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IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – I, CHENNAI

IBA/930/CHE/2019

(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of ***RR Infopark Private Limited***

JM Financial Asset Reconstruction Company Ltd.
Having its office at 7th Floor, Cnergy
Appasaheb Marathe Marg,
Prabhadevi, Mumbai- 400025.
And Branch Office at 40/1A, 4th Floor,
Basappa Complex, Lavelle Road,
Bengaluru– 560 001

.. .. .. *Applicant*

Versus-

RR Infopark Private Limited
Having its Registered Office at
RR Skyline, Ambattur Industrial Estate,
Ambattur, Chennai- 600058.
Also at:
RR Tower III, TVK Industrial Estate,
Besant Nagar, Chennai 600090

.. .. .. *Respondent*

Present:

For Applicant	:	*Surya Teja SS Nalla, Advocate*
For Respondent	:	*Anando Mukherjee Advocate* *Kumar Anurag Singh Advocate*

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

*Order Pronounced on **12th December 2023***

ORDER

(Heard through physical hearing)

Under consideration is an application filed by the Financial Creditor viz. JM Financial Asset Reconstruction Company Limited under Section 7 of Insolvency and Bankruptcy Code, 2016 ("IBC, 2016") seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor viz. R.R. Infopark Private Limited.

2. Part-I of the application states about the details of the Financial Creditor

3. Part-II of the application states about the details of the Corporate Debtor. The Corporate Debtor was incorporated on 24.01.1986 and the authorized share capital is Rs.110,00,000/- and the paid-up capital is Rs.104,505,200/-. The registered office address of the Corporate Debtor is situated at RR Skyline, Ambattur Industrial Estate, Ambattur, Chennai-58.

4. In Part-III of the application, the applicant has proposed name of one Mr. C. Ramasubramanian as the Interim Resolution Professional (IRP). Thereafter, the applicant moved IA(IBC)402/CHE/2022 to

replace the Mr. C. Ramasubramanian with one Ms. Sujatha Chattopadhyay. The said IA was allowed by this Tribunal vide order dated 13.01.2023.

5. In Part IV of the application, the Financial Creditor has claimed a sum of Rs.198,31,59,760/- as the amount which is due and payable by the Corporate Debtor. The date of default is mentioned as 21.05.2013.

6. This Application under Section 7 of IBC, 2016 was filed before this Tribunal on 27.06.2019. When the matter came up for hearing before this Tribunal, it was submitted by both the parties that Settlement talks are going on and there is a possibility of settlement in this matter. Thereafter, on 22.12.2020, it was reported that the matter was settled and a Settlement Agreement was entered into between the parties. Recording the same, following order was passed by this Tribunal.

> *"Mr. Bhagavath Krishnan, Advocate for the Petitioner is present through videoconferencing platform and represents that a memo has been filed on behalf of the Applicant Company seeking for withdrawal of the Petition filed against the Corporate Debtor. None is present on behalf of the Corporate Debtor.*
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> *It is also represented that terms of settlement have also been annexed along with the memo stating in case if the Corporate Debtor doesn't adhere to the schedule liberty may be granted to the Petitioner to revive the Petition.*

Taking into consideration the representation as well as the memo filed on behalf of the Applicant dated 21.12.2020, this Application stands dismissed as withdrawn, with the liberty as well."

7. Thereafter, the Corporate Debtor defaulted in repayment of the amount to the Financial Creditor as per the Settlement Agreement. Hence the Applicant filed a Restoration Application No.2 of 2022 before this Tribunal. The said Restoration Application was allowed by this Tribunal vide order dated 04.03.2022 and as such the IBA/930/2019 was restored back on the file of this Tribunal.

8. Pursuant thereto, the Applicant / Financial Creditor filed IA(IBC)/832(CHE)/2022 before this Tribunal seeking leave to file additional documents in the main Company Petition. The said IA was allowed by this Tribunal vide order dated 13.01.2023.

