

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1044 of 2022
& I.A. No. 3030 of 2022**

[Arising out of Order dated 14.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P.(IB)/02/KB/2020]

IN THE MATTER OF:

Mallick Heemghar Pvt. Ltd.

...Appellant

Versus

Central Bank of India & Anr.

...Respondents

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Kumar Anurag Singh, Mr. Zain A. Khan and Mr. Akhil Nene, Advocates.

**For Respondents: Ms. Zeba Khan, Advocate
Mr. Kushal Bansal, Advocate for RP.**

J U D G M E N T
(22nd April, 2025)

Ashok Bhushan, J.

This Appeal by an occupier of the assets of the corporate debtor has been filed challenging the order dated 14.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata admitting Section 7 application filed by the Central Bank of India against the Corporate Debtor- 'Shima Edibles Pvt. Ltd.'

2. Brief facts giving rise to this Appeal are:-

2.1. The Corporate Debtor- 'Shima Edibles Pvt. Ltd.' was granted financial facilities by Central Bank of India since the year 2005. The credit facilities included various term loans and other facilities. Assets of the corporate debtor were also given in security to the loan by the corporate debtor and its directors. The Corporate debtor could not regularise the account. Bank declared the account NPA on 27.09.2011. Bank also issued a recall notice on 13.09.2012 recalling the loan. Bank also filed proceeding under Section 19 of the Recovery of Debts due to banks and Financial Institution Act, 1993 for recovery of debts due to Bank vide O.A. No.332 of 2013 (TA 1660/2013) praying for decree against the corporate debtor. The corporate debtor entered into an agreement with the Appellant on 28.01.2014. Central Bank of India also issued possession notice dated 21.11.2013 in respect of land owned by the company. Corporate debtor entered into an agreement on 28.01.2014 which agreement stated that company unable to pay its debt, Appellant having expressed its desire to extend co-operation in making payment of debt. Agreement acknowledged the debt of the bank. Agreement stated that it was agreed that on payment of Rs.50 lakhs by Appellant to the corporate debtor, corporate debtor shall allow the appellant to run the business of cold storage from the accounting year 2014-15. In pursuance of the agreement, Rs.50 lakhs was paid by the appellant to the corporate debtor and possession was given to the appellant. A compromise proposal was submitted by the corporate debtor to the bank. Bank issued orders on 07.05.2014 accepted the OTS proposal on payment of Rs.12.50 Crores. Under the compromise proposal, Rs.1.75 Crore was to be deposited by 31.03.2014 and balance Rs.955 lacs by five monthly instalments. Certain amounts were paid by the Appellant on

19.03.2014. Rs.50 lakhs was paid on 31.03.2015. Appellant in total made payment of Rs.6.72 Crores which was transferred by the financial creditors to the loan account of the corporate debtor. On 30.06.2015 amount of Rs.2 lakh was further paid by the Appellant. There was Share Purchase Agreement between the Appellant and the Corporate Debtor. Appellant filed Suit No.72 of 2015 against the corporate debtor seeking an injunction against the Defendant for not transferring the property mentioned in Schedule A & B which is hypothecated with the financing bank i.e. Central Bank of India. In the suit, interim injunction was issued by Civil Judge (Senior Division) 3rd Court, Paschim Medinipur under Order 39, Rules 1 and 2 of CPC restraining the corporate debtor for transferring the suit property along with the cold storage to third party.

2.2. In the OA filed by the Central Bank of India against the corporate debtor being OA No.332 of 2013, the Appellant filed an application seeking intervention in the suit. The bank opposed intervention of the appellant. Debt Recovery Tribunal by order dated 05.06.2016 permitting intervention of the Appellant in the suit. Bank prayed decree in the suit and appointment of receiver. A written statement was filed by Defendant (corporate debtor) acknowledging that Rs.5.78 Crore is to be paid with overdue interest on reducing balance. The proceedings before the DRT are still pending consideration. The Central Bank of India filed an application dated 13.11.2019 under Section 7 claiming debt of Rs.37,20,01,350/-. In the Section 7 application, date of NPA mentioned is 27.09.2011, proceedings before the DRT as well as OTS given by the corporate debtor was pleaded.

Notices were issued in Section 7 application against corporate debtor. Corporate debtor appeared and filed a reply pleaded that assets of the corporate debtor is in possession of the appellant. Corporate debtor has referred to Settlement Agreement dated 28.01.2014 and 22.11.2014 and also pleaded that Rs.6.72 Crores have been paid. Corporate debtor opposed the application. Adjudicating Authority heard the parties and by impugned order dated 14.07.2022 admitted Section 7 application. Reply filed by the corporate debtor was noticed in paragraph 6 of the judgment.

2.3. Adjudicating Authority after considering the submissions of the Central Bank of India as well as the Corporate Debtor and the document annexed along with the petition held that the financial creditor has successfully proved that there exists debt and default. Adjudicating Authority admitted Section 7 application and appointed Resolution Professional. This Appeal has been filed challenging the said order by the Appellant who claim to have taken possession of the corporate debtor in pursuance of the agreement with the corporate debtor dated 24.01.2014.

