IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

C.P.(IB)1166/MB/2020

Under Section 7 of the IBC, 2016

In the matter of

Edelweiss Asset Reconstruction Company Ltd.

Edelweiss House, Off CST Road, Kalina,

Santacruz (east), Mumbai- 400098

... Petitioner

v/s.

Perfect Engine Components Private Limited

1101, Viraj Towers, Junc of Andheri-Kurla Road, W. E. Highway, Andheri (east), Mumbai- 400069

… Corporate Debtor

Order Pronounced on: 10.08.2021

Coram:

Hon'ble Suchitra Kanuparthi, Member (Judicial)

Hon'ble Chandra Bhan Singh, Member (Technical)

For the Petitioners: Adv. Abhijeet Sinha, Adv. Nishit Dhruva, Adv. Prakash Shinde, Adv. Rohan Agrawal, Adv. S.M. Algaus, Adv. Zaid Mansuri, Adv. Priyanka Shah, Adv. Harshad Vyas i/b MDP & Partners

For the Corporate Debtor: Adv. Mukesh Jain, Adv. Eshna Kumar

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This Company Petition is filed by Edelweiss Asset Reconstruction Company Ltd. (hereinafter called “Petitioner”) seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Perfect Engine Components Private Limited (hereinafter called "Corporate Debtor") alleging that the Corporate Debtor committed default to the extent of Rs. 226,77,83,051/- as provided under Section 7 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Submissions made by the Petitioners:

2. The Petition reveals that the State Bank of India (“Original Lender”) had extended various credit facilities to the Corporate Debtor at the requests made by the Corporate Debtor vide its Sanction Letters, the details of which are extracted below:

Sr. No.	Date of Sanction	Amount (Rs.).
1.	26th November 2008	22.31 crores
2.	26th May 2009	23.21 crores
3.	15th March 2010	29.81 crores
4.	31st March 2011	62.73 crores

3. The Counsel for the Petitioner submits that the above mentioned credit facilities were secured by the Personal and Corporate Guarantees of various individuals and one Corporate namely M/S. Perfect Engineering Products Ltd. vide the following Deeds of Guarantee:
   - Guarantee Agreement dated 11.12.2008
   - Guarantee Agreement dated 15.12.2008
   - Guarantee Agreement dated 30.05.2009
   - Guarantee Agreement dated 23.03.2010
   - Guarantee Agreement dated 31.03.2011

4. The Counsel for the Petitioner submits that the Corporate Debtor entered into the following Agreements for Hypothecation of Goods and Assets with the Original Lender in relation to the above mentioned credit facilities extended:
    - Agreement of Hypothecation of Goods and Assets dated 11.12.2008
    - Supplemental Agreement of Hypothecation of Goods and Assets for increase in overall limit dated 30.05.2009
    - Supplemental Agreement of Hypothecation of Goods and Assets for increase in overall limit dated 23.03.2010
    - Supplemental Agreement of Hypothecation of Goods and Assets for increase in overall limit dated 31.03.2011
5. The Counsel for the Petitioner further submits that the Corporate Debtor also created mortgage of various immovable properties in favor of the Original Lender vide the following Deeds of Mortgage:
    - Registered Mortgage Deed dated 24.12.2008
    - Registered Mortgage Deed dated 13.08.2010
    - Registered Mortgage Deed dated 08.08.2011
6. The Counsel for the Petitioner further submits that the Corporate Debtor committed default in repayment of its outstanding dues on 31.03.2009 and the Corporate Debtor's account was declared as NPA on 30.06.2009 by the Original Lender. The Corporate Debtor had also acknowledged the outstanding debt which is reflected in various Balance Confirmation Letters issued by the State Bank of India dated 31.03.2010, 31.03.2010, 31.03.2011 and 31.03.2012. The last Balance Confirmation Letter dated 31.03.2012 is as below:

STATE BANK OF INDIA, COMMERCIAL BRANCH, PUNE

I/ We confirm that the balance of my/ our following accounts as on 31.03.2012 was as under:-

Name of the Company: - Perfect Engine Components Pvt Ltd

CIF No. 85396419686

Facility	Account No.	Outstanding (Amount in Rs.)
Cash Credit	30605170687	44,10,65,100.36 (Dr.)
Term Loan -1	30605335494	5,91,31,712.00 (Dr.)
Term Loan -2	31152647501	1,25,34,691.00 (Dr.)
Term Loan -3 (Corp Loan)	31859876526	4,93,36,459.00 (Dr.)
Term Loan -4	31868158288	3,39,45,768.00 (Dr.)
LC (Inland ~~& Foreign~~)	30635502983	0.00
BG (Inland & Foreign)	—	—
Others (Please Specify)	—	—

due by me/ us to the Bank, as shown in your statement of account on that date.