9. As to the facts of the case, the Learned Counsel for the Financial Creditor submitted that vide Agreement dated 22.11.2006, a term loan for a sum of Rs.70.00 Crores was granted by the Oriental Bank of Commerce to the Corporate Debtor. Since the Corporate Debtor committed default in repayment of the said Term Loan, the Oriental Bank of Commerce along with other Banks filed O.A. No.121 of 2011 before the DRT-III, Chennai seeking recovery of the amount which was due and payable to the Banks. The said O.A. No. 121 of 2011 was decreed

on 13.12.2012 by DRT – III, Chennai and also a Recovery Certificate was issued in favour of the Oriental Bank of Commerce for a sum of Rs.107,46,91,420.28/- dated 21.05.2013 in DRC No.73/2013. Thereafter vide Assignment Deed dated 07.03.2014, the loan pertaining to Oriental Bank of Commerce was assigned to the Applicant/Financial Creditor therein.

10. Learned Counsel for the Applicant / Financial Creditor relied upon the balance sheet of the Corporate Debtor for the Financial Year 2014-15 till the Financial Year 2017-18 to state that the Corporate Debtor had acknowledged the dues payable to the Financial Creditor. Further, the Corporate Debtor had offered OTS to the Financial Creditor on 30.01.2019, which letter is placed at page No.122 of the typed set, however, the Financial Creditor vide its e-mail dated 06.02.2019 rejected the said proposal. Accordingly, the present Application has been filed seeking thereof to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

11. The Respondent has filed the counter.

12. The Learned Counsel for the Respondent submitted that the Applicant/Financial Creditor has mentioned the date of default in Part-IV of the Application as 21.05.2013. The present Application has been

filed before this Tribunal on 27.06.2019 and as such the Application is barred by limitation. In support of the said contention, the Learned Counsel relied upon the following Judgments of the Hon'ble Supreme Court in the matter of **B.K. Educational Services Ltd. Vs Paras Gupta and Associates**; *2019(11) SCC 633*, wherein at para 42 it was held as under;

> **42.** It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

13. Reliance was also placed upon the Judgment of the Hon'ble Supreme court in the matter of **Nazar Md. Vs J. Kamal and Ors;** *(2020) SCC online SC 676*, wherein it was held as follows;

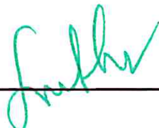
> "To be a question of law "involved in the case", there must be first a foundation laid in the pleadings, and the question should emerge from the sustainable findings of fact arrived at by Courts of facts..."

14. The Learned Counsel for the Respondent also relied upon the Judgment of the Hon'ble Supreme Court in the matter of **Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Limited & Anr.** *(2020) 15 SCC 1*, wherein at para 35 and 35.1 it is held as under;

35. Apart from the above and even if it be assumed that the principles relating to acknowledgment as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor do they enure to the benefit of Respondent 2 for the **fundamental reason that in the application made before NCLT, Respondent 2 specifically stated the date of default as "8-7-2011 being the date of NPA". It remains indisputable that neither has any other date of default been stated in the application nor has any suggestion about any acknowledgment been made. As noticed, even in Part V of the application, Respondent 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point 8 therein, nothing was at all stated at any place about the so-called acknowledgment or any other date of default.**

35.1. Therefore, on the admitted fact situation of the present case, where only the date of default as "8-7- 2011" has been stated for the purpose of maintaining the application under Section 7 of the Code, and not even a foundation is laid in the application for suggesting any acknowledgment or any other date of default, in our view, the submissions sought to be developed on behalf of Respondent 2 at the later stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. **Indisputably, in the present case, Respondent 2 never came out with any pleading other than stating the date of default as "8-7-2011" in the application.** That being the position, no case for extension of period of limitation is available to be examined. In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgment. In this view of the matter, reliance on the decision in Mahabir Cold Storage [Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402] does not advance the cause of the Respondent 2.