3. We have heard Shri Krishnendu Datta, Learned Senior Counsel for the Appellant, Ms. Zeba Khan, Learned Counsel for the Central Bank of India and Shri Kushal Bansal, Learned Counsel for the Resolution Professional.

4. Learned Counsel for the Appellant submits that the Appellant has paid amount of Rs.6.74 Crores towards OTS which was entered with the Bank on 07.05.2014. Appellant has locus to challenge the order initiating the CIRP. It is submitted that the Appellant has filed Civil Suit against the corporate

debtor and have obtained interim order on 23.12.2015 which interim order is still continuing. The application filed by the Central Bank of India was barred by time. Date of NPA being 27.09.2011 default has occurred on 26.06.2011 and Section 7 application came to be filed on 13.11.2019, hence, it is barred by time. Request for OTS was made by corporate debtor on 28.11.2018 only, hence, it cannot be treated to be acknowledgment under Section 18 of the Limitation Act. It is submitted that the Adjudicating Authority has not adverted to the question of issue of limitation which was required to be looked into by the Adjudicating Authority. Appellant in the present appeal has raised the question of limitation. It is submitted that no payment has been made by the Appellant after 2015, hence, there is no question of giving any acknowledgment under Section 19 of the Limitation Act.

5. Counsel for the Central Bank of India opposing the submissions of the Counsel for the Appellant submits that Appellant is illegally occupying the assets of the corporate debtor from 28.01.2014 and has not paid the amount of Rs.12.5 Crores as per the OTS and OTS has come to an end. Appellant without paying any balance amount to the Bank is continuing illegally with the possession of the assets of the corporate debtor and carrying on his business. For the last more than 9 years, Appellant is illegally continuing in the business. The OTS was breached in the year 2015 itself. The corporate debtor having failed to pay the amount, Appellant who was in possession of the assets of the corporate debtor also could not make the payment. Bank has filed relevant statement of account which indicates that appellant has made payment on several dates 31.03.2015 and 30.06.2015 and there is also

payment entered into the records of the bank. Lastly, on 27.06.2018, application is not barred by time. Corporate debtor never raised any plea that application is barred by time before the Adjudicating Authority. The Appellant who is illegal occupier of the assets cannot be allowed to raise any question regarding application being barred. Corporate debtor has acknowledged the debt time and again and application of the bank cannot be rejected.

6. Counsel for the Resolution Professional submits that the Resolution Professional has not been permitted to take possession of the assets. Resolution Professional has also filed the reply to the appeal and submits that the appellant who are in possession, did not allow the Resolution Professional to enter into the premises for the last more than 8.5 years. Resolution Professional has initiated proceeding under Section 19(2) as well as Contempt proceedings. An application has also been filed by the Resolution Professional for taking possession and control of the assets. Financial information of the corporate debtor are available only up to 31.03.2010. Resolution Professional has also filed an IA 6860 of 2024 seeking a direction to the Appellant to pay a sum of Rs.79,50,00,000/- to the corporate debtor on account of illegal gains appropriated and/or misappropriated by wrongfully and/or unauthorizedly misutilizing and running the valuable asset of the Corporate Debtor since the last ten years commencing from 2014 till date.

7. We have considered the submissions of the Counsel for the parties and perused the record.

8. Appellant has not filed copy of Section 7 application along with the appeal. We had passed an order on 08.02.2023 permitting the appellant to file Section 7 application by means of affidavit dated 20.02.2023. Appellant has brought on the record Section 7 application filed by the Central Bank of India. The Appellant in its appeal has brought on the record the Agreement dated 28.01.2014 entered with the corporate debtor by which appellant was permitted to take possession after payment of Rs.50 lakhs of the cold storage. The Agreement which was signed by the corporate debtor clearly contained acknowledgment of the debt of the bank and the agreement contemplated that the appellant shall run the cold storage.

9. A compromise proposal was submitted before the Bank on 07.05.2014. Bank has sanctioned the OTS dated 07.05.2014 which is brought on the record by Appellant at Page 93 of the paper book which OTS directed as follows:-

**“Central Bank of India
(A Government of India Undertaking)**

HALDIA BRANCH,
Khanjanchak,
Purba Medinipur, WB. Fax 03224 273694
PIN: 721602 Phone No.03224 274124
[email:bmdurg1500@centralbank.co.in](mailto:bmdurg1500@centralbank.co.in) Gram: CERTAIN, HALDIA.

BR/HALDIA/COMP/14-15/1

May 7TH, 2014

*Mr. Akram Hossain
Shima Edibles Pvt. Ltd. & others 9 group concern
Kshudiram Square, Basudevpur(W)
Haldia-721602.*

Dear Sir.

Reg: Your Compromise Proposal in NPA A/c M/s Shima Edibles Pvt. Ltd. & others 9 Group Accounts with us.

In the above matter we have to inform you that your above compromise proposal has been sanctioned by the Management Committee of the our Bank's Board on the following terms and conditions:-

<i>Amount of OTS</i>	<i>Rs.1250.00 lacs (Twelve Crore Fifty Lac only) in full & final settlement of Bank's dues in necount M/s Shima Edibles valid Other 9 group accounts.</i>
<i>Repayment Terms</i>	<i>Rs. 75,00 lacs already deposited. Further Rs 45.00 lacs to be deposited on 22.03.2014, Rs.175.00 lacs by 31.03.2014 and balance Rs 955.00 lacs by five monthly installments starting after 30 days on conveying sanction along with interest. Post Dated Cheques to be submitted.</i>
<i>Interest</i>	<i>10% (simple) p.a on reducing balance basis</i>
<i>Default</i>	<i>In case of default in payment as per the terms of sanction, the sanction will be automatically treated as cancelled.</i>

The party has to enter into consent decree with the usual default clause. In case of any delay in obtaining consent decree, the party should deposit the settled dues amount as per sanction in a separate account carrying no interest, which should be adjusted towards the settled amount In such case, on recovery of entire compromise dues as per sanction, the suit may be withdrawn and bank should claim refund of court fees and credit the entire refund to P/L account.

In case party fails to pay the compromise amount within stipulated period, entire concessions will stand withdrawn and to be treated as if there was no compromise settlement in the account and in that case suit shall be pursued vigorously.

The above sanction will be subject to compliance of all the terms and conditions stated above and extant guidelines of recovery policy of the Bank.

Yours truly,

Senior Manager”

10. The Appellant in pursuance of the said OTS made certain payments towards dues of the corporate debtor. A letter dated 19.03.2015 was written by the Appellant to the Bank acknowledging that there is OTS for Rs.12.50 Crores and Appellant has made payment of Rs.6 crores and although Appellant was required to pay amount by 31.03.2015 but they are unable to do the same. Prayer was made to extend the time for payment till 30.09.2015. Appellant also wrote to the Director of the Corporate Debtor that in event the corporate debtor does not deposit the share transfer deed and share-scripts of Shima Edibles Pvt. Ltd. immediately and 60% shares of the corporate debtor, no further payment shall be paid by the appellant towards bank dues and bank be asked to refund all amounts already paid to the Bank.

11. The Appellant thereafter filed a Suit (Suit Case No.72 of 2015) before the Civil Court praying for injunction. An injunction order was passed by Civil Court on 23.12.2015 directing the corporate debtor not to transfer the assets to any third party. Along with Section 7 application, Bank has brought statement of account which indicates that the appellant has paid certain amounts by transferring to the loan account and payment till 30.06.2015 as made by the Appellant. The DRT proceedings were also initiated against the corporate debtor as noted above.

12. The principle submission which has been advanced by the Appellant is that the application filed by the Bank under Section 7 was barred by time.

13. The present is a case where corporate debtor had filed its reply and no ground regarding application barred by time was raised by the corporate debtor. It is relevant to notice the reply-affidavit filed by the corporate debtor which was noticed by the Adjudicating Authority in the impugned order. In paragraph 6 of the reply of the corporate debtor which has been noticed is as follows:-

“6. The Corporate Debtor has filed its reply affidavit, wherein the Corporate Debtor submits as follows:

a) One of the director of the Corporate Debtor i.e., Mrs. Firoza Begum died on 07 September, 2016 and the same is known to the Financial Creditor. Since there is only one director in the Company, the Corporate Debtor has lost its status as 'Private Limited'.

b) It is also pertinent to mention that the Corporate Debtor is in possession of a third party, namely, Mallick Hingarh Private Limited(Third Party') and the same has been suppressed by the Financial Creditor.

c) The Corporate Debtor had entered into a settlement agreement with the Third Party. As per the settlement agreement dated 28 January, 2014 and 22 November, 2014, Third Party was to pay Rs.12.50 Crores to the Financial Creditor and took over the possession of the Cold Storage. Thereafter, third party paid a sum of Rs.6,72,59,012.00 to the Financial Creditor and took over the possession of the Cold Storage but, till date they have not paid the balance amount to the Financial Creditor. Thus, the Financial Creditor should initiate

proceedings against the third party not the Corporate Debtor.

d) The entire debt liability is rested on the third party and the same can be construed from the order dated 15 July, 2014 to 15 June, 2016 of the Ld. DRT, Kolkata.

e) As per the OTS/settlement agreement with the third party this instant petition is not maintainable against the Corporate Debtor. Further, the Corporate Debtor is being run by the third party. In this instant Petition the Financial Creditor is stating the date of default as on 27 September, 2011, whereas, as per the T.A. pending before the Ld. Debt Recovery Tribunal the date of NPA is 20 March, 2013.”

14. Perusal of the order does not indicate that the corporate debtor at any point of time has raised any objection regarding application of Central Bank of India being barred by time. It is debtor who can object regarding application being barred by time which plea was never raised. The Appellant who is illegally occupying the assets of the corporate debtor for the last