For PERFECT ENGINE COMPONENTS PVT LTD.

Signature (s)

Authorised Signatory

Address

2012 Please return this form duly signed and notify any change of address.

7. The Original Lender, i.e., State Bank of India, had issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor on 06.08.2012. Later, the total outstanding debt along with all the securities in favor of the Original Lender came to be assigned in favor of the Petitioner vide Deed of Assignment dated 19.03.2014. Thereafter, the Petitioner became a Secured Creditor in respect of the Corporate Debtor, being assignee of the debt, the Petitioner also issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor on 06.12.2019. The Petitioner has also annexed NESL and CIBIL Reports to the Petition.

8. The Counsel for the Petitioner further submits that the Petitioner also filed an Original Application No. 01/2014 in the Debt Recovery Tribunal against the Corporate Debtor under Section 19(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 for the recovery of the dues in the sum of Rs. 80,67,60,995.92/- along with future interest. The Debt Recovery Tribunal, vide its Order dated 22.11.2016, allowed the Original Application and issued the Recovery Certificate also.
9. The Counsel for the Petitioner further submits that it addressed a Restructuring Letter dated 30.06.2017 for restructuring the loans of the group of companies (including the Corporate Debtor). The Restructuring Letter confirmed the terms and conditions provided that the combined dues of all three companies shall be payable as follows;
    a. Rs. 77.50 Crores repayable from operational cash flows of the company as per the schedule provided in Annexure I.
    b. The possession of land (admeasuring 9,048 sq. mtrs.) and building at Wagle Industrial Estate; Thane (Thane Property) has been taken by EARC and the Promoter shall assist in sale of the property. The estimated value of the Thane property is Rs. 60 crores.
    c. The possession of Land Parcel admeasuring 14,100 sq. mtrs. at Chikalse, Pune has been taken by EARC and EARC may sell the property under SARFAESI and adjust the proceeds against the dues of PEPL. The promoter shall assist in scouting buyers for the property. The estimated value of the property is Rs. 2.48 crores.
    d. Equity shares for 13.5% stake in equity in Perfect Engineering Products Limited (48,88,841 nos. of Face Value Rs. 10/- each) and Perfect Engine Components Private Limited (40,578 nos. of Face Value Rs. 10/- each) allotted to EARC. At present, the shares allotted have been valued at Rs. 26.50 crores. Such stake

of 13.5% will be maintained at all points in time. EARC may get further equity stake of upto 6.5% post September 30, 2017 depending on achievement of projected EBITDA (provided in Annexure 11) in FY17 by the Companies (PEPL and PECL). Equity stake shall be computed on basis of EV/EBIDTA multiple of 30 times on 12 months EBIDTA for the period April 2016-March 2017.

e. If the combined EBITDA of PEPL and PECL for FY-2017 is less than Rs. 11 crores then EARC will be allotted further equity stake of upto 6.50% in PEPL and PECL (post dilution).

   i. Such equity will be issued not later than December 31, 2017.

   ii. If EBITDA is equal to or more than Rs. 11 crores, then no further equity is proposed to be allotted.

10. The Petitioner, vide its Letter dated 01.06.2018, revoked the said Restructuring Letter due to a default on part of the Corporate Debtor in honoring the payment terms of the Restructuring Letter. This revocation by the Petitioner was done as per one of the terms of the Restructuring Letter dated 30.06.2017 which stated that *"in case of non-compliance of any of the terms of restructuring, EARC has the right to unilaterally revoke the restructuring and the original liabilities of the companies will be restored along with further interest and costs and adjustment shall be made of the payments made till that time."*

11. It is further submitted by the Counsel for the Petitioner that the Petitioner has also produced the Balance Sheets and Independent Auditor's Report of the Corporate Debtor's Account for the year ended on 2015, 2016, 2017 and 2019 which clearly reflects the credit facilities extended by the Petitioner to the Corporate Debtor and further reflects the outstanding amounts of loan owed by the Corporate Debtor to the Petitioner.

12. The Counsel for the Petitioner submits that due to the failure of the Corporate Debtor to make payment of the entire outstanding amount, the

Petitioner have filed the present Petition seeking initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for a claim amount of Rs. 226,77,83,051/-.

13. The Counsel for the Petitioner submitted the following computation of dues payable by the Corporate Debtor to the Petitioner:

(Amount in Rs.)

Facilities	Opening Principal	Conversion of Debt into Equity	Closing Principal	Interest	Penal Interest	Total Dues
30605170687- DCC	45,10,29,753	4,95,02,898	40,15,26,855	1,15,68,63,474	9,89,12,878	1,65,73,03,207
30605335494- TL-1	5,81,60,112	63,83,380	5,17,76,732	17,57,63,911	1,43,01,069	24,18,41,712
31152647501- TL-2	1,23,25,723	13,52,813	1,09,72,910	3,72,30,961	30,29,360	5,12,33,232
31868158288-TL-3	3,35,00,000	36,76,802	2,98,23,198	9,20,58,160	77,11,359	12,95,92,718
31859876526- Corp Loan	4,86,00,000	53,34,107	4,32,65,893	13,32,85,295	1,12,60,994	18,78,12,182
TOTAL	60,36,15,588	6,62,50,000	53,73,65,588	1,59,52,01,802	13,52,15,661	2,26,77,83,051

Reply by the Corporate Debtor:

14. The Counsel for the Corporate Debtor contended that:

a. The present Petition is not maintainable *per se* as the claim of the Petitioner is barred by limitation applicable to proceedings under the Code. The Petitioner herein has attempted to trigger a fresh round of limitation on the basis of a restructuring package which is not permissible. There is no fresh default under the said restructuring package as alleged by the Petitioner and hence, there is no cause or occasion for filing the present Petition on the basis of the said package.

b. The Corporate Debtor along with another group concern namely Perfect Engineering Private Limited (PEPL) were granted credit facilities by State Bank of India (Original Lender) against several common securities including the security of Thane Land. SARFAESI Notice u/s. 13(2) dated 13 February 2013 issued by State Bank of India was addressed to PEPL and another guarantor company namely Perfect Infrastructure Private Limited (PIPL). The said Thane Property was a common collateral security for the facilities of PEPL.

c. All the statement of accounts also date back to 2012 as annexed in Volume 4 of the Petition at the time when the Corporate Debtor was declared as NPA and hence, from the documents placed on record by the Petitioner itself, it again proves that the present Petition is barred by Limitation. The date of NPA as per Part IV of Form-1 of the present Petition is 30.06.2009 and the State Bank of India had classified the said credit facilities as NPA in its books on 28.06.2012. The Petitioner and SBI themselves are not sure when the account of the Corporate Debtor was declared as NPA.

d. The financial debt was assigned by State Bank of India to the Petitioner by Deed of Assignment dated 19 March, 2014. After assignment of the debt in favour of the Petitioner, the Petitioner sanctioned a singly consolidated restructuring package in favour of the Corporate Debtor and its associate PEPL by letter dated 07 November, 2014. One of the conditions of the said restructuring package read as under:

   "*Secured Rupee Loan- III of Rs. 60 crores payable only from cash flows arising from sale of Thane Land (Panchpakhadi). Operational cash flows shall not be required to fund repayment of such loan. All beneficial rights in land or any development thereon shall remain with EARC and promoter/ companies shall have no claim on the same.*"

e. Accordingly, on or about 27 September, 2017, although the possession of the Thane Land was offered by the Corporate Debtor pursuant to the restructuring package, the said possession was taken over by the Petitioner under SARFAESI pursuant to Notice dated 13 February, 2013 issued by the State Bank of India to PEPL. Noteworthy, the Thane Land is a common security for the Corporate Debtor and the said PEPL. The said possession of Thane Land was taken under SAEFAESI which can be invoked only when the account is an NPA, even though the restricting package was very well in force. Not only that when sale notices dated 12th April, 2019 and 22nd August, 2019 were issued by the Petitioner for sale of the Thane Land, the same were also issued pursuant to possession notice dated 27th September, 2016 which itself was issued under the earlier SARFAESI Notices as is set out hereinabove. It is therefore evident that regardless the approval of the restructuring package and pending implementation, the Petitioner continued to classify the account of the Corporate Debtor and PEPL as an NPA continuously and continued to act pursuant to the SARFAESI notices issued by the State Bank of India well before assignment of the debt to the Petitioner herein. It is therefore submitted that all along the account of the Corporate Debtor continued to be in 'default status'.

f. The Petitioner had also filed an Original Application bearing No. 01/2014 before the Debt Recovery Tribunal (DRT). The Petitioner, even after the approval of the restructuring package, continued to prosecute the said recovery application without placing on record the factum of the restructuring package. Not only that, on or about 22nd November, 2016, the Petitioner went on to secure a recovery certificate from DRT, Pune for entire amount of claim without any reference to the said restructuring package. It is thus evident that the said recovery certificate was obtained pursuant to the original liability in default and the restructuring package made no impact on the default status of the account. In any event, it is a settled law that once recovery proceedings are filed in DRT on the basis of a default, it is not permissible to recompute limitation for the purpose of the proceedings before this Tribunal from a subsequent date.

g. The assignment Agreement between the State Bank of India and the present Petitioner dated 19.03.2014 was entered into after the Corporate Debtor was declared as NPA on 30.06.2009 by the State Bank of India as per RBI guidelines. The said date of NPA is way beyond the three year limitation period since the present Petition is filed in 2020 after a lapse of over a decade. In fact, SBI had already started the proceedings under SARFAESI Act, 2002 before the said assignment and action under the said proceedings continued even after the assignment and approval of the restructuring package. The reference to purported default made in part IV of the Form No. 1 to purported reworking of date of default on the basis of the restructuring package is completely fallacious and irrelevant. The status of the account which was "default" before assignment of the debt in favor of the Petitioner continued uninterruptedly to be "default status" all through and the Petitioner even acted pursuant to the SARFAESI Notices issued by the state Bank of India before the said assignment.

h. After the debt of the Corporate Debtor was assigned by State Bank of India in favour of the Petitioner on or about 19 March, 2014, the Petitioner engaged in elaborate and detailed interaction with the Corporate Debtor through its then Managing Director Mr. Ambrish Shah. Thereupon, restructuring package was approved by the Petitioner by its letter dated 7th November, 2014 as per detailed terms and conditions set out therein which *inter alia* included payment of a lump sum amount of Rs. 77.50 crores. The most critical condition of the said package was that the entire repayment had to be made from 'operational cashflow' as provided therein. Nowhere in the said letter of approval was there any condition requiring the promoters of the Corporate Debtor to induct any additional funds for funding payment of instalments of the Petitioner in the event of shortfall in the operating cash flows. Taking cognizance of all the above and other relevant factors which resulted in generation of much lower 'operating cash flow' then what was originally expected, the Petitioner was pleased to realign the repayment schedule of the settled amount of Rs. 77.50 crores by its letter dated 30 June 2017. Save and except the relaxation in repayment resulting from revised estimation of projected 'operating cash flow', no other condition was changed. The said revised letter of approval also mentioned about the compliances of the earlier sanction till then effectuated by the Corporate Debtor and its group concern named above. Yet again, the revised schedule of yearly repayments was illustrative in nature having been based upon the revised estimates of EBIDTA and operating cash flow. Yet again, there was no stipulation of induction of any funds by the promoters in case of shortfall of the operating cash flow.

i. There has been no allegation of the Application against the Corporate Debtor, its associates or its management that any part of the EBIDTA or the operating cash flow has been diverted for any purpose other than what was stipulated in the above OTS package and the revised OTS package. There is no insinuation in any contemporaneous correspondence or in the present application, and rightly so, that there was any obligation on the promoters of the Corporate Debtor to induct any funds. There is no allegation that there was any delay or demur on the part of the Corporate Debtor, its associates or its management from complying with the other terms and conditions of the OTS package. On the contrary, there is recognition of due discharge of the said obligations in so far as it was within the power of the Corporate Debtor and its management.

j. Regardless of the above, the Petitioner purported to declare a default on the part of the Corporate Debtor and its associates and purported to cancel the OTS package by its letter dated 1st June, 2018. The unwanted, unmerited and arbitrary, capricious and high ended action of the Petitioner was promptly and vigorously countermanded by the Corporate Debtor promptly inter alia by letter dated 14th June 2018. The said letter categorically opposed the revocation of restructuring of loan and stated that the restructuring involved several critical steps as follows;

i. conversation of liability of lender in to CCDs of Rs. 50 crores convertible into equity shares in stake of Rs. 13.50 for EARC

ii. year marking of secured loans of Rs. 5 crores repayable from sale of assets charged in favour of EARC

iii. transfer of Thane property in favour of EARC at a valuation of Rs. 60 crores

iv. grant of secured rupee term loan of Rs. 77.50 crores repayable only from receivable cash flows as per scheduled provided therein.

v. introduction of strategic investor Mr. Nitin Chattawal Group and Investment of Rs. 26 crores in equity and 11 crores in working capital

k. The present Petition has been filed by the Petitioner on the basis that there was a default qua the restructuring package and the Petitioner has sought to compute limitation on the basis thereof. Assuming while denying that the argument taken by the Petitioner is correct, it is stated that there is no incidence of 'default' incidental to the restructuring package as alleged or at all. It is trite law that the provisions of the Code cannot be invoked unless there is a default as provided in the Court. It is reiterated that no cause has inured to the Petitioner preferring the above Application on the basis of the restructuring package. Therefore, no cause of action has accrued to the Petitioner on the basis of its allegations.

l. The letter also put forth the performance of the Corporate Debtor for the past two years and also mentioned that there is no element of willful default, no diversion of funds and based on the package approved by the Petitioner, Corporate Debtor and the investor had put in money. The repayment of money had to be paid by the internal generation only and interest had to be paid in case of delay.

m. The present Petition has been filed by the Petitioner on the basis that there was a default qua the restructuring package and the Petitioner has sought to compute limitation on the basis thereof. The Corporate Debtor and its associates employed by it workers whose wages are paid up to date. The Corporate Debtor is the registered MSME and produces OEMs which included large corporates like Cummins India Ltd., Bajaj Auto Ltd, Tata Motors Ltd., Tata Companies Ltd. and others.

n. The Corporate Debtor being the MSME protected by the rigours of the Code. Section 240 A of the Code incorporates the special provision of the code. The government has gone to the extent of saying that MSME may be exempted from the CIRP by prohibiting filing of an application against the MSME under Section 7 of the Code, MSME being bedrock of the Indian economy cannot be put to liquidation.

o. The Corporate Debtor further contended that while the restructuring package was approved on 07.11.2014, the Petitioner continued with the recovery application filed by the predecessor SBI before Debt Recovery Tribunal (DRT). The Petitioner obtained the Recovery Certificate as on 26.11.2016, the Petitioner failed to inform about the OTS package before the Hon'ble Debt Recovery Tribunal (DRT).

p. Assuming while denying that the argument taken by the Petitioner is correct, it is stated that there is no incidence of 'default' incidental to the restructuring package as alleged or at all. It is trite law that the provisions of the Code cannot be invoked unless there is a default as provided in the Court. It is reiterated that no cause has incurred to the Petitioner preferring the above Application on the basis of the restructuring package. Therefore, no cause of action has accrued to the Petitioner on the basis of its allegations.

q. The Petitioner originally acted as an "intermediary" for assisting the Corporate Debtor for arriving and working out a proposal of OTS to be offered to SBI (Original Lender/ Assignor). The Petitioner was well conversant with all the facts and financial condition of the Corporate Debtor right from 2012 since it was the Petitioner which has been interacting with SBI and the then Managing Director of the Corporate Debtor to arrive at a settlement while knowing that SBI had issued a Notice under Section 13(2) of SARFAESI on 06th August 2012 against the Corporate Debtor.

r. Subsequently, sometime in September 2013, the Petitioner also visited the factories and sites of the Corporate Debtor to undertake its own due diligence and valuation and Petitioner released a document titled "SBI Negotiation Rationale" which was used as basis for OTS proposal of Rs. 70 crores of which Rs. 55 crores was to be funded by Allium Finance Private Limited ("Allium") which at that point in time was part of the Petitioner's Group.

s. All of the above information was not shared by the Petitioner with State Bank of India while taking assignment. The Petitioner also took over the possession of land parcel in Thane which the Petitioner itself had valued at Rs. 60 crores from the Corporate Debtor. This only goes to prove that the said Petition has been filed merely for "Recovery of its dues" which not only fails on the ground of its being barred under the "Limitation Act, 1963" as well as but also is clearly against the provisions of Section 65 (1) of the Code and hence, on these counts, the present Petition deserved to be quashed and costs be levied on the Petitioner in terms of provisions of Section 65 of the Code.

<u>Findings:</u>

15. The question which arises for consideration are as follows;

a. Whether the Petition is barred by Limitation?
b. Whether the Petitioner has waived his statutory right by restructuring the loan on 07.11.2014 and 30.06.2017?

c. Whether there is any default on the part of the Corporate Debtor in view of the restructuring of the loan?

16. The present Petition is filed for initiation of CIRP against the Corporate Debtor for nonpayment of outstanding dues of Rs. 226,77,83,051/-. The Petitioner has been assigned the debt from the Original Lender, i.e., SBI vide Deed of Assignment dated 19.03.2014. The Original Lender, i.e., SBI had extended the loan facility to the Corporate Debtor has vide sanction letters more particularly mentioned below;

Sr. No.	Date of Sanction	Amount (Rs.).
1.	26th November 2008	22.31 crores
2.	26th May 2009	23.21 crores
3.	15th March 2010	29.81 crores
4.	31st March 2011	62.73 crores

17. The said credit facility was secured by execution of personal and corporate guarantees, agreement of hypothecation of goods, registered mortgaged deeds etc. The Petitioner declared the Date of Default as on 31.09.2009 and NPA as on 30.06.2009. The Corporate Debtor acknowledged the outstanding liabilities as balance confirmation letters in favor of the SBI on 31.03.2010, 31.03.2011 and 31.03.2012. The Original Lender invoked SARFAESI proceedings and filed the Application No. 01 of 2014. The Debt Recovery Tribunal (DRT) on 22.11.2016 allowed the Original Application and issued Recovery Certificate.

18. The Petitioner further granted restructuring as on 07.11.2014 and on 30.06.2017, the restructuring package which was extended to the Corporate Debtor included a fix scheduled of repayment and terms and conditions of charge of default interest etc., however, the Petitioner revoked the restructuring package as on 21.06.2018

19. The Petitioner also produced the balance sheet of the Corporate Debtor for the year 2015, 2016, 2017 and 2019 and therefore, claims that the Petitioner is within limitation though the date of default is on 31.03.2009 and NPA on 30.06.2009, the Petitioner confirmed that the Corporate Debtor had made part payment in all the four loan accounts as on 28.09.2018. The present Petition was filed on 06.08.2020 with a claim that such Petition is within limitation.

20. The Corporate Debtor filed the Reply stating that the default took as on 31.03.2009 and the NPA was declared on 30.06.2009, but however, the Petitioner relies on two dates of default, which has been culled out from various deeds such as NESL notice, notice of original lender under SARFAESI, etc. which records the date of default as 28.06.2012. The Petitioner obtained the Recovery Certificate from Debt Recovery Tribunal (DRT) as on 22.11.2016 without disclosing the fact of restructuring of the supervening events more particularly restructuring package post filing of Recovery Application. The Corporate Debtor further pointed out that the Petitioner is claiming two different default amounts. The Corporate Debtor pointed out that the Petitioner claimed in part 4 an amount of Rs. 226,77,83,051/-. On the other hand, an amount claimed as default is Rs. 5,85,00,000/- and therefore, two different amounts are claimed by the Petitioner.

21. The Corporate Debtor further stated that the debt is disputed as per the NESL record, and that there is no fresh default on the part of the Corporate Debtor pursuant to the restructuring package. The restructuring package dated 07.11.2014 sets out terms and conditions of the sanction which inter alia included the payment of lump sum amount of Rs. 77.50 Crores. The repayment schedule is based on projected EBIDTA/ Operational cash flows. However, the Corporate Debtor mentions that there was no condition required that the Corporate Debtor to induce additional funds for funding payment of installment of the Petitioner.

22. The Corporate Debtor contended that the Petitioner has sanctioned the 2nd restructuring package as on 30.06.2017 which captured the schedule of repayment based on revised estimation of projected operating cash flow. There were no indication about payment of monies by the promoter in case of shortfall of operating cash flow. The Petitioner revoked the restructuring package on 01.06.2018 and the Corporate Debtor immediately objected to the revocation of restructuring package and brought to the notice of the Petitioner that several critical steps being followed post the restructuring and that the company was in no element of willful default. No diversion of funds and the infusion of funds by the Investor commenced in the year 2015-16.

23. The Corporate Debtor further claimed that there was no fresh default on the part of the Corporate Debtor pursuant to the restructuring of the said loan as on 30.06.2017. The Letter dated 14.06.2018 further narrated the compliances made by the Corporate Debtor and there is no default as follows;

    a. Thane Land was surrendered as per the package. The agreed valuation was Rs 60 crores.

    b. 13.5% equity of the Corporate Debtor &PEPL, was given to the Applicant as per the package. The agreed valuation was Rs. 50 crores.

    c. The non-core assets had to be sold as per the package and a sum of Rs. 5 crores had to be paid to the Applicant. This condition was complied in so far as some assets were sold and amount paid to the Applicant. The remaining asset was handed over to the Applicant.

    d. A sum of Rs 77.50 crores was payable without interest from the `operating cash-flows'. The Applicant had fixed indicative instalments based on projected 'operating cash-flows'. There was no stipulation of the promoters being required to make-up shortfall of cash flows to meet the instalments. It is not the case of the Applicant that there was any diversion of funds. A sum aggregating Rs 9.37 crores was paid to the Applicant. Due to mismatch between the operating cash-flows and the tentative instalments, on 30.6.2017, the Applicant revised the instalments to balance the instalments with revised estimates of 'operating cash-flows'. Yet again, there was no stipulation of the promoters being required to make-up shortfall of cash flows to meet the instalments.

24. It is not the case of the Petitioner that there was any diversion of funds. Still Notice of Revocation of the restructuring package was served on 01.06.2018.
25. The Corporate Debtor also claimed that the Petition is filed in violation to Section 65 of the Code as the Petition is barred by limitation and discloses no cause of action and there is no default on the basis of restructuring package. Further, the Corporate Debtor also mentioned that it is a MSME and is protected from the rigours of the Code and have 600 employees working who have been paid upto date.
26. Upon perusal of the facts narrated in the aforesaid paragraphs it can be said that the Original Lender, i.e., SBI had granted a loan to the Corporate Debtor to the tune of Rs. 62.73 crores as on 31.03.2011. The Petitioner was assigned this debt as per the deed of assignment dated 19.03.2014 and the original lender had commenced the proceeding under SARFAESI and Debt Recovery Tribunal (DRT). The Debt Recovery Tribunal (DRT) had issued the Recovery Certificate of Rs. 80,67,60,995.92 along with future interest on 22.11.2016. The Petitioner granted a restructuring on 07.11.2014 and 30.11.2017 the restructuring package is as follows. The restructuring package as on 30.06.2017 is as follows;
    a) The restructuring package categorically contained a clause wherein the outstanding dues was repayable from operational cash flows.

b) It also contains conditions wherein the possession of land admeasuring 900 sq.mts. at Wagle Industrial Estate thane has been taken over by the Petitioner. The estimate value of Thane property is Rs. 60 crores. The possession of land parcel at Chikalase, Pune was taken over by the Petitioner and the Petitioner may sell the property at SARFAESI. There will be a transfer of equity shares of 13.5 stakes in the company of Corporate Debtor.

c) The restructured debt would not carry any interest but would carry an interest when there is a default.

27. The Petitioner however unilaterally invoked the restructuring package dated 30.06.2017. The Corporate Debtor strongly rebutted by Letter dated 14.06.2018, wherein the Petitioner was categorically informed that the restructuring package was acted upon and several steps were taken pursuant to the restructuring package was carried out. Further, it was also pointed out that there was a revenue short fall in the year 2016-17 and they were not able to achieve the targets for the year 2017-18 due to working capital challenges and loss of production of Tata Motors, still the performance had immeasurably increased as compared to the precedent years with regard to the repayment of loan secured by specified assets wherever the liquidation of assets and payment to the Petitioner is not possible, the asset has been handed over to the Petitioner . The conversion of part of loan to the CCDs and issuing of shares has been carried out. Further, the Corporate Debtor had to pay Rs. 12.53 crores towards statutory dues and therefore, finally requested to the Petitioner to recall the Notice dated 01.06.2018. It was also contended that out of total package of Rs. 192.50 crores, a sum of Rs. 115 crores has been satisfied by handing over Thane land for Rs. 60 crores, issue of share capital of Corporate Debtor and its associate concern to the tune of 13.5% for which credit of Rs. 50 Crores accrued and handed over proceeds of value of Rs. 5 Crores. The balance amount of Rs. 77.50 Crores was converted in the above term loan out of which Rs. 9.37 crores has been paid

from operating cash flows. It is contended that payment from operating cash flows without any diversion is sufficient compliance of the terms of sanction as the tentative repayment schedule was only indicative in nature based on projections of EBIDTA. There is no stipulation that the corporate Debtor or its associate or promoters of being required to induct funds to make up for shortfall in operating cash flows.

28. The date of default as mentioned in Part IV of the Petition is 31.03.2009 and the NPA is 30.06.2009. However, the Petitioner also relied upon the Debt of Default as on 28.06.2012 as per NESL filing and SARFAESI Notice. The present Petition is filed on 06.08.2020, however the date of default relied upon the Petition is on the 31.03.2009 and 28.06.2012, therefore, even if we assume that cause of action arose on 28.06.2012, even then the Petition, if filed beyond three years, is time barred.

29. Evidently, there has been restructuring of loan on 07.11.2014 and 30.06.2017, contrary to the terms and conditions of the restructuring package, the Petitioner has revoked the restructuring package on 01.06.2018. The said letter of revocation of restructuring immediately objected/rebutted by the Corporate Debtor. In strict interpretation of law of Contracts, it seems that there was no consensus ad idem and the unilateral revocation was strongly objected by the Corporate Debtor who pointed out that there is no default and payments will have to be made only from operational cash flows. It is relevant to refer to Section 3(12) of the Code, which defines default as follows:

    "Default means no-payment of debt when whole or any part or instalment of amount of debt has become due and payable and is not paid by the debtor or the corporate Debtor as the case may be"

    Therefore, this Bench finds it difficult to construe that default has occurred in the present case.

30. This Bench is of the considered view that the cause of action arose as on 31.03.2009/ 28.06.2012. However, the Petitioner was filed on 08.08.2020

which is beyond three years as contemplated in judgment of Hon'ble Supreme Court in *B.K. Educational services Private Limited Vs Parag Gupta and Associates* wherein it is categorically held that the Article 137 of the Limitation Act, 1963 mentioned that the right to sue accrues by the Default occurs, the default has occurred over three year prior to the filing of Petition and the Petition is barred by the Limitation under Limitation Act, 1963. In the instant case, it can be seen from the facts of the given case the default occurred as on 31.03.2009 or on 28.06.2012, a recovery certificate issued by the Debt Recovery Tribunal (DRT) on 22.11.2016, the restructuring package as on 07.11.2014, 30.06.2017.

31. The restructuring package further envisaged the payment of installment from operational cash flows and therefore, there can be no default attributed to the Corporate Debtor. It is the case of the Petitioner that thought the defaults occurred on 31.03.2009. It has balance confirmation letter for the period 2010, 2011 and 2012 and that the Corporate Debtor had made part payment in all the credit facilities till 28.09.2018. Further, they are relying on the acknowledgment of debt in the balance sheet of the Corporate Debtor. The balance sheet confirms that there is no default on behalf of the Corporate Debtor for year 2016 and 2019. The Auditor Report at page 781 and 829 is reproduced below:

> *"...*
>
> *viii 'Based on the audit procedure and according to the information and explanation given to us, we are of the opinion that the company has not defaulted in repayment of loans or borrowings to banks & Financial institutions.*
>
> *..."*

32. Therefore, it can be construed that the Corporate Debtor has rightfully included the long term borrowing from the Petitioner in view of the restructuring package, but it does not demonstrate default. Further, the CIBIL Report of the Corporate Debtor mentioned this account to be a

standard account and therefore, there is no default recorded in the Information Utility and in terms of the restructuring package, it is concluded that the Petitioner has not been able to demonstrate the default on the part of the Corporate Debtor.

33. The factual matrix narrated in the aforesaid paras indicate that post filing of DRT proceedings by the Original Lender. The present Petitioner was substituted by virtue of deed of assignment from SBI in March, 2014. The Petitioner granted First restructuring package on 7 November, 2014, which was revoked on 22.09.2016 and Second restructuring Package on 30.06.2017, thus at the time when Recovery certificate was granted on 22.11.2016. The Petitioner having contractually agreed to be bound by certain terms and conditions of the contract under the restructuring package, wherein a mechanism is prescribed for payment of outstanding dues, cannot now enforce its statutory rights when there is no default in payment by the Corporate Debtor.

34. The Corporate Debtor and its group are OEM suppliers having interdependent operations. The said OEM's include Companies like Cummins India Limited, Bajaj Auto Limited, Tata Motors Limited, Kirloskar Oil Engines Limited, Indian Railways etc. and that the Corporate debtor and its associates has 600 employees on its rolls and accreditations which may fall by initiation of CIRP proceedings. The intention of IBC is maximization of assets of Corporate Debtor and initiating CIRP against the Corporate Debtor. The objective of the Code is to aid organizations which are insolvent and are unable to pay its debts and are consistently defaulting. However, in the instant case, there is no default and payment of installments is linked to operating cash flows.

35. In view of all the above facts, circumstances of the case and observations made, this bench is of the opinion that the Petitioner has not been able to demonstrate default of non-payment of monies under the restructuring package and the petition is barred by limitation as the date of default as

shown in the petition is of 31.03.2009 as per the original agreement with the Lender SBI. Hence, the present Petition is dismissed. All pending applications if any stands disposed off. No cost.

Sd/-	Sd/-
Chandra Bhan Singh	Suchitra Kanuparthi
Member (Technical)	Member (Judicial)