(emphasis supplied)



15. The Learned Counsel for the Respondent referred to the Judgment of the Hon'ble Supreme Court in the matter of **J.C. Budhraja –Vs- Chairman Orrisa Mining Corporation Ltd. & Anr**; *(2008) 2 SCC 444*, wherein at para 20 and 21, it is held as under;

> **20.** Section 18 of the Limitation Act, 1963 deals with effect of acknowledgment in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The explanation to the section provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right. Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, 1963) this Court in *Shapoor Freedom Mazda* v. *Durga Prosad Chamaria* [AIR 1961 SC 1236] held: (AIR p. 1238, paras 6-7)
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> > *"6. ... acknowledgment as prescribed by Section 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 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. 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. … 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. … 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.

7. … The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document…."

21. It is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgment of liability should consciously admit his liability to pay or admit his intention to pay the debt. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs 1 lakh due under a promissory note executed by the debtor and the debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgment of liability. If a writing is relied on as an acknowledgment for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgment should necessarily be in

> respect of the subject-matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgment will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. Again we may illustrate. If a house is constructed under the item rate contract and the amount due in regard to work executed is Rs two lakhs and certain part-payments say aggregating to Rs 1,25,000 have been made and the contractor demands payment of the balance of Rs 75,000 due towards the bill and the employer acknowledges liability, that acknowledgment will be only in regard to the sum of Rs 75,000, which is due. If the contractor files a suit for recovery of the said Rs 75,000 due in regard to work done and also for recovery of Rs 50,000 as damages for breach by the employer and the said suit is filed beyond three years from completion of work and submission of the bill but within three years from the date of acknowledgment, the suit will be saved from bar of limitation only in regard to the liability that was acknowledged, namely, Rs 75,000 and not in regard to the fresh or additional claim of Rs 50,000 which was not the subject-matter of acknowledgment. What can be acknowledged is a present subsisting liability. An acknowledgment made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages.

16. The Learned Counsel for the Respondent also referred to the Judgment of the Hon'ble Supreme Court in the matter of **Asset Reconstruction Company (India) –Vs- Bishal Jaiswal & Anr.** *(2021) 6 SCC 366*, wherein it is held as under;

10. From the above, it is clear that the principle of Section 9 of the Limitation Act is to be strictly adhered to, namely, that when time begins to run, it cannot be halted, except by a process known to law. One question that arises before this Court is whether Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgment of debt made in writing and signed by the corporate debtor, is also applicable under Section 238-A, given the expression "as far as may be" governing the applicability of the Limitation Act to the IBC.

11. The aforesaid question is no longer res integra as two recent judgments of this Court have applied the provisions of Section 14 and Section 18 of the Limitation Act to the IBC. Thus, in *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Coop. Bank Ltd.* [*Sesh Nath Singh* v. *Baidyabati Sheoraphuli Coop. Bank Ltd.*, (2021) 7 SCC 313 : 2021 SCC OnLine SC 244], after setting out the issues that arose in that case in para 55, and after referring to Section 238-A IBC, held : (SCC paras 64-66)

> *"64. Similarly under Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.*
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> *65. As observed above, Section 238-A IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before NCLT and NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in NCLT/NCLAT, to the extent feasible.*
>
> *66. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding under Section 7 or Section 9 IBC. Of course, Section 18 of the Limitation Act is not attracted in*

this case, since the impugned order [Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd., 2019 SCC OnLine NCLAT 928] *of NCLAT does not proceed on the basis of any acknowledgment."*

(emphasis supplied)

17. Thus, by referring to the aforementioned Judgments, the Learned Counsel for the Corporate Debtor submitted that the present Application filed by the Applicant / Financial Creditor is hopelessly barred by Limitation.

18. Learned Counsel for the Respondent submitted that the Corporate Debtor had taken genuine efforts to settle the dispute between the parties and as such the Corporate Debtor vide letter dated 18.03.2020 made a proposal with the Applicant/Financial Creditor. Further, based upon the said proposal, the Financial Creditor agreed to settle the dues of the Corporate Debtor for Rs.47.56 Crores as against the total dues of Rs.198.31 Crores.

19. Learned Counsel submitted that the Corporate Debtor as per the Settlement Agreement, made payment of Rs.14.24 Crores to the Applicant / Financial Creditor. However, due to outbreak of COVID pandemic there were loss to the business of the Corporate Debtor and hence no amounts were paid thereafter. Under these circumstances, the present application is to be dismissed.

FINDINGS OF THIS TRIBUNAL

20. Heard the submissions made by the Learned Counsel for both the parties and perused the record.

21. The main contention raised by the Learned Counsel for the Corporate Debtor in the present application pertains to limitation. In this regard, it is noted that the DRT-III, Chennai has passed a decree in favour of the Oriental Bank of Commerce as on 13.12.2012. Thereafter, a recovery certificate was issued in favour of the Oriental Bank of Commerce for a sum of Rs.107,46,91,420.28/- dated 21.05.2013 in DRC No.73/2013. The dues payable by the Corporate Debtor to the Oriental Bank of Commerce were assigned to the Applicant / Financial Creditor herein on 07.03.2014.

22. The Applicant/Financial Creditor has filed the balance sheets of the Corporate Debtor for the Financial Years 2014-15 till 2017-18. A perusal of the Balance Sheets for the Financial year 2014 – 2015 till 2017 – 2018 would show that a sum of Rs.270,59,83,577/- has been shown under the head 'borrowings'. Eventhough the Balance Sheet of the Corporate Debtor does not reflect the exact dues payable to the Applicant / Financial Creditor, but we find it apt to refer to the Judgment of the Hon'ble Supreme Court in the matter of **Asset**

Reconstruction Company *(supra)* wherein at para 40 and 45 it is held as under;

> **40.** In *CIT* v. *Shri Vardhman Overseas Ltd.* [*CIT* v. *Shri Vardhman Overseas Ltd.*, 2011 SCC OnLine Del 5599 : (2012) 343 ITR 408] , the Delhi High Court held : (SCC OnLine Del para 17)
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> > *"17. In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance sheet as on 31-3-2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect of acknowledgment in writing. It says where before the expiration of the prescribed period for a suit 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, a fresh period of limitation shall commence from the time when the acknowledgment was so signed. In an early case, in England, in Jones v. Bellgrove Properties Ltd. [Jones v. Bellgrove Properties Ltd., (1949) 2 KB 700 : (1949) 2 All ER 198 (CA)] , it was held that a statement in a balance sheet of a company presented to a creditor shareholder of the company and duly signed by the Directors constitutes an acknowledgment of the debt. In Mahabir Cold Storage v. CIT [Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402] , the Supreme Court held : (Mahabir Cold Storage case [Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402] , SCC p. 409, para 12)*
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> > > *'12. The entries in the books of accounts of the appellant would amount to an acknowledgment of the liability to Messrs. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt.'*
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> In several judgments of this Court, this legal position has been accepted. In *Daya Chand Uttam Prakash Jain* v. *Santosh Devi Sharma* [*Daya Chand Uttam Prakash Jain* v. *Santosh Devi Sharma*, 1997 SCC OnLine Del 238 : (1997) 67 DLT 13] , S.N. Kapoor, J. applied the principle in a case where the primary question was whether a suit under Order 37 CPC could be filed on the basis of an acknowledgment. In *Larsen & Toubro Ltd.* v. *Commercial Electric Works* [*Larsen & Toubro Ltd.* v. *Commercial Electric Works*, 1997 SCC

OnLine Del 144 : (1997) 67 DLT 387] a Single Judge of this Court observed that it is well settled that a balance sheet of a company, where the defendants had shown a particular amount as due to the plaintiff, would constitute an acknowledgment within the meaning of Section 18 of the Limitation Act. In *Rishi Pal Gupta* v. *S.J. Knitting & Finishing Mills (P) Ltd.* [*Rishi Pal Gupta* v. *S.J. Knitting & Finishing Mills (P) Ltd.*, 1998 SCC OnLine Del 360 : (1998) 73 DLT 593] , the same view was taken. The last two decisions were cited by Geeta Mittal, J. in *S.C. Gupta* v. *Allied Beverages Co. (P) Ltd.* [*S.C. Gupta* v. *Allied Beverages Co. (P) Ltd.*, 2007 SCC OnLine Del 655 : (2009) 163 DLT 495] and it was held that the acknowledgment made by a company in its balance sheet has the effect of extending the period of limitation for the purposes of Section 18 of the Limitation Act. In *Ambica Mills Ltd.* v. *CIT* [*Ambica Mills Ltd.* v. *CIT*, 1963 SCC OnLine Guj 26 : (1964) 54 ITR 167] **, it was further held that a debt shown in a balance sheet of a company amounts to an acknowledgment for the purpose of Section 19 of the Limitation Act and in order to be so, the balance sheet in which such acknowledgment is made need not be addressed to the creditors.** In light of these authorities, it must be held that in the present case, the disclosure by the assessee company in its balance sheet as on 31-3-2002 of the accounts of the sundry creditors' amounts to an acknowledgment of the debts in their favour for the purposes of Section 18 of the Limitation Act. The assessee's liability to the creditors, thus, subsisted and did not cease nor was it remitted by the creditors. The liability was enforceable in a court of law."

45. In *Agni Aviation Consultants* v. *State of Telangana* [*Agni Aviation Consultants* v. *State of Telangana*, 2020 SCC OnLine TS 1462 : (2020) 5 ALD 561] , the High Court of Telangana held : (SCC OnLine TS paras 107-108)

> "107. **In several cases, various High Courts have held that an acknowledgment of liability in the balance sheet by a company registered under the Companies Act, 1956 extends the period of limitation though it is not addressed to the creditor specifically**. [Zest Systems (P) Ltd. v. Center for Vocational & Entrepreneurship Studies [Zest Systems (P) Ltd. v. Center for Vocational & Entrepreneurship Studies, 2018 SCC OnLine Del 12116] , Bhajan Singh Samra v. Wimpy International Ltd. [Bhajan Singh Samra v. Wimpy International Ltd., 2011 SCC OnLine Del 4888 : (2011) 185 DLT 428 : (2012) 173 Comp Cas 455] , Vijaya Kumar Machinery & Electrical Stores v. Alaparthi Lakshmikanthamma [Vijaya

Kumar Machinery & Electrical Stores v. Alaparthi Lakshmikanthamma, 1968 SCC OnLine AP 219 : (1969) 74 ITR 224] , Bengal Silk Mills Co. [Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, 1961 SCC OnLine Cal 128 : AIR 1962 Cal 115] and Rajah of Vizianagaram v. Official Liquidator [Rajah of Vizianagaram v. Official Liquidator, 1951 SCC OnLine Mad 56 : (1951) 2 Mad LJ 535 : AIR 1952 Mad 136] .

108. **Therefore it is not necessary that the acknowledgment of liability must be contained in a document addressed to the creditor i.e. the petitioners in the instant case."**

(emphasis supplied)

23. Thus, the fact that a sum of Rs.270,59,83,577/- is shown under the head 'borrowings' in the Balance Sheet of the Corporate Debtor for the Financial year 2014 – 2015 till 2017 – 2018, would amount to an acknowledgment of debt as per Section 18 and 19 of the Limitation Act, 1963 in terms of the Judgment of the Hon'ble Supreme Court as referred above.

24. Be that as it may, even otherwise, the Corporate Debtor vide its letter dated 30.01.2019 had offered an OTS in favour of the Applicant/Financial Creditor. In the said OTS letter, the Corporate Debtor has not only acknowledged its debt, but has also offered to repay the debt with a specified timelines. However, the said OTS proposal was rejected by the Applicant / Financial Creditor. Also, the Corporate Debtor during the pendency of the present Application entered into a

settlement with the Applicant/Financial Creditor for a sum of Rs.47.56 Crores and pursuant to the same, he paid a sum of Rs.14.25 Crores.

25. In relation to the OTS Letter dated 30.01.2019 issued by the Corporate Debtor, we place reliance upon the decision of the Hon'ble Supreme Court in the matter of **Kotak Mahindra Bank -vs- Kew Precision Parts Private Ltd. and others** in *Civil Appeal No. 2176 of 2020*, wherein at para 29 to 33 it has held as follows;

> *"29. From the above, it is clear that any agreement to pay a time barred debt, would be enforceable in law, within three years from the due date of payment, in terms of such agreement. It appears that Section 25(3) of the Indian Contract Act was not brought to the notice of the NCLAT. The NCLAT also did not consider the aforesaid Section.*
>
> *30. In this appeal, it is contended that the last offer of 20th December, 2018 was followed by an agreement. Whether there was such agreement or not would have to be considered by the Adjudicating Authority. To invoke Section 25(3), the following conditions must be satisfied:*
>
> *(i) It must refer to a debt, which the creditor, but for the period of limitation, might have enforced;*
>
> *(ii) There must be a distinct promise to pay such debt, fully or in part;*
>
> *(iii) The promise must be in writing, and signed by the debtor or his duly appointed agent.*
>
> *31. Under Section 25(3), a debtor can enter into an agreement in writing, to pay the whole or part of a debt, which the*

creditor might have enforced, but for the limitation of a suit in law. A written promise to pay the barred debt is a valid contract. Such a promise constitutes novation and can form the basis of a suit independent of the original debt, for it is well settled that the debt is not extinguished, the remedy gets barred by passage of time as held by this Court in Bombay Dyeing and Manufacturing Company Limited vs. State of Bombay.

32. Section 25(3) applies only where the debt is one which would be enforceable against the defendants, but for the law of limitation. Where a debt is not binding on the defendant for other reasons, and consequentially not enforceable against him, there is no question of applicability of Section 25(3).

33. There is a distinction between acknowledgment under Section 18 of the Limitation Act, 1963 and a promise within the meaning of Section 25 of the Contract Act. Both promise and acknowledgment in writing, signed by a party or its agent authorised in that behalf, have the effect of creating a fresh starting of limitation. The difference is that an acknowledgment under Section 18 of the Limitation Act has to be made within the period of limitation and need not be accompanied by any promise to pay. If an acknowledgment shows existence of jural relationship, it may extend limitation even though there may be a denial to pay. On the other hand, Section 25(3) is only attracted when there is an express promise to pay a debt that is time barred or any part thereof. Promise to pay can be inferred on scrutinising the document. Only the promise should be clear and unconditional."

26. Thus, to invoke Section 25(3) of the Contract Act, 1872, the following test has been laid down by the Hon'ble Supreme Court in the matter of **Kew Precision** *(supra)*

(i) It must refer to a debt, which the creditor, but for the period of limitation, might have enforced;

(ii) There must be a distinct promise to pay such debt, fully or in part;

(iii) The promise must be in writing, and signed by the debtor or his duly appointed agent.

27. In the present case, the OTS Letter dated 30.01.2019 issued by the Corporate Debtor has referred to the debt which the creditor, but for the period of limitation, might have enforced; has a distinct promise to pay such debt, in part; the said promise has been made in writing and signed by the Corporate Debtor.

28. Thus, the said OTS letter dated 30.01.2019 fulfils the conditions laid down by the Hon'ble Supreme Court under Section 25(3) of the Contract Act, 1872 and as such it gives a fresh cause of action for the Financial Creditor to file the Section 7 Petition. The present petition under Section 7 of IBC, 2016 was filed by the Financial Creditor before this Adjudicating Authority on 27.06.2019 and as such the present petition is well within the period of limitation.

29. The Hon'ble Supreme Court in the matter of **Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy and Anr;** *(2021) 100 SCC 330* while dealing with the acknowledgment of debt under Section 18 of the Limitation Act, 1963 in respect of the dues appearing in the Balance Sheet, has held in para 124, 125 and 139 as follows:

124. The finding of the NCLAT that there was nothing on record to suggest that the 'Corporate Debtor' acknowledged the debt within three years and agreed to pay debt is not sustainable in law, in view of the Statement of Accounts/Balance sheets/Financial Statements for the years 2016-2017 and 2017-2018 and the offer of One Time Settlement referred to above including in particular, the offer of One Time Settlement made on 3rd March, 2017.

125. Section 18 of the Limitation Act speaks of an Acknowledgment in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgment is undated, evidence might be given of the time when it was signed. The explanation clarifies that an acknowledgment may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent....

139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.

30. Thus, the fact that a sum of Rs.270,59,83,577/- is shown under the head borrowings in the Balance Sheet of the Corporate Debtor coupled with the fact that the Corporate Debtor has issued a OTS letter in favour of the Applicant / Financial Creditor on 30.01.2019 would prove that the present Application is not barred by Limitation. Further, the *ratio* laid down by the Hon'ble Supreme Court in the matter of **Kew Precision** *(supra)* and **Dena Bank** *(supra)* squarely applies to the fact of the present case. Thus, the plea of limitation raised by the Corporate Debtor does not hold any water. Further, in the reply the Corporate Debtor has clearly admitted that it was unable to adhere to the terms of the settlement agreement due to Covid – 19 pandemic.

31. Hon'ble Supreme Court in the case of **Innoventive Industries Limited vs. ICICI Bank Limited;** *(2018) 1 SCC 407* has discussed extensively the scope of the Adjudicating authority under section 7 of the IBC, 2016 as limited to assessing the records provided by the financial creditor to satisfy itself that the default has occurred.

> 28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an

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

30. On the other hand, as we have seen, <u>in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred.</u> It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

32. Thus, by taking into consideration the totality of the facts and circumstances of the present case, we are of the view that the present Application filed by the Applicant/Financial Creditor is well within the period of limitation. The Applicant/Financial Creditor has proved that there is 'financial debt' and the consequent 'default' committed by the Corporate Debtor.

33. Further, the default arising in the present case is much prior to the advent of Covid – 19 pandemic and as such the Corporate Debtor also cannot seek shelter under Section 10A of IBC, 2016. In the said circumstances we are left with no other option than to initiate (CIRP) Corporate Insolvency Resolution Process as against the Corporate Debtor. We therefore **admit** this application and order for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

34. The Financial Creditor has proposed the name of **Ms. Sujata Chattopadhyay,** having Reg. No. *IBBI/IPA-003/IP-N00044/2017-2018/10353;* Email ID: sujata@scassociates.co.in as the Interim Resolution Professional (IRP) who has also filed his consent in Form – 2 and also upon verification from the IBBI website, it is seen that the said person hold valid Authorization for Assignment till 15.12.2023.

Ms. Sujata Chattopadhyay, is appointed as the IRP and is directed to take charge of the Corporate Debtor's management immediately. The IRP is also directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this Order is received, and call for submissions of claim by the creditors in the manner as prescribed under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

35. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

a. The institution of suits or continuation of pending suits or proceedings against the respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b. Transferring, encumbering, alienating or disposing of by the respondent any of its assets or any legal right or beneficial interest therein;

c. Any action to foreclose, recover or enforce any security interest created by the respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

36. However, during the pendency of moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder;

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

37. The duration of period of moratorium shall be as provided in Section 14(4) of the Code which is reproduced below for ready reference;

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

38. The IRP is directed to take charge of the Corporate Debtor's management immediately. The IRP is also directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this Order is received, and call for

submissions of claim by the creditors in the manner as prescribed under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

39. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15, 17, 18 of the IBC, 2016 and file his report within 30 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

40. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its Promoters or any person associated with the management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 of IBC, 2016 for the purpose of discharging his functions under Section 20 of IBC, 2016.

41. The IRP shall take custody of the records of information relating to the assets, finances and operations of the Corporate Debtor referred

in clause (a) of section 18 and such other information required under regulation 36; and also the assets recorded in the balance sheet of the Corporate Debtor or in any other records referred in clause (f) of section 18 of IBC, 2016 and the personnel of the Corporate Debtor, its promoters or any other person associated with the management of the Corporate Debtor shall provide to the IRP, the list of assets in terms of Regulation 3A of the IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016.

42. The IRP shall conduct the Corporate Insolvency Resolution Process in respect of the Corporate Debtor as stipulated under Chapter VIII of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

43. Based on the above terms, the Petition stands admitted in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above

named shall also be furnished with copy of this Order forthwith by the Registry, who will communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

44. Accordingly, IBA/930/2019 stands **admitted**.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond