NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 725 (ND)/2020

In the matter of:

ICICI BANK LTD.

HAVING ITS REGISTERED OFFICE AT:

ICICI BANK TOWER, NEAR CHAKLI CIRCLE,

OLD PADRAROAD, VADODARA- 390 007

CORPORATE OFFICE AT:

ICICI BANK TOWERS, BANDRA KURLA COMPLEX,

BANDRA (EAST), MUMBAI- 400051

MAHARASHTRA

REGIONAL OFFICE AT:

ICICI BANK TOWER, NBCC PLACE,

BISHAM PIT AMAH MARG,

PRAGATI VIHAR,

NEW DELHI - 110 003 .... APPLICANT/FINANCIAL CREDITOR

VERSUS

DEHRADUN HIGHWAYS PROJECT LIMITED

HAVING ITS REGISTERED OFFICE AT:

B-292, CHANDRA KANT A COMPLEX,

SHOP NO.2 & 3,

NEAR METRO PILLAR NO. 161,

NEW ASHOK NAGAR, NEW DELHI - 110 096

ALSO AT:

C-56/41, SECTOR- 62,

NOIDA, UTTAR PRADESH- 201 301

.... RESPONDENT/CORPORATE DEBTOR

SECTION: U/S 7 of IBC, 2016

Order delivered on: 18.09.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant/Financial Creditor: Mr. Ramji Srinivasan, Mr. Abhirup Dasgupta, Mr. Rishab Kapoor, Ms. Nitu and Mr. Nalin

For the Respondent/Corporate Debtor: Mr. Gaurav Mitra, Ms. Shriya Roy Chaudhary, Mr. Apoorv Agarwal, Ms. Simran Singh

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its financial debt.

2. The facts mentioned in the application in brief are as follows:

i. As per averments made in the petition, vide Concession Agreement dated 24.02.2010, the National Highways Authority of India ("NHAI") granted the Corporate Debtor a concession for construction, operation, maintenance and management of the existing road of a specified section of NH - 58 and NH - 72 on Haridwar - Dehradun route, Uttarakhand, on the terms and conditions set out in the Concession Agreement. For the said purposes, the Corporate Debtor availed credit facilities, inter alia, from the Applicant Financial Creditor. That vide Credit Arrangement Letter dated 29.03.2011, the Applicant Financial Creditor sanctioned a rupee term loan facility aggregating to INR 2700 Million with a sub-limit of USD 60 million as an external commercial borrowing ("ECB Facility"), in favour of the Corporate Debtor to part finance the cost of the Project ("DHPL Sanction Letter"). The DHPL Sanction Letter was amended vide an amendatory Credit Arrangement Letter dated 02.12.2011.

ii. That pursuant thereto, on 07.06.2011, the Applicant Financial Creditor and the Corporate Debtor executed an ECB facility agreement, wherein the Applicant Financial Creditor undertook to extend a foreign currency \ loan facility up to USD 60 Million ("ECB Facility Agreement") to partly finance implementation of the Project undertaken by the Corporate Debtor. The terms and conditions of the ECB Facility Agreement was modified by way of amendment

agreements dated 20.07.2011, 03.02.2012, 07.02.2012 and 27.06.2012.

iii. That accordingly, the Corporate Debtor requested the Applicant Financial Creditor and the Applicant Financial Creditor agreed to extend a rupee term loan aggregating to INR 2700 Million to the Corporate Debtor ("DHPL RTL-1 Facility") on the terms and conditions set out in the amended and restated common loan agreement dated 08.12.2011 entered into by and between the Corporate Debtor, Bank of India, Union Bank of India, Dena Bank, Oriental Bank of Commerce, Federal Bank, Punjab and Sind Bank, and the Applicant Financial Creditor ("Common Loan Agreement 1"). That only an amount of USD 22.8 million was disbursed under ECB Facility Agreement and balance amount was disbursed under RTL-I Facility.

iv. That due to mounting cost overruns, the Applicant Financial Creditor, vide two Credit Arrangement Letters, both dated 04.09.2014, sanctioned a rupee term loan with two tranches, Tranche-A aggregating to INR 313.4 Million and Tranche-B aggregating to INR 706.1 Million, in favour of the Corporate Debtor. The end amount of the INR 313.4 Million of Tranche-A was disbursed and request of the Corporate Debtor, an amount of INR 649.0 Million was disbursed to the Corporate Debtor from Tranche-B.

v. That for availing the said facilities, various facility agreements and transaction documents as amended from time to time, were executed by the Corporate Debtor and the Sponsor I Promoter I Pledger (i.e. Era Infra Engineering Limited) in favour of the Applicant Financial Creditor.

vi. That consequently, an amended and restated common loan agreement dated 27.03.2015, was entered into between the Corporate Debtor and the consortium of lenders, comprising of Bank of India, Union Bank of India, Punjab & Sind Bank, Dena Bank, Oriental Bank of Commerce, the Federal Bank Ltd. and the Applicant Financial Creditor ("Senior Lenders"), whereby the Applicant Financial Creditor agreed to extend the DHPL RTL-II Facility to the Corporate Debtor ("Common Loan Agreement II").

vii. That thereafter, the terms of the RTL-II Sanction Letters were modified vide two amendatory Credit Arrangement Letters dated 27.03.2015.

viii. That on 23.05.2016, in light of the Corporate Debtor's failure to adhere to timelines, NHAI issued an intention to terminate the Concession Agreement. Pursuant thereto, the Senior Lenders in-principal agreed that the Corporate Debtor would avail bridge-financing from NHAI to complete the balance work of the Project. NHAI granted approval for one-time fund infusion to the extent of INR 2798.8 subject to signing of a tripartite agreement between the Corporate Debtor, NHAI and

Bank of India (as the lead bank of the Senior Lenders) ("Tripartite Agreement").

ix. That on 27.03.2017, due to the default in payment of interest under the DHPL Facilities for the period of September 2016 to February 2017. Applicant Financial Creditor issued a demand notice to the Corporate Debtor demanding payment under the DHPL Facilities. The Financial Creditor directed the Corporate Debtor to pay the total outstanding of INR 187.7 Million.

x. That however, despite issuance of the demand notice, the Applicant Financial Creditor did not receive any payment under the DHP~ Facilities.

xi. That the account of the Corporate Debtor was declared as NP A w.e.f. 31.12.2015.

xii. That on 26.04.2018, the Tripartite Agreement as referred to above, was executed, inter alia by the Corporate Debtor and the Bank of India, being the Lead Bank I representative of the Senior Lenders (including ICICI Bank). By virtue of signing the said Tripartite Agreement, the Corporate Debtor admitted and acknowledged the facilities granted by the Senior Lenders, including the DHPL facilities granted by the Financial Creditor herein. However, later the bridge-financing by NHAI did not fructify.

xiii. That in the interregnum, vide Order dated 08.05.2018, this Tribunal ordered for commencement of corporate insolvency resolution process against Era Infra Engineering Limited.

xiv. That consequently, on 28.05.2018, the Applicant Financial Creditor filed its claim in the prescribed Form C in the corporate insolvency resolution process of Era Infra Engineering Limited. However, the claim of the Applicant Financial Creditor was rejected by the Resolution Professional.

xv. That aggrieved by the abovementioned rejection, the Applicant Financial Creditor approached this Tribunal by way of C.A. No. 997(PB)/2018 in C.P. No. (IB)-190(PB)/2017 titled Union Bank of India vs. Era Infra Engineering Private Limited.

xvi. That vide Order dated 06.12.2018, this Tribunal allowed the C.A. No. 997(PB)/2018 and consequently, directed the Resolution Professional to admit the claim of the Applicant Financial Creditor in the corporate insolvency resolution process of Era Infra Engineering Limited. That as on date, the claim filed by the Applicant Financial Creditor stands withdrawn.

xvii. That thereafter, on 07.12.2018, in light of the continuous defaults by the Corporate Debtor, the Applicant Financial Creditor issued a Notice of Acceleration and Reservation of Rights to the Corporate Debtor wherein the Applicant

Financial Creditor stated that several events of defaults have occurred regarding the DHPL facilities availed by the Corporate Debtor. Consequently, the Applicant Financial Creditor cancelled the DHPL facilities and inter alia called upon the Corporate Debtor to immediately pay the outstanding amount of INR 493.43 Crore as on 30.11.2018, to the Applicant Financial Creditor. However, the Corporate Debtor has failed to pay the outstanding amount.

xviii. The Applicant Financial Creditor states that no payments have been made by the Corporate Debtor as on the date of filing the instant Application.

3. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:

i. That it is pertinent to mention that the claim deceitfully filed by the Applicant is Time Barred according to the Limitation Act, which is applicable to this Application under Section 238A of the Insolvency Bankruptcy Code, 2016.

ii. That due to the default in payment of interest under the Dehradun Highways Project Limited Facilities, the Applicant Financial Creditor issued a Demand Notice to the Corporate Debtor demanding payment under the DHPL facilities. In the interregnum, the account of the Corporate Debtor was classified as a Non-Performing Asset with effect from 31.12.2015. The said date is mentioned as the date of NPA by

the Applicant/Financial Creditor, whereas the date of default as per the Code would be three months prior to NPA date.

iii. That in plethora of judgments, it is time and again emphasized that any time, barred Application is bad in law. It is worthy to note that the same is accentuated in "B.K. Educational Services Private Limited vs. Parag Gupta and Associates in Civil Appeal No.7286 of 2018 that for filing of the Application, Section 5 of the Limitation Act may be applied to condone the delay in filing such an application. That in consequence of the same, it is intelligible to note 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.

iv. That in another contemporary judgment dated 14th August 2020- Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. Manu/SCOR/47022/2019, the Apex Court dismissed the IBC Application filed more than three years after default. It was clearly held that the Limitation

period for Application under section 7 of the Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by Application of Section 5 of Limitation Act, if any case for condonation of delay is made out.

v. That the claim is also barred in law as per Dr. Vishnu Kumar Agarwal vs. M/s. Piramal Enterprises Ltd Judgment, bearing Case Number:- C.P. No. (IB)-65(PB)/2018. It is abundantly clear that the Applicant has already filed their entire claim in the Parent Company stating the amount defaulted by the Corporate Debtor, which is pending before the Principal Bench. Thus, an Application before this Tribunal for the same issue would be barred under law proving to be an act of Forum Shopping.

vi. That the Principal Bench, National Company Law Tribunal, had received two Applications by the same Financial Creditor with the same proposition in Law. The said Applications under Section 7 in the ICICI Bank v. Era Infrastructure (India) Limited in and ICICI Bank v. Hyderabad Ringroads Project Limited in C.P No. IB-1152 (PB)/2018 dated 23.05.2019 clearly enunciates that Financial Creditor/Applicant is attempting to have its claim admitted and harm the functioning of the Corporate Debtor by taking them into insolvency and appointing a biased RP, which would be against the tenets of the Code.

4. The Petitioner/Financial Creditor has filed its rejoinder and has asserted the following contentions:

i. That the Corporate Debtor has also filed an application under Section 10 of the IBC for voluntary initiation of insolvency proceedings against itself. This shows that the financial condition of the Corporate Debtor has deteriorated and warrants immediate resolution under the aegis of the IBC. In view of the same, since the commencement of CIRP is inevitable and further, since the Corporate Debtor has not denied and hence, admitted its debt towards the Petitioner Bank, the present Company Petition deserves to be admitted.

ii. That the date of default for the purpose of a Petition under Section 7 of the IBC is the date of NPA. This has been highlighted by the Hon'ble Supreme Court inter alia in the matter of Gaurav Hargovindbhai Dave vs Asset Reconstruction Company (India) Limited &Anr [(2019) 10 SCC 572] and Babulal Vardharji Gurjar vs Veer Gurjar Aluminum Industries Private Limited &Anr [2020 SCC Online SC 647]. That in the present matter, the date of NPA is 31.12.2015. It is most relevant to mention that on 18.07.2017 i.e. before the expiry of the limitation period starting 31.12.2015, the Corporate Debtor issued a letter to Bank of India, being the Lead Bank / representative of the Senior Lenders (including ICICI Bank) titled "REVIVAL

LETTER / ACKNOWLEDGMENT OF DEBT / SECURITIES" wherein the Corporate Debtor unequivocally admitted the debt towards the Senior Lenders (including ICICI Bank). In view of the same, it is clear that the limitation period stands extended in terms of Section 18 of the Limitation Act, 1963.

iii. That on 26.04.2018, a Tripartite Agreement was executed inter alia by the Corporate Debtor and the Bank of India, being the Lead Bank / representative of the Senior Lenders (including ICICI Bank). By virtue of signing the said Tripartite Agreement, the Corporate Debtor admitted and acknowledged the facilities granted by the Senior Lenders, including the facilities granted by the Petitioner Bank herein (Pages 1365 and 1367 of Volume IX of the Company Petition). In view of the same as well, the limitation period stands extended in terms of Section 18 of the Limitation Act, 1963.

iv. That the Corporate Debtor cannot rely upon the judgment of the Hon'ble Supreme Court in the matter of BK. Educational Services Private Limited vs Parag Gupta and Associates {2018 SCC Online SC 1921] because neither is the present Company Petition time barred nor does the said judgment state that Section 18 of the Limitation Act, 1963 would not be applicable to proceedings under the IBC. The Corporate Debtor is put to strict proof of proving to the contrary.

v. That the Corporate Debtor cannot rely upon the judgment of the Hon'ble Supreme Court in the matter of Babulal Vardharji

Gurjar vs Veer Gurjar Aluminum Industries Private Limited & Anr [2020 SCC Online SC 647] because the said judgment does not state that Section 18 of the Limitation Act, 1963 would not be applicable to proceedings under the IBC. In the present case, there are numerous instances of acknowledgment of debt by the Corporate Debtor, which would extend the period of the limitation in terms of Section 18 of the Limitation Act, 1963. The above judgment does not in any manner state that such a tripartite agreement would not amount to acknowledgement. The said judgment also does not hold that Section 18 of the Limitation Act would not apply to proceedings under IBC.

vi. That the allegations of "forum shopping" are false and unfounded. Further, the Corporate Debtor has attempted to rely upon the judgment passed by the Hon'ble National Company Law Appellate Tribunal in the matter of Dr. Vishnu Kumar Agarwal vs M/s Piramal Enterprises Limited [Company Appeal (AT) (Insolvency) No. 346 of 2018] which provides that the same claim cannot be filed in multiple CIRPs. However, the same is not applicable in the present case since as mentioned hereinabove, the Financial Creditor had withdrawn its claim in the CIRP of the Corporate Debtor's alleged parent company. Further, vide the Company Petition itself (Para 20 at Page 7 of Volume I of the Company Petition), the Petitioner Bank brought has it to the notice of

this Tribunal that it has withdrawn its claim in the CIRP of the Corporate Debtor's alleged parent company.

vii. That in addition to the above, the RP of the Parent Company has emailed to the Petitioner on 19.03.2020, acknowledging the withdrawal of the Petitioner's claim. The RP of the parent company has specifically mentioned that going forward, the Petitioner's claim will not be reflected in the stakeholders.

5. We have gone through the application, reply and rejoinder and the documents filed by both the parties and heard the arguments of both parties and perused written submissions made by both the parties.

6. Ld. Counsel for petitioner submitted that by filing the reply the respondent has not disputed that loan was not disbursed to the respondent and there is default in payment of the debt and he further submitted that the points, which the respondent has raised in its reply is that: -

(i). Debt is barred by limitation in view of the latest decision of Hon'ble Apex Court given in the case of **Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited reported in SCC Online SC 647 of 2020.**

(ii). That the petitioner had earlier filed its claim before the RP in the CIRP initiated against the parent company of the respondent, therefore, the petitioner is not permitted to file the fresh application, when he has already raised his claim before the RP.

He further submitted that so far the debt is barred by limitation is concerned, the respondent/Corporate Debtor on **18.07.2017** sent a letter of revival/acknowledgment of debt and para 3 of the said letter, the respondent specifically mentioned this fact that ***"we do hereby acknowledge for the purpose of Section 18 of the Indian Limitation Act 1963 and in order to preclude any question being raised on limitation regarding out liability to your bank and other consortium member banks for the payment of the outstanding amount"*** and this letter is at page 21 of the rejoinder filed on behalf of the applicant and he further submitted that the NPA was declared on **31.12.2015,** whereas the letter of acknowledgement was issued on 18.07.2017, which is within the three years from the date of NPA, therefore, the acknowledgement in writing has been made within three years from the date of NPA in view of the Section 18 of the Limitation Act and limitation shall runs from the date of acknowledgement and from that period, the present application is within the time. He further submitted that the decision upon which the respondent has placed reliance that is **Babulal Vardharji Gurjar vs Veer Gurjar Aluminum Industries Private Limited &Anr [2020 SCC Online SC 647]** in that decision, the Hon'ble Apex Court in para 33 discussed the issue of acknowledgement of debt under Section 18 of the Limitation Act and held that nothing was at all stated at any place about the so called acknowledgement or any other date of default, whereas in this case the petitioner has already enclosed

the written acknowledgement made by the respondent and that document has not been denied by the respondent, therefore, the facts of the decision of Babulal Vardharji Gurjar vs Veer Gurjar Aluminum Industries Private Limited &Anr is different from the facts of the case in hand and he further submitted that even the Hon'ble NCLAT in the case of **Ishrat Ali** has also stated the same facts on the point of Section 18 of the Limitation Act, neither in the Babu Lal Case nor in the Ishrat Ali case, there is any document regarding the acknowledgement of debt and therefore, the applicability of Section 18 of the Limitation Act was not considered but herein the case the said document is available, therefore, these decisions are not applicable. He further submitted that even in the case of **Jagdish Prasad Sarada v. Allahabad Bank,Company Appeal (AT) No. 183/2020 decided by the Hon'ble NCLAT** has not considered the Section 18 of the Limitation Act.

7. He further submitted that so far the contention of respondent that the petitioner had filed a claim before the R.P in CIRP initiated against the parent company of the Corporate Debtor i.e. EIEL and on the date of filing of this application the claim was pending before the RP, therefore, this application is not maintainable is concerned ,the Ld. Counsel for the petitioner submitted that the said claim was withdrawn by the petitioner and the RP has communicated and at present, there is no such claim pending before the RP. He further submitted that therefore this application is not barred by

any in view of the facts that the petitioner had earlier filed a claim before the RP but the same was now withdrawn.

8. He further submitted that if both the Corporate Debtor and Financial Creditor/Operational Creditor proposed the name of IRP in that case, the name proposed by the Financial Creditor/Operational Creditor is required to be approved by the Adjudicating Authority because the purpose of initiating the CIRP is to take over the control of the Corporate Debtor from the Suspended Board of Directors and he further submitted that it is the admitted fact that the Corporate Debtor has filed an application under Section 10 of the IBC, which is pending for consideration before this Adjudicating Authority in which the petitioner has also be shown as a financial creditor, therefore, the default is admitted and so the IRP proposed by the petitioner may be appointed in place of the IRP proposed by the respondent in Section 10 application.

9. On the other hand, Ld. Counsel for respondent, in course of his arguments submitted that the application is not maintainable because on the date of filing of this application, the claim filed by the petitioner was pending before the IRP in CIRP proceeding initiated against the parent company of the respondent i.e. EIEL.

10. He further submitted that the RP is not empowered to permit the applicant to withdraw the claim, once the claim is submitted, it is for the CoC to decide and in this regard, he placed reliance upon the decision of **Dr. Vishnu Kumar Aggarwal v. M/s. Piramal**

Enterprises Ltd. Company Appeal (AT) (Insolvency) No. 346 of 2018 passed by the Hon'ble NCLAT.

11. He further submitted that in the case of **Brilliant Alloys Pvt. Ltd. v Mr. S. Rajagopal & Ors., MANU/SCOR/41419/2018,** the withdrawal application was not allowed, though it was agreed by the Corporate Debtor as well as the creditor because of the stipulation in Section 30 A of the CIRP Regulations, does not permit the withdrawal application, after the issuance of invitation for EOI and the same view was reiterated in Swiss Ribbons Private Limited and Another v. Union of India and Other 2019 SCC OnLine 73.

12. He further submitted that the debt is time barred because the NPA was declared on 31.12.2015, which is mentioned at page 12 of the application filed under Section 7 of the IBC and so in view of **Jagdish Prasad Sarada v. Allahabad Bank, Company Appeal (AT) No. 183/2020,** the date of declaration of account as NPA in such date of default would not sick.

13. He further submitted that in Form C, he has not mentioned the date of NPA and so the present application is defective. He further submitted that Section 18 of the Limitation Act will not apply in the present case and in this regard, he placed reliance upon the decision of Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. He further submitted that the private bank is bound by the decision taken by the CoC and the CoC of the EIEL had specifically approved the consortium during the course of the 18th CoC meeting with 66.6 % voting and so in

view of the decision of Hon'ble NCLAT **Edelweiss Asset Reconstruction Company Limited v. Sai Regency Power Corporation Private Limited & Ors. C.A (AT)/ Ins. No. 887/2020, the applicant is bound by the decision of COC.**

14. He further submitted that the RP has not filed the change of the constitution of the CoC and he further submitted that the petitioner is aware with the facts that the respondent has filed an application under Section 10 of the IBC, which is still sub-judice, in which, the petitioner has proposed the name of the IRP, who is also the RP is EIEL.

15. He further submitted that Hon'ble NCLAT in the case of Infrastructure Leasing and Financial Services Limited v Union of India & Ors C.A. (AT) No. 346 of 2018 highlighted the common RP in group insolvency. He further submitted that under such circumstances the prayer of the petitioner may be rejected.

16. Now, in the light of submissions raised on behalf of parties, we have gone through the averments made in the application, reply and rejoinder filed by the respective parties as well as the decision upon which the parties placed reliance and we have also gone through the documents filed by the parties and we find that by filing reply the respondent has not denied that he has not taken the loan rather by filing an application under Section 10 of the IBC, the respondent admit that this petitioner is also shown as Financial Creditor, therefore, the debt is Financial Debt is admitted by the

respondent, the only question, which is required to be considered by us in this case.

(i). whether the debt is barred by limitation?

(ii). Whether the present application is barred under the IBC because the earlier the petitioner had filed the claim before the RP in the CIRP initiated against the parent company of the respondent i.e. EIEL ?

Therefore, we would like to considered at first, whether the application is barred by limitation or not, as we have referred the arguments advanced on behalf of parties on the point of limitation and both the parties have placed reliance upon the decision of Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. Manu/SCOR/47022/2019 and Respondent has also placed reliance upon the decision of Jagdish Prasad Sarada v. Allahabad Bank,Company Appeal (AT) No. 183/2020 decided by the Hon'ble NCLAT. In course hearing, the petitioner has also referred the decision of Ishrat Ali passed by Hon'ble NCLAT.

17. We have gone through the decisions, upon which the parties have placed reliance and we find that herein the case in hand, the petitioner claimed the exemption under Section 18 of the Limitation Act, therefore, before making any comment on the submissions made by the parties, we would like to refer Section 18 of the Limitation Act and Section 18 of the Limitation Act is quoted below:-

Section 18 in The Limitation Act, 1963

Effect of acknowledgment in writing —

(1) Where, before the expiration of the prescribed period for a suit or 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 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.

18. Mere plain reading of the provision shows that Section 18(1) of Limitation Act says that Where, before the expiration of the prescribed period for a suit or 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.

19. As we have already referred the submissions of the parties and Ld. Counsel for the petitioner in course of arguments referred the page 21 of the rejoinder in which he enclosed the letter written by the Corporate Debtor to the Bank of India and in para 3 he mentioned this fact that ***"we do hereby acknowledge for the purpose of Section 18 of the Indian Limitation Act 1963 and in order to preclude any question being raised on limitation regarding out liability to your bank and other consortium member banks for the payment of the outstanding amount in respect of the present of the present as well as future indebtedness and liabilities under the said term loan/cash credit account/WCDL/export packing credit/Inland purchased /discounted foreign bills purchased/discounted/letters of credit Guarantee/FCL issued/ other Accounts (elaborated in***

Annexure l) together with interest, i compound interest, additional interest, liquidated damages, costs, charges, expenses and other moneys in terms of the said Amended and Restated Common Rupee Loan Agreement, i and Addendum no. 1 to Deed of Hypothecation, and Term Loan and Agreement of ".Hypothecation for BOI Additional Loans, our liability shall remain in full force with al relative securities, agreements and obligations as mentioned therein" mentioned at page 21-22 of the rejoinder.

20. At this juncture, we would like to refer para 9 page 5 of the application, in which he mentioned that consequently, an amended and restated common loan agreement dated 27.03.2015, was entered into between the Corporate Debtor and the consortium of lenders, comprising of Bank of India, Union Bank of India, Punjab & Sind Bank, Dena Bank, Oriental Bank of Commerce, the Federal Bank Ltd. and the Applicant Financial Creditor ("Senior Lenders"), whereby the Applicant Financial Creditor agreed to extend the DHPL RTL-II Facility to the Corporate Debtor ("Common Loan Agreement II"). If we shall read para 9 along with the letter written by the Corporate Debtor address to the Bank of India enclosed at page 21 of the rejoinder then we are of the considered view that a common loan agreement had arrived with the ICICI Bank, Bank of India and other banks referred in para 9 of this application and this fact has not been denied by the respondent in its reply, therefore, we are of the considered view that although the NPA was declared

on 31.12.2015 and according to the date of the NPA, the petitioner was required to file an application under Section 7 of the IBC within the 3 years from the date of default i.e. 31.12.2015 to 30.12.2018 but the present case was filed on 04.03.2020

21. Now, the question is whether the acknowledgement of debt can change the date of default in view of Section 18 of the Limitation Act or nor, as we have already referred Section 18 of the Limitation Act and specially Sub Section 18(1) of the Limitation Act, which says that the **Where, before the expiration of the prescribed period for a suit or 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.**

22. At this juncture, we would like to refer Section 7 of the IBC, which says that when a default has occurred a Financial Creditor either by itself or jointly with other Financial Creditors may file an application for initiating the CIRP against the Corporate Debtor before the Adjudicating Authority, which means that whenever a default occurs in respect of the Financial debt then under Section 7 of the IBC, a Financial Creditor has acquired a right to file an application.

23. At this juncture, we would like to refer Article 137 of the Limitation Act and the same is quoted below: -

137.	*Any other application for which no period of limitation is provided*	*3 yrs*	***When the right to apply accrues.***

Article 137 of the Limitation Act says that if there is no period is prescribed then an application or suit shall be filed within 3 years when the right to apply accrues, it means a person may file an application within 3 years from the date when the right to apply accrues and here in this case, the right to apply accrues, when the default has occur and the NPA was declared on 31.12.2015, therefore, right to file an application under Section 7 accrues within 3 years from the date of NPA i.e. on 31.12.2015 but when we shall consider the Section 18 in which it is clearly mentioned the word property or right, which means the acknowledgement in respect of property or right, if it is made in writing then the period of limitation shall be computed from the date when the acknowledgement in writing was made.

24. In the light of Section 18 of the Limitation Act, when we shall consider the case in hand then we find that as per the NPA the period of limitation comes to an end on 30.12.2018 but prior to that an acknowledgement of debt was made in writing by the Corporate Debtor on 18.07.2017, which is at page 21 of the rejoinder and this letter has not been denied by the respondent rather the contention of the respondent is that in view of the decision of Babulal

Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. and Jagdish Prasad Sarada v. Allahabad Bank, Section 18 of Limitation Act is not applicable and so the present application is not maintainable.

25. At this juncture, we have gone through the decision of Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. Civil Appeal No. 6347 of 2019 and we find that in para 33 of the judgment, the Hon'ble Supreme Court held that:-

"33. Apart from the above and even if it be assumed that the principles relating to acknowledgement 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 they enure to the benefit of 62 respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 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 No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

33.1. Therefore, on the admitted fact situation of the present case, where only the date of default as '08.07.2011' 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 acknowledgement or any other date of default, in our view, the submissions sought to be developed on behalf of the respondent No. 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, the respondent No. 2 never came out with any pleading other than stating the date of 63 default as '08.07.2011' 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 acknowledgement. In this view of the matter, reliance on the decision in Mahaveer Cold Storage Pvt. Ltd. does not advance the cause of the respondent No. 2".

26. Therefore, we are of the view that the matter regarding the acknowledgement under Section 18 was not before the Hon'ble Apex Court and that is the reason the Hon'ble Apex

Court in para 33 held that there was no document to show the written acknowledgment as required under Section 18 of the Limitation Act, therefore, no case for extension of period of limitation is available to be examined.

27. At this juncture, we have gone through the decision of Jagdish Prasad Sarada v. Allahabad Bank, Company Appeal (AT) No. 183/2020 decided by the Hon'ble NCLAT and we find that the facts of this case is different from the facts of case in hand and in that case, some payment was made by the Corporate Debtor and from that day the limitation was decided that is not under Section 18 rather under Section 19 of the Limitation Act, therefore, in that case, in our considered view provision of section 18 of the Limitation Act was not for consideration before the Hon'ble NCLAT, hence, we are of the view that the facts of this case is different from the facts of the case in hand, hence, that will not help the applicant.

28. At this juncture, we would also like to refer the Ishrat Ali Case and in this case, the 5 Member Bench of Hon'ble NCLAT, considered the point of limitation and in para of the judgment Hon'ble NCLAT considered the Section 18 of the Limitation Act and the same is quoted below: -

10. This Appellate Tribunal also considered the same issue in "V

Hotels Limited vs. Asset Reconstruction Company (India) Limited –

Company Appeal (AT) (Insolvency) No.525 of 2019" decided on 11th December, 2019, by referring to the aforesaid judgment of the Hon'ble Supreme Court observed: -

"17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the 'Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.

xxx xxx xxx

19. Section 13(2) of the 'SARFAESI Act, 2002' reads as follows:

"13. Enforcement of security interest.—

.....(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4). 20. Admittedly, the 'Financial Creditor' took action under the 'SARFAESI Act, 2002' in the year 2013. Therefore, the second time it become NPA in the year 2013 when action under Section 13(2) was taken." Referring to Section 18 of the Limitation Act, 1963, this Appellate Tribunal further observed: -

"22. The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such

property or right is claimed. 23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in writing by the 'Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgment of liability in respect of debt payable to the 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') signed by the 'Corporate Debtor' or its authorised signatory. 24. In "Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679", the Hon'ble Supreme Court observed that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgment, even after the completion of the period of limitation i.e. December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under Section 7 is barred by limitation,

the accounts of the 'Corporate Debtor' having declared NPA on 1st December, 2008.

29. In this decision also, the Hon'ble NCLAT has referred the decision of "Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679", in which the Hon'ble Supreme Court held that "Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act", therefore, in our considered view, Section 18 of the Limitation Act was not before the Hon'ble NCLAT even in the case of Ishrat Also case and before the Hon'ble Supreme Court in Sampuran Singh and Ors case and acknowledgement of debt under Section 18 was also not before the Hon'ble Apex Court in the Babu Lal Case, whereas in the case in hand, we have already referred a written acknowledgement is available at page 21 of the rejoinder, under such circumstances we are of the considered view that since Section 18 of the Limitation Act says that Where, before the expiration of the prescribed period for a suit or application in respect of any property or right and admittedly when a default has occurred a right is accrued to the Financial Creditor under Section 7 and Operational Creditor under Section 9 and after acquiring that right the Financial Creditor or the operational Creditor may file an application and the word application is referred under Section 18 of the Limitation Act, therefore, we are of the considered view that the facts of the decision upon, which the respondent has placed reliance is different from the facts of the case in hand and the

matter regarding the acknowledgement of debt under Section 18 of the Limitation Act was not before the Hon'ble NCLAT and Hon'ble Supreme Court in the case upon which the petitioner has placed reliance, therefore, we are of the view that under Section 18 of the Limitation Act, if the acknowledgement of debt in writing and signed by the person before the expiration of prescribed period of limitation then the limitation shall be computed from the time when the acknowledgment was so signed and in this case, the acknowledgement was signed by the Corporate Debtor on 18.07.2017, therefore, the limitation runs from that day and the present application was filed by the corporate Debtor on 04.03.2020 hence, the application is within time.

30. Therefore, the first point is decided in the manner stated above.

31. Now, the second question, whether during the pendency of the claim filed by the applicant in other CIRP proceeding, this application is maintainable or not?

32. In course of hearing, Ld. Counsel for petitioner informed us that the RP informed through the email dated 19.03.2020 that the RP acknowledged the decision of the petitioner to withdraw the claim from the CIRP initiated against the parent company of the respondent i.e. EIEL.

33. At this juncture, we would like to mention this fact that the present application was filed on 04.03.2020 and the contention of the petitioner is that before filing this application, he informed the

RP for withdrawal of its claim and accordingly, the RP communicated vide email dated 19.03.2020, therefore, of course on the date of filing of this application, the RP had not communicated to the petitioner regarding his acknowledgement for withdrawal of its claim but after the filing of the application and before the application was taken up for hearing, the RP had communicated to the petitioner regarding the withdrawal of the claim.

34. Now, at this juncture, we would like to refer the submission made on behalf of the respondent, who in course of his arguments submitted that the petitioner cannot be permitted to file its claim against the parent company of the respondent i.e. EIEL and also against the Corporate Debtor/respondent of this case and he further submitted that the RP has still not file the report for change in the constitution of the CoC and he further submitted in the case of Dr. Vishnu Kumar Aggarwal v. M/s. Piramal Enterprises Ltd. Company Appeal (AT) (Insolvency) No. 346 of 2018, the application filed by the petitioner is barred because under law Forum Shopping is not permissible.

35. He further submitted that the RP does not have power to allow the withdrawal of any admitted claim after the constitution of CoC, under Section 12A of the IBC, it can be done only with the approval of 90% voting share of the CoC and he further submitted that under Regulation 30A of CIRP Regulations, an application for withdrawal under Section 12A shall be submitted to the RP in form FA of the schedule to the said regulations before the issuance of

expression of interest under Regulation 36A and in this regard, he placed the reliance upon the decision of Brilliant Alloys Pvt. Ltd. v Mr. S. Rajagopal & Ors., MANU/SCOR/41419/2018 and in the light of submissions, when we have gone through the provision referred by the respondent then we find that Section 12A is related with an application admitted under Section 7 or Section 9 or Section 10 of the IBC but herein the case in hand, admittedly, the petitioner was not an applicant in that case, in which, he filed claim before the RP.

36. At this juncture, we would like to refer Chapter IV of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, this chapter deals with the claim filed by the Operational Creditor/Financial Creditor/Creditors in class, claims by workman and employees, claims by other creditors.

37. Under Regulation 8, the Financial Creditor shall submit a claim with proof to the IRP and after verification of the claim, the IRP prepared the list of the creditor and under Regulation 14, the IRP determined the amount of claim and we further noticed that under Chapter V, the Committee of Creditor is constituted, therefore, on the basis of the provision referred above, it can be said that the claimant is not an applicant rather the claimant may be a Operational Creditor, he may be a Financial Creditor, he may be a workman and he may be under the class of creditors and other creditors, whereas under Section 12A of the IBC only the applicant can file an application for withdrawal of the petition, which was

admitted and form FA also shows that it must be signed by the person who file the application, therefore, the contention of the petitioner that the withdrawal of the claim can only be done under Section 12A of the IBC, after the approval of the 90% voting shares, in our considered view is not applicable in the case, if a person wanted to withdraw its claim submitted before the IRP. It is the IRP, who give an acknowledgement regarding its withdrawal and accordingly, IRP vide email dated 19.03.2020 informed the petitioner that he acknowledged his withdrawal of claim, therefore, we find that of course on the date of filing of application i.e. 04.03.2020 although, the petitioner claimed that he informed the RP for the withdrawal of the claim but the IRP/RP has not communicated its acknowledgement on the date of filing of application i.e. 04.03.2020 rather it was communicated after the filing of application i.e. 19.03.2020, at present, we noticed that there is no such claim pending before any IRP and this fact also been not reverted by the Ld. Counsel for the respondent rather he claimed that when the petitioner had filed this application at that time, the IRP had not communicated or not given his consent for withdrawal.

38. We have already discussed the provision of law and we are of the considered view that Section 12A is not applicable, so far the claim filed by the person before the IRP is concerned. The decisions upon which, the petitioner has placed reliance, in our considered view the facts of that decision is different from the facts of the case

in hand, therefore, none of the decision will help the respondent to substantiate its submission that a person can withdraw its claim only under Section 12A of the IBC with the approval of the 90% of the member of the CoC.

39. Hence, for the reasons discussed above, we have no option but to hold that there is no force raised on behalf of Ld. Counsel for respondent that the petition filed by this applicant is not maintainable because he had already filed its claim before the RP in the CIRP initiated against the parent company of the respondent i.e. EIEL.

40. At this juncture, we would like to refer the submission of the Ld. Counsel for respondent, who in course of his arguments submitted that the petitioner is bound by the decision taken by the CoC and the CoC of the EIEL had specifically approved the consortium during the course of the 18th CoC meeting with 66.6 % voting and in this regard, he placed reliance upon the decision of Edelweiss Asset Reconstruction Company Limited v. Sai Regency Power Corporation Private Limited & Ors. C.A (AT)/ Ins. No. 887/2020. He further submitted that the decision to appoint the RP of the Parent Company as the IRP for all the SPVs was approved by the CoC of the Parent Company in its Ninth meeting held on 29.01.2019 with more than 88% majority votes and the petitioner was the member of the CoC of that meeting, therefore, he is bound by that decision.

41. At this juncture, we would like to refer the submission raised on behalf of the petitioner, Ld. Counsel for petitioner submitted that since he has already withdrawn the claim, therefore, in view of Section 7, the applicant is required to prove only whether there is a financial debt and there is any default of financial debt or not and the application filed by the applicant is complete or not.

42. He further submitted that since the debt and default have already been admitted by the Corporate Debtor, therefore, the Corporate Debtor is not permitted to raise any question.

43. In the light of the submission, when we shall consider the claim of the applicant and respondent then we find that we have already decided the issue of limitation and we have already held in the aforementioned para that application is within time and we further held that before the filing of this application, the petitioner has already informed the RP regarding his withdrawal of claim from the CIRP proceeding against the parent company of the this respondent i.e. EIEL and accordingly, after filing of this application and before the matter was taken up for consideration on 19.03.2020, the IRP acknowledged the withdrawal of the claim of the petitioner, under such circumstances, while considering the application under Section 7, we have to examine only whether there is Financial Debt or there is any default of payment and application is complete under Sub Section 2 of Section 7 and there is no disciplinary proceeding pending against the proposed IRP, if all the

criteria have been fulfilled then the Adjudicating Authority under Section 7(5) has to admit the application.

44. In the light of that, when we shall consider the case in hand then we find that the applicant has succeeded to establish that there is a financial debt and Corporate Debtor is in default in making the payment of that financial debt, the application is complete and the applicant has also proposed the name of IRP **Mr. Anil Kohli having registration number IBBI/IPA-001/IP-P00112/2017-18/10219** Who have also sent the written consent and there is no disciplinary proceeding pending against him.

45. Under such circumstances, we hereby inclined to admit this application and accordingly same is ADMITTED and initiate CIRP against the respondent. Since the applicant has proposed the name of the IRP therefore, we appoint **Mr. Anil Kohli having registration number IBBI/IPA-001/IP-P00112/2017-18/10219** as IRP **Accordingly, this petition is admitted.** A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying: -

1. effect forthwith staying: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 corporate debt or 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 corporate debtor in respect of its property including any action under the Securitisation 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 corporate debtor.

Further:

(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.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(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.

46. Financial Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

47. **Registry is directed to communicate the order with the IRP as well both the parties.**

Sd/-

K. K. VOHRA
Member (T)

Sd/-

ABNI RANJAN KUMAR SINHA
Member (J)