in regard to applicability of Section 18 of the Limitation Act for extension of limitation:-

> *"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*

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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."

The five Member Bench also took note of the observations of Hon'ble Apex Court in *"Sampuran Singh and Ors. vs. Niranjan Kaur and Ors.— (1999) 2 SCC 679"*and held:

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,***

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> ***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."*

Thus, it was on the basis of the authoritative pronouncements and binding precedents of the Hon'ble Apex Court that the five Member Bench of this Appellate Tribunal arrived at the conclusion that for purpose of computing the period of limitation under Section 7, the date of default is NPA.

13. In *"Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminum Industries Ltd. & Anr.", Civil Appeal No. 6347 of 2019,* the Hon'ble Apex Court observed that Section 18 of the Limitation Act, 1963 would have no application to proceedings under I&B Code. Therefore, the issue raised as regards acknowledgement of liability by reflection in the Balance Sheet/ Annual Return would be irrelevant.

14. Thus, it is manifest that the findings arrived at by the five Member Bench were based on consideration of the latest judgments of the Hon'ble Apex Court wherein the remedy available across the ambit of I&B Code was recognized as distinct from the recovery mechanism in civil jurisdiction. It is not in

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controversy that the I&B Code was enacted to achieve the objective of resolving insolvency and bankruptcy issues for which timelines were laid down. It is now well settled that the remedy available under the I&B Code is a remedy distinct from remedy available in civil jurisdiction/ recovery mechanism and since the I&B Code is not a complete Code, provisions of Limitation Act are attracted to proceedings under it before NCLT and NCLAT as far as applicable i.e. in regard to matters not specifically provided for in I&B Code. The whole mechanism of triggering of Corporate Insolvency Resolution Process revolves round the concept of 'debt' and 'default'. Once debt and default are established, the Financial Creditor, the Operational Creditor or the Corporate Person can initiate the CIRP by filing application respectively under Section 7, 9 or 10 of I&B Code in prescribed format before the Adjudicating Authority. It is well settled now that proceedings under I&B Code are not in the nature of recovery proceedings and being an independent remedy same can be had recourse to by the aggrieved person seeking triggering of CIRP by establishing debt and default and complying with the procedural requirements laid down under the Code. With reference to the above referred judgments of the Hon'ble Apex Court there is no room for doubt that the date of default in regard to application under Section 7 of I&B Code is the date of classification of the account of Corporate Debtor as NPA. The date of default is extendable within the ambit of Section 18 of Limitation Act on the basis of an acknowledgement in writing made by the Corporate Debtor before the expiry of period of limitation. This is clearly laid down by Hon'ble Apex Court in '*Sampuran*

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Singh's Case' (supra) and a host of other judgments. The dictum of law in *'Jignesh Shah's Case'* (supra) is loud and clear. In para 21 of the judgment, the Hon'ble Apex Court, while observing that an acknowledgment of liability under Section 18 of Limitation Act would certainly extend the limitation period but a suit for recovery being 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 proceedings.** In para 28, the Hon'ble Apex Court clearly laid down that for filing of a winding up petition under Section 433(e) of the Companies Act, 1956, trigger point for purpose of limitation would be the date of default in payment of the debt in any of the three situations mentioned in Section 434. The Judgment of Hon'ble Apex Court in *'Gaurav Hargovindbhai Dave'* (supra) also brings it to fore that the remedy in the form of a Section 7 application under I&B Code is an independent proceeding and Article 137 of Limitation Act governs the same. Their Lordships took note of the report of the Insolvency Law Committee, while holding that **the date of classification of account of Corporate Debtor as NPA was the starting point for limitation, that the intent of the Code could not have been to give new lease of life to debts which are already time barred**. As regards the issue raised whether reflection of a debt in the Balance Sheet/ Annual Return of a Corporate Debtor would amount to acknowledgement under Section 18 of the Limitation Act, suffice it to say that the finding has been recorded by the five Member Bench in the context of a

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judgment or a decree passed for recovery of money by Civil Court/ Debt Recovery Tribunal which cannot shift forward the date of default for purposes of computing limitation for filing of an application under Section 7 of the I&B Code and the fact that filing of Balance Sheet/ Annual Report being mandatory under Section 92(4) of Companies Act, failing of which attracts penal action under Section 92(5) & (6).In view of the judgment of Hon'ble Apex Court in "*Sampuran Singh*" (supra), the Referral Bench should not have relied on a stray observation made by the Hon'ble Apex Court in an earlier decision *"Mahavir Cold Storage Vs. CIT, (1991) Supp (1) SCC 402"* in regard to extension of period of limitation on the basis of entries in the books of accounts amounting to acknowledgement of liability which related to recovery proceedings. It is therefore preposterous to hold that the judgment of five Member Bench 'is so incorrect that the same can in no circumstances be followed'. The Referral Bench has failed to draw a distinction between the 'recovery proceedings' and the 'insolvency resolution process'. I&B Code provides timelines for resolution of insolvency issues and proceedings thereunder cannot be equated with the 'recovery proceedings'. The insolvency resolution mechanism is based on 'debt' and 'default'. Adjudication of civil disputes and complex issues is impermissible within the ambit and scope of I&B Code. Stretching forward the concept of default beyond NPA, in the context of law declared by the Hon'ble Apex Court as it now stands, would be the forbidden province and the liability in regard to defaulted amount on the basis of classification of account of Corporate Debtor as NPA cannot be given a new lease of life when it is time

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barred. The judgment of Hon'ble Apex Court in *'B. K. Educational Services'* (supra) is eloquent on the subject. Even in *'Jignesh Shah's Case'*, the Hon'ble Apex Court has recognized the nature of remedy under Companies Act being distinct from recovery mechanism and observed that limitation cannot be impacted by an acknowledgement of liability under Section 18 of Limitation Act to keep debt alive for the purpose of winding up proceedings. This equally holds good in so far as insolvency jurisdiction in concerned unless a contrary view is taken by the Hon'ble Apex Court in matters involving the issue.

15. We are therefore of the considered view that the order of reference which, in letter and spirit, is more akin to a judgment of an Appellate Court appreciating the findings and judgment in *'V. Padmakumar's Case'* is incompetent and deserves to be rejected.

16. This brings us to consider the most painful aspect of the misadventure undertaken by the Referral Bench in making the reference which we have found to be incompetent. Judicial indiscipline creates uncertainty and impairs public faith in Rule of Law. Crossing the red line by disregarding the binding precedent results in making the legal proposition uncertain. Such misadventure creates uncertainty as regards settled position of law. What constitutes the judicial discipline has aptly been dwelt upon in the judgments rendered by Hon'ble Apex Court noticed herein below:

I. In *"Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr.", reported in (2005) 2 SCC 673*, it was held that a decision

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delivered by a Bench of Larger strength is binding on any subsequent Bench of lesser or co-equal strength. It cannot disagree or dissent from the view of law taken by the Bench of Larger quorum. In case of doubt attention of Lord Chief Justice is to be invited with request to place the matter before a Bench of Larger quorum. **A Bench of co-equal strength can only express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength**.

II. In *"Keshav Mills Co. Ltd. vs. CIT (1965) 2 SCR 908"*, it was held that nature of infirmity or error would be one of the factors in making a reference. Whether patent aspects of the question remained unnoticed or was the attention of Court not drawn to any relevant and material statutory provision or was any previous decision of the Hon'ble Apex Court not noticed would be the relevant factors.

III. In *"Supreme Court Advocates on Record Association vs. Union of India, (2016) 5 SCC 1"*, it was held that **the Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling given after due deliberation and full hearing was erroneous, revisit earlier decision so that the law remains certain**.

IV. In *'Sub-Inspector Rooplal & Anr. Vs. Lt. Governor & Ors.' reported in (2000)1 SCC 644*, the Hon'ble Apex Court observed as under:-

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"12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. ***A***

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> ***Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench.*** *It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. ……. "*

V. Hon'ble Apex Court in another case *reported in (2005) 2 SCC 59*, excerpts from para 16 whereof are reproduced, observed:-

> *"…..* ***These being judgments of coordinate benches were binding on the Tribunal. Judicial discipline required that the Tribunal follow those judgments.*** *If the Tribunal felt that those judgments were not correct, it should have referred the case to a larger bench."*

17. Following of the judicial precedent of a Bench of equal strength and of a Larger Bench as in the instant case, is a matter of judicial discipline. The Referral Bench, where such reference is competent, can make a reference for matter being placed before a Larger Bench for reconsideration in the circumstances indicated in the aforesaid judgments after recording its opinion. It is not open to the Referral Bench to appreciate the judgment rendered by the earlier Bench as if sitting in appeal to hold that the view is erroneous. Escaping of attention of the earlier Bench as regards a binding judicial precedent or a patent error is of relevance but not evaluation of earlier judgment as if sitting in appeal. We are sad to note that the Referral Bench

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has overlooked all legal considerations. Such misadventures weaken the authority of law, dignity of institution as also shake people's faith in rule of law. We hope and trust that the Hon'ble Members of the Referral Bench would exhibit more serious attitude towards adherence of the binding judicial precedents and not venture to cross the red line.

As a sequel to the rejection of order of reference as being incompetent, let the Company Appeal (AT) (Insolvency) No. 385 of 2020 be listed for regular hearing before Court No. IV on 11th January, 2021.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Venugopal M.]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI

22nd December, 2020

AM