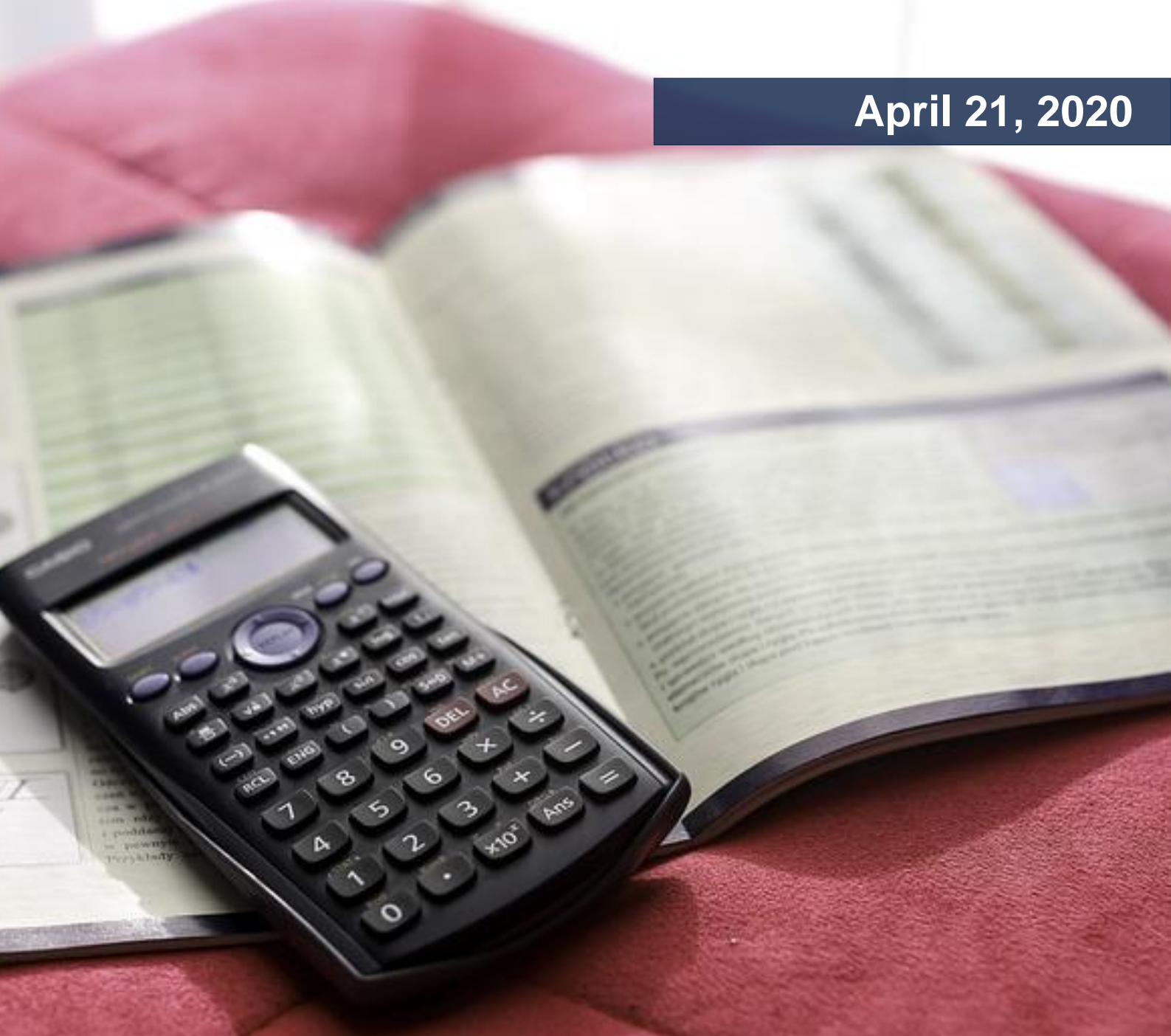


April 21, 2020



LIMITATION IN BALANCE

- A CRITIQUE OF THE MAJORITY DECISION IN
V. PADMAKUMAR

argus
partners
SOLICITORS AND ADVOCATES

MUMBAI | DELHI | BENGALURU | KOLKATA | AHMEDABAD

1. Introduction

- 1.1 Does entry in balance sheet of a company amount to acknowledgement for the purposes of Section 18 of Limitation Act, 1963 (“**Limitation Act**”)? The answer to the question, which seems so apparent in view of a catena of cases, both domestic and foreign, seems to have been turned on its head by a decision of National Company Law Appellate Tribunal (“**NCLAT**”) in its recent decision rendered in the case of *V. Padmakumar v. Stressed Assets Stabilisation Fund (SASF)*¹ (“**Padmakumar Decision**”).
- 1.2 The majority decision, which was rendered by a 4:1 majority of an unprecedented five-member bench of NCLAT, ruled that *entry in balance sheet/ annual return, which is required to be prepared to comply with statutory requirements, cannot be treated to be an acknowledgement under Section 18 of the Limitation Act*. Notably, the majority decision had reiterated the decision of the two-member bench of NCLAT in the earlier case of *Sh. G Eswara Rao v. Stressed Assets Stabilisation Fund*², incidentally also written by Justice S J Mukhopadhya, who had penned the majority judgment in the Padmakumar decision.
- 1.3 The purpose of this paper is to examine whether an entry in balance sheet could qualify as acknowledgement for the purpose of the Limitation Act. For the aforesaid purpose, we first intend to examine if an entry in balance sheet signed in the manner specified in the applicable statute would satisfy the requirements of Section 18 of the Limitation Act. Subject to our analysis suggesting that such entry would qualify as an acknowledgement, we shall then examine, if such acknowledgement can be disregarded as the same was done under statutory compulsion.

2. Review of Judicial Position - Foreign Jurisprudence

- 2.1 Before we get into our independent analysis of the issue, let us review the extant judicial position prevalent in India and other prominent common law jurisdictions.
- 2.2 In so far England is concerned, *Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd.*³ was the first of the English balance sheet cases, where the company's balance sheets were held to be a sufficient acknowledgment of the debenture debt even though they were not sent to the debenture holders. A similar claim was made in *Coliseum {Barrow} Ltd.*⁴, but failed because the directors could not as agents of the company, acknowledge a debt as due to themselves in respect of unpaid directors' fees. The next significant decision was rendered in *Ledingham v. Bermejo Estancia Co. Ltd.*⁵, where it was noted that balance sheet was capable of constituting an acknowledgment of debt and the signature of the balance sheets after the date to which they had been made up was not a ground for saying that they were not an acknowledgment. Next came the decision of *Jones v. Bellgrove Properties Ltd.*⁶, arguably the most cited English decision in the context of balance sheet being considered as acknowledgement, where the Court of Appeal held that the balance sheet—which had been signed by the chartered accountants as agents of the company and by two of its directors—constituted an acknowledgment within the meaning of applicable limitation statute.
- 2.3 The aforesaid decision was not followed, however, by the Judicial Committee of the Privy

¹ *V. Padmakumar v. Stressed Assets Stabilisation Fund (SASF)* [Company Appeal (AT) (Insolvency) No. 57 of 2020, decision dated March 12, 2020 (NCLAT)].

² *Sh. G Eswara Rao v. Stressed Assets Stabilisation Fund* [Company Appeal (AT) (Insolvency) No. 1097 of 2019, decision dated February 7, 2020 (NCLAT)].

³ *Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd.* [1928] Ch. 836.

⁴ *Coliseum {Barrow} Ltd.* [1930] 2 Ch. 44.

⁵ *Ledingham v. Bermejo Estancia Co. Ltd.* [1947] 1 All E.R. 749.

⁶ *Jones v. Bellgrove Properties Ltd.* [1949] 2 K.B. 700.

Council in the case of *Consolidated Agencies Ltd v Bertram Ltd*⁷, as it was not enamoured with the idea that signing of financial records by the directors was necessarily an acknowledgment of the debt and noted that, it would depend upon whether the signature on the relevant balance sheet was made when the liability was not time-barred. The present position in English law may, however, be derived from the decision rendered in *Gee & Co. (Woolwich) Ltd*⁸, where Brightman J. after a careful and detailed analysis of all the previous decisions, rejected this main contention and came to the conclusion that there is no requirement of English law that an acknowledgment to be effective must be of a debt which is actually existing at the date when the acknowledgment is written. The relevant observation in this context was as follows:

"In my judgment there is nothing in the decision in Consolidated Agencies Ltd. V. Bertram Ltd. [1965] A.C. 470 which entitles me to depart from the clear current of English authority. I shall accordingly decide this case on the footing that a balance sheet, if duly signed by the directors, is capable of being an effective acknowledgment of the state of indebtedness as at the date of the balance sheet, and that, in an appropriate case, the cause of action will be deemed to have accrued at the date of the balance sheet, being the date to which the signature of the directors relates. In my judgment the balance sheet of the company as at December 31, 1965, signed by the directors on November 25, 1966, would have been an effective acknowledgment as at December 31, 1965, of the liability of the company so as to take the matter out of the Limitation Act 1939, if the acknowledgment had not been made by the directors in favour of one of themselves." (emphasis supplied)

The aforesaid decision had subsequently been followed again in *Compania de Electricidad de la Provincia de Buenos Aires Ltd.*⁹ and *Overmark Smith Warden Ltd*¹⁰.

- 2.4 If we shift our focus to other jurisdictions, we see in Australia, the *locus classicus* is *Stage Club Ltd. v. Millers Hotels Pty. Ltd.*¹¹ where the balance sheet was considered to constitute an acknowledgement for the purpose of statute of limitation, which position has been consistently followed in subsequent decisions¹².
- 2.5 Whilst our limited research suggests that entry in balance sheet has been considered to be acknowledgement in certain other jurisdictions as well¹³, certain other jurisdiction taking a contrary view probably also could not be ruled out¹⁴.

3. Review of Judicial Position - India

- 3.1 Let us now shift our focus to the judicial position prevalent in India. It may be noted that, for the purpose of this analysis, we have purposefully decided to not consider any decision of

⁷ *Consolidated Agencies Ltd v Bertram Ltd* [1965] A.C. 470.

⁸ *Gee & Co. (Woolwich) Ltd.* [1975] Ch. 52.

⁹ *Compania de Electricidad de la Provincia de Buenos Aires Ltd.* [1980] Ch. 146.

¹⁰ *Overmark Smith Warden Ltd* [1982] 1 W.L.R. 1195.

¹¹ *Stage Club Ltd. v. Millers Hotels Pty. Ltd.*, [1981] HCA 71.

¹² See, *Re Brookers (Australia) Ltd. (in liq.); Brooker v. Pridham* (1986), 41 S.A.S.R. 380 (Supreme Court of South Australia), *Chianti Pty. Ltd. v. Leume Pty. Ltd.*, [2007] WASCA 270 (Western Australia Court of Appeal), *Giacci -v. Giacci Holdings Pty Ltd* [2010] WASCA 233 (Western Australia Court of Appeal).

¹³ See, the decision of Court of Appeal for British Columbia in *Freeway Properties Inc. v. Genco Resources Ltd.*, 2012 BCCA 258.

¹⁴ See, *Premium Investments Limited v. Jamaican Redevelopment Foundation Inc.* [(2008) Supreme Court, Jamaica, No. 3632 of 2007].

various benches of National Company Law Tribunal¹⁵ or NCLAT¹⁶, holding that balance sheet would amount to an acknowledgement, as validity of all such decisions would be questionable post the Padmakumar decision. Further, the line of cases where the balance sheet was held to not constitute acknowledgment basis specific factual situations¹⁷, is also not being considered for the sake of brevity.

- 3.2 As we would be referring to quite a few of the decisions in the context of our analysis of Section 18 of Limitation Act, for the sake of brevity, it would suffice to state that, whilst there are a catena of cases¹⁸, starting from the *Rajah of Vizianagaram v. Official Liquidator, Vizianagaram Mining Company Limited*¹⁹, which support the treatment of entry in balance sheet as an acknowledgement, there are certain decisions which question the approach.
- 3.3 For instance, in one of the earliest cases, *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.*²⁰, which even predated *Rajah of Vizianagaram (supra)*, the Nagpur High Court had observed as follows:

“18. Turning next to the balance sheets. The mere signing of a balance sheet by a director does not operate to save limitation because the director in drawing up a balance sheet does not do so with the intention of acknowledging liability but under a duty where he is bound to set out, among other things, the claims made on the company. It is then for the directors, and later for the company, to pass on these claims and either accept them or reject them (See Ghosh's Company Law, Edn. 7, p. 392; See also Kandasami Reddi v. Suppammal 45 Mad. 448 at p. 477; (A.I.R.

¹⁵ See,

Ahmedabad bench: *Anandkumar P Chopra v. PNB* [Inv.P 16 of 2019 in CP(B) 342/NCLY/Ahm/2018, order dated February 13, 2020].

Chennai bench: *SASF v. Ramana Sekhar Steels Limited* [IBA/829/2019, order dated October 5, 2019].

Hyderabad bench: *Bank of India v. Sainath Estates Private Limited* [CP(IB) No. 651/7/HDB/2018, order dated July 8, 2019].

Kolkata bench: *Kotak Mahindra Bank v. Sri Balaji Metals and Minerals* [CP(IB) No. 1476/KB/2018, order dated December 3, 2019].

Mumbai bench: *TJSB Sahakari Bank Ltd. v. Unimetal Castings Ltd.* [CP (IB) -3622/I&BP/MB/2018, order dated January 25, 2019].

¹⁶ *Gautam Sinha v. UV Asset Reconstruction Company Limited* [Company Appeal (AT) (Ins) No.1382 of 2019, order dated February 25, 2020].

¹⁷ *Parasuraman v. Purushothaman* AIR 1977 Ker 132 (Kerala), where balance sheet was held to not constitute acknowledgement, as the signature of the agent was done in breach of the agent's fiduciary duty.

¹⁸ See, the following decisions of various High Courts:

Andhra Pradesh: *Vijaya Laxmi Sugar Mills v. Alaparthi Lakshmikanthamma* [1968 Indlaw AP 28, decision dated January 29, 1968].

Bombay (Goa): *EDC Limited v. Penthouse Builders* [WP 138 of 2013, decision dated December 5, 2013].

Calcutta: *In Re: Deepika Housing Projects Pvt. Ltd* [C.A. No. 472 of 2006, decided on July 16, 2007].

Delhi: *Sheetal Fabrics v. Coir Cushions Ltd.* [CP No. 407 of 1998, decided on February 28, 2005].
Bhajan Singh Sharma v. Whimpy International Ltd. [[2012] 173 Comp Cas 455, decision dated November 21, 2011].
Zest Systems Pvt Ltd. v. Center for Vocational and Entrepreneurship Studies [CS (COMM) 513/2017, decision dated on September 19, 2018].

Gujarat: *Ambica Mills Ltd. Ahmedabad v. Commissioner of Income-tax, Gujarat, Ahmedabad* AIR 1964 Guj. 208.

Karnataka: *Hedge and Golay Limited v SBI* [ILR 1987 Karnataka 2673, decision dated November 20, 1985].

Kerala: *Al-Ameen Limited v. K. P. Sethumadhavan* [A.S.No.444 of 2002, decision dated August 18, 2017].

Madras: *Swarna Paper Cutting Works v. Indian Express (Madurai) Private Limited, Madras* 1999 (3) CTC 167 (Madras).

Punjab & Haryana: *Ranjiv Kumar v. Raksha Devi* [RSA No.5088 of 2013 (O&M), decision dated November 13, 2018].

Rajasthan: *Babu lal Rukmanand v. Official Liquidator* AIR 1968 Raj 214.

¹⁹ *Rajah of Vizianagaram v. Official Liquidator, Vizianagaram Mining Company Limited* AIR 1952 Mad 136 (Madras).

²⁰ *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.* AIR 1951 Nag 255 (Nagpur).

1922 Mad. 104).”

(emphasis supplied)

Similar view was also expressed by a full bench of the Allahabad High Court in the case of *Jwala Prasad v. Jwala Bank Ltd.*²¹, where the following was observed:

“The balance-sheets do not contain any acknowledgment of an existing liability and therefore cannot be treated as acknowledgments which would extend the period of limitation within the meaning of Section 19 of the Lim. Act.” (emphasis supplied)

- 3.4 Though not in the context of balance sheet, however, in the context of entry in accounts book, the Madras High Court had, in the case of *N.M. Shanmughasundaram Mudaliar v. Chidambaram Pillai*²² held that a mere entry in the accounts book would by itself be sufficient to constitute an acknowledgement for the purpose of the statute of limitation.
- 3.5 Interestingly, there is no decision of the Supreme Court of India which has conclusively settled the issue. For instance, whilst the Supreme Court had the opportunity to decide the issue in the case of *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.*²³, the Court refused to pass any such observation noting that the balance sheet in question was not duly passed. The closest that the Supreme Court had come in acknowledging that balance sheet entry may qualify as acknowledgement was in the case of *A V Murthy v. B S Nagabasavanna*²⁴. In this case, which pertained to a cheque dishonour case, the Court had noted as follows:

“5...Moreover, in the instant, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31st March 1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent.” (emphasis supplied)

- 3.6 In absence of a definitive pronouncement of the Apex Court settling the dispute in question, let us next examine if, on an independent analysis, a duly signed balance sheet could qualify as *acknowledgement* under Section 18 of Limitation Act.

4. Section 18 of Limitation Act - Ingredients

- 4.1 Section 18 of the Limitation Act reads as follows:

18. *Effect of acknowledgment in writing.*—

(1) *Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*

(2) *Where the writing containing the acknowledgment is undated, oral evidence may be*

²¹ of *Jwala Prasad v. Jwala Bank Ltd.* AIR 1957 All 143 (Allahabad).

²² *N.M. Shanmughasundaram Mudaliar v. Chidambaram Pillai* AIR 1953 Mad 433 (Madras).

²³ *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.* AIR 1958 SC 437 (Supreme Court).

²⁴ *A V Murthy v. B S Nagabasavanna* [Criminal Appeal No. 206 of 2002, decided on February 8, 2002 (Supreme Court)].

given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

- (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;*
- (b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and*
- (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.*

4.2 The ingredients of Section 18 were summarised by the Supreme Court in the case of *State of Kerala v. T M Chacko*²⁵ as follows:

- (a) there must be an acknowledgement of liability in respect of property or right;*
- (b) the acknowledgement must be in writing signed by the party against whom such right or property is claimed (or by any person) through whom he derives his title or liability;*
- (c) the acknowledgement must be made before the expiration of the period prescribed for a suit or application (other than application for the execution of a decree) in respect of such property or right.*

Also to be noted that, in terms of the Clause (a) of the explanation appended to that Section an acknowledgement may be sufficient for purposes of Section 18 even though,

- (i) it omits to specify the exact nature of the property or right;
- (ii) it avers that the time for payment, delivery, performance or enjoyment has not yet come;
- (iii) it is accompanied by refusal to pay, deliver, perform or permit to enjoy;
- (iv) it is coupled with a claim to set off; or
- (v) it is addressed to a person other than a person entitled to the property or right.

Clause (b) of the explanation defines the word "signed" to mean signed either personally or by an agent duly authorised in that behalf.

4.3 We should also note the following often quoted observation of the Supreme Court in the case of *S.F. Mazda v. Durgaprasad*²⁶, rendered in the context of Section 19 of Limitation Act, 1908 (which is the predecessor to Section 18 of Limitation Act and almost *pari materia* with the extant provision):

"It is thus clear that acknowledgment as prescribed by s. 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence

²⁵ *State of Kerala v. T M Chacko* [Civil Appeal No. 1682 of 1991, decided on April 19, 2000 (Supreme Court)].

²⁶ *S.F. Mazda v. Durgaprasad* AIR 1961 SC 1236 (Supreme Court).

of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in s. 19, and there is really no substantial difference between the parties as to the true legal position in this matter.” (emphasis supplied)

5. Entry in Duly Signed Balance Sheet – If Constitutes Acknowledgement

5.1 In the preceding section, we have identified the ingredients of Section 18. Let us now analyse whether entry in a balance sheet satisfies the ingredients so identified by asking us the following primary questions:

- (a) *Whether an entry in balance sheet amounts to admission of a jural relationship of debtor and creditor?*
- (b) *Whether a statement of liability shown in a balance sheet by a company would serve as an acknowledgment to the creditor, even though the same is not addressed to the creditor?*
- (c) *For an acknowledgement to be valid, such acknowledgement needs to be signed by the person owing the amount or its duly authorised agent. Whether directors signing the balance sheet satisfies the test of being an agent?*

5.2 **Whether an entry in balance sheet amounts to admission of a jural relationship of debtor and creditor?**

5.2.1 The issue has been answered in affirmative by a division bench of Calcutta High Court in the case of *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*²⁷ in the following manner:

“11... In my opinion the balance-sheets satisfy the test of an acknowledgment under S. 19. Each of them contains an admission that balances have been struck at the end of the previous year and that a definite sum has been found to be the balance then due to the creditor. The natural inference to be drawn From the balance-sheets is that the closing balance due to the creditor at the end of the previous year will be carried forward as the opening balance due to him at the beginning of the next year. In each balance sheet there is thus an admission of a subsisting liability to continue the relation of debtor and creditor, and a definite representation of a present intention to keep the liability alive until it is lawfully determined by payment or otherwise. There is necessarily a time lag between the date of the signing of the balance-sheet and the end of the previous year. The balance sheet contain no admission of the amount due on the date of the signature. That amount may be and often is different from the amount shown as

²⁷ *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff* AIR 1962 Cal 115 (Calcutta).

due at the end of the previous year, but that fact alone does not take the amount out of the purview of Section 19....” (emphasis supplied)

5.2.2 The same principle has also been noted by Punjab and Haryana High Court in the case of *Dainik Finance and Chit Fund Co. P. Ltd. v. Agricultural Industries*²⁸, where the following was observed:

“13.... The words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission and need not be expressed in words. It has been further observed that if the statement is fairly clear, then the intention to admit jural relationship may be implied from it. The balance-sheets contain the assets and liabilities of the firm and, in my view, the liabilities admitted therein will amount to an acknowledgment under Section 18. In the above view, I get force from the observations in Vijaya Kumar Machinery & Electrical Stores' case [1969]74ITR224(AP). It was held therein that the presentation of the balance-sheets to the Income Tax authorities constituted an acknowledgment of a subsisting liability as on the date of signing of the balance-sheet. Though the question was of academic interest, yet I decided it.” (emphasis supplied)

5.2.3 This, however, needs to be contrasted with the situation where an entry in the balance sheet is qualified by any conditions or qualifications. For instance, in the case of *Padam Tea Co. Ltd.*²⁹, whilst the Calcutta High Court approved the principal of treating balance sheet as an acknowledgment, in the instant case, the balance sheet was not treated to be an acknowledgment as the directors' report contained a qualification that the relevant liabilities were barred by limitations.

5.3 ***Whether a statement of liability shown in a balance sheet by a company would serve as an acknowledgment to the creditor, even though the same is not addressed to the creditor?***

5.3.1 *Explanation (a)* to Section 18 of Limitation Act reads as follows:

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

5.3.2 As apparent, the language of the statute itself recognises that an acknowledgment would not cease to be a valid acknowledgment merely because the same is not addressed to the creditor. However, if support of judicial precedent is required, reference may be made to the division bench of Calcutta High Court in the case of *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*³⁰, where the aforesaid issue was answered in affirmative by noting that, to constitute acknowledgment a debt need not be made to the creditor.

5.3.3 Following observation of Punjab & Haryana High Court in the case of *Lahore Enamelling and Stamping v. A.K. Bhalla*³¹ is also relevant in support of the aforesaid proposition:

²⁸ *Dainik Finance and Chit Fund Co. P. Ltd. v. Agricultural Industries* [1986] 60 Comp Cas 180 (Punjab & Haryana).

²⁹ *Padam Tea Co. Ltd.* AIR 1974 Cal 170 (Calcutta).

³⁰ *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff* AIR 1962 Cal 115 (Calcutta).

³¹ *Lahore Enamelling And Stamping v. A.K. Bhalla* AIR 1958 P&H 341 (Punjab & Haryana). Followed in *Swarna Paper Cutting Works v. Indian Express (Madurai) Private Limited, Madras* 1999 (3) CTC 167 (Madras).

“Debts due to creditors not mentioned by, name but included in the item relating to "Loans (unsecured)" or as due to "Sundry Creditors" mentioned in the balance sheet amount to an acknowledgment within the provisions of Section 19 of the Indian Limitation Act, so as to extend the period of Limitation with effect from the date of the signing of the acknowledgment.” (emphasis supplied)

5.4 For an acknowledgement to be valid, such acknowledgement needs to be signed by the person owing the amount or its duly authorised agent. Whether directors signing the balance sheet satisfies the test of being an agent?

5.4.1 The Supreme Court had, in the case of *Dale and Carrington Invt. (P) Limited v. P.K. Prathapan*³², noted that the directors are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company.

5.4.2 With that hindsight, we may refer to the following observation of division bench of Kerala High Court in the case of *Krishnan Assari v. Akilakerala Viswakarma Maha Sabha*³³, where the following was held:

“10. How far the balance sheets could be acted upon in deciding the claim of the appellant is the next question. The appellant relies on the balance sheets as acknowledgment of liability contemplated in S.18 of the Limitation Act, 1963. Under S.18 an acknowledgment of liability signed by the party against whom the right is claimed gives rise to a fresh period of limitation. Under Explanation (b) to the Section the word 'signed' means signed either personally or by an agent duly authorised. A company being a corporate body acts through its representatives, the Managing Director and the Board of Directors. Under S. 210 of the Companies Act it is the statutory duty of the Board of Directors to lay before the Company at every annual general body meeting a balance sheet and a profit and loss account for the preceding financial year. S.211 directs that the form and contents of the balance sheet should be as set out in Part I of Schedule VI. The said form stipulates for the details of the loans and advances and also of sundry creditors. The balance sheet should be approved by the Board of Directors, and thereafter authenticated by the Manager or the Secretary if any and not less than two directors one of whom should be the Managing Director. (See S.215). The Act also provides for supply of copies of the balance sheet to the members before the company in general meeting. Going by the above provisions, a balance sheet is the statement of assets and liabilities of the company as at the end of the financial year, approved by the Board of Directors and authenticated in the manner provided by law. The persons who authenticate the document do so in their capacity as agents of the company. The inclusion of a debt in a balance sheet duly prepared and authenticated would amount to admission of a liability and therefore satisfies the requirements of law for a valid acknowledgment under S.18 of the Limitation Act, even though the directors by authenticating the balance sheet merely discharge a statutory duty and may not have intended to make an acknowledgment.” (emphasis supplied)

Similar view has also been expressed by a single bench of Rajasthan High Court in the case of *Babulal Rukmanand v. Official Liquidator, Bharatpur Oil Mills*³⁴.

5.4.3 One may, however, need to contrast the aforesaid line of cases with those, where the signature was done by a signatory in breach of such signatory's fiduciary duty. For instance, in *The Coliseum (Barrow), Limited*³⁵, an acknowledgement signed by directors to pay to

³² *Dale and Carrington Invt. (P) Limited v. P.K. Prathapan* [Civil Appeal Nos. 5915-5916 of 2002, decided on September 13,2004 (Supreme Court)].

³³ *Krishnan Assari v. Akilakerala Viswakarma Maha Sabha* [1980 KLT 515 (Kerala)].

³⁴ *Babulal Rukmanand v. Official Liquidator, Bharatpur Oil Mills* AIR 1968 Raj 214 (Rajasthan).

³⁵ *The Coliseum (Barrow), Limited* (1930) 2 Ch 44.

themselves the amount of the directors' fees was held to not be a valid acknowledgement for the purpose of statute of limitation. Similar was the decision of Kerala High Court in the case of *Parasuraman v. Purushothaman*³⁶.

- 5.5 As is apparent from the aforesaid discussion, an entry in balance sheet would qualify as *acknowledgement* for the purpose of Section 18 of Limitation Act.

6. Analysis of Padmakumar Decision – If Acknowledgement to comply with Statutory Obligation is not a Valid Acknowledgement

- 6.1 In the *Padmakumar decision*, the NCLAT paved the way for disregarding any entry contained in the balance sheet of a company by holding the following:

- (i) *As the filing of Balance Sheet/ Annual Return being mandatory under Section 92(4) of the Companies Act, 2013, failing of which attracts penal action under Section 92(5) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor' cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963.*
- (ii) *If the argument is accepted that the Balance Sheet / Annual Return of the 'Corporate Debtor' amounts to acknowledgement under Section 18 of the Limitation Act, 1963 then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for the 'Corporate Debtor' to file Balance Sheet/ Annual Return, which is not the law.* (emphasis supplied)

- 6.2 As is apparent, the principal ground on which balance sheet has been disregarded as an acknowledgement is basis the fact, such preparation of balance sheet is to comply with statutory obligation and not on a voluntary basis. Let us examine then, whether an acknowledgement, which is otherwise valid, can be disregarded merely because such acknowledgement was made pursuant to statutory compulsion.

- 6.3 In one of the earliest known cases in this aspect, in the case of *Goode v. Jane Job*³⁷ Erle J. voiced in favour of the proposition that an acknowledgement given under statutory compulsion was also a valid acknowledgement, in the following words:

"It has been argued that it is not within the statute, because it is given under compulsion and upon oath. The laws of evidence have, of late years, been qualified and regulated with a view to the attainment of truth: and a statement is not the less likely to be true, in fact it is, a fortiori, the more likely to be true, because it is made upon compulsion, against the interests of the party making it. And that is equally true of statements made upon oath. That was certainly the opinion of Foster B. in Tristram v. Harte (Longf. & T. Exch. (Ir.) Rep. 186). He there says: "The defendant has not only acknowledged, in writing, the sum to be due, but has sworn that it is due." I think, therefore, for the reasons which I have stated, that the acknowledgment is sufficient, and that the action is therefore not barred by the Statute of Limitations. (emphasis supplied)

- 6.4 When we shift our focus to the Indian cases, we note that, in one of the first Indian cases dealing with this aspect, there was divergence of opinion between the two learned judges of

³⁶ *Parasuraman v. Purushothaman* AIR 1977 Ker 132 (Kerala).

³⁷ *Goode v. Jane Job* (1858) 1 Ellis and Ellis 6. Also see, *Overmark Smith Warden Ltd* [1982] 1 W.L.R. 1195, where Slade J was content to assume in favour of the relevant creditors, without so deciding, that a statement produced on a C company receivership or on a company liquidation, albeit in pursuance of a statutory obligation, is capable of constituting an effective acknowledgment for the purpose of the Limitation Act 1939.

the bench³⁸. A more authoritative pronouncement was, however, rendered four years later by another division bench of Madras High Court in the case of *Periavenkan Udaya Tevar v. Subramanian Chetti*³⁹, where the Court observed as follows:

“2. The first point was ably discussed in the case of *Venkata v. Parthasaradhi I.L.R. 16 Mad. 220*. The two learned judges in that case took opposite views, but we have no hesitation in expressing our concurrence with the view adopted by *Muttusami Ayyar, J., viz., that a deposition given and signed by a witness in a suit is as much a writing contemplated by Section 19 as is a letter addressed by him to a third party. There is nothing in the language of the Section or in the policy on which it is founded to justify us in restricting its scope by excluding statements made in depositions or other proceedings before a Court of Justice.*”

(emphasis supplied)

- 6.5 In the specific context of the balance sheet, we have in the preceding paragraph 3.3 referred to the decision of Nagpur High Court in the case of *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.*⁴⁰, where the Court refused to admit that balance sheet entry could qualify as acknowledgement as the balance sheet is drawn up under a duty. The aforesaid decision was considered and not followed by the division bench of Calcutta High Court in the case of *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*⁴¹. The relevant observation is contained in the following provision:

“10. In support of the contention that the balance-sheets do not amount to acknowledgments of liability because they were prepared under compulsion of law *Mr. Banerji* relies upon the decision in *Kashinath v. New Akot Cotton Ginning and Pressing Co. Ltd. ILR 1950 Nag 562: AIR 1951 Nag 255*. It is true that the balance sheets were required to be made both by the Indian Companies Act, 1913 as also by the articles of association of the defendant company. There, was a compulsion upon the managing agents to prepare the documents but there was no compulsion upon them to make any particular admission. They faithfully discharged their duty and in doing so they made honest admissions of the company's liabilities. Those admissions though made in discharge of their duty are nevertheless conscious and voluntary admissions. A document is not taken out of the purview of Section 19 of the Indian Limitation Act merely on the ground that it is made under compulsion of law. See *Venkata v. Partha Saradhi ILR 16 Mad 220, Udaya Them v. Subramania Chetti 6 Mad L J 266, Goode v. Job, (1858) 1 El and El 6 at p. 11 : 120 ER 810*. I am unable to agree with the reasoning of the Nagpur decision that a balance-sheet does not save limitation because it is drawn up under a duty to set out the claims made on the company and not with the intention of acknowledging liability. The balance-sheet contains admissions of liability; the agents of the company who makes and signs it intends to make those admissions. The admissions do not, cease to be acknowledgments of liability merely on the ground that they were made in discharge of a statutory duty. I notice that in the Nagpur case the balance-sheet had been signed by a director and had not been passed either by the Board of Directors or by the Company at its annual general meeting and it seems that the actual decision may be distinguished on the ground that the balance-sheet was not made or signed by a duly authorised agent of the company.”

(emphasis supplied)

- 6.6 The aforesaid decision was followed, amongst other decisions, in *Takan Ram v. Narain Das*⁴²

³⁸ *Venkata v. Parthasaradhi* 1892 I.L.R. 16 Mad. 220 (Madras).

³⁹ *Periavenkan Udaya Tevar v. Subramanian Chetti* (1897) ILR 20 Mad 239 (Madras).

⁴⁰ *Kashinath Shankarappa v. The New Akot Cotton Ginning and Pressing Co. Ltd.* AIR 1951 Nag 255 (Nagpur).

⁴¹ *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff* AIR 1962 Cal 115 (Calcutta).

⁴² *Takan Ram v. Narain Das* AIR 1972 P&H 477 (Punjab & Haryana).

to hold that *it makes no difference whether a person acknowledges his status voluntarily or he does so when he is required under any law in a certain contingency to describe his status.*

- 6.7 As to whether *statutory compulsion* can take an otherwise valid acknowledgement outside the purview of Section 18 of Limitation Act, we do however note a recent decision of a single bench of Kerala High Court in the case of *Kesavan Namboodiri v. B S Radhakrishnan*⁴³, where it was held that an admission pursuant to *statutory compulsion cannot* be brought under the purview of Section 18 of Limitation Act. Interestingly, the decision, which pertained to mortgagor-mortgagee relationship, did not cite a single authority in support of the proposition.
- 6.8 Notably, neither did NCLAT, in the Padmakumar decision, cite any decision in favour of the the proposition it canvassed, nor did it consider any of the decisions cited in the previous paragraphs to distinguish the judgments, which have now stood ground over for more than a century.

7. Parting Thoughts

- 7.1 If one undertakes a review of the decisions of NCLAT, which have been reversed by Supreme Court, a recurring theme across majority of such overturned decisions would be the aspect of limitation. It was the Supreme Court, which had to come to the rescue by clarifying that *limitation would not get saved by initiation of suit for recovery*⁴⁴; *the date of enforcement of IBC has no bearing on limitation, nor does it revive a time-barred claim*⁴⁵; *a Section 7 application being in the nature of application, an application basis secured mortgage money cannot be filed within twelve years from when the money becomes due*⁴⁶. Interestingly, NCLAT has, every single time till now, achieved to come up with a new line of thinking to attract Supreme Court's attention. The Padmakumar decision has all the ingredients to summon Supreme Court's attention to clarify the law and settle the debate once and for all. The only question is when.

This paper has been written by Arka Majumdar (Partner) and Ayushi Jain (Associate).

⁴³ *Kesavan Namboodiri v. B S Radhakrishnan* RSA. No. 17 of 2007, decided on December 4, 2018 (Kerala).

⁴⁴ *Jignesh Shah v. UoI* [Writ Petition (Civil) No.455 of 2019, decision dated September 25, 2019 (Supreme Court)].

⁴⁵ *Sagar Sharma v. Phoenix Arc Private Limited* [Civil Appeal No. 7673 of 2019, decided on September 30, 2019 (Supreme Court)].

⁴⁶ *Gaurav Hargovindbhai Dave v. ARCIL* [Civil Appeal No. 4952 of 2019, decided on September 18, 2019 (Supreme Court)].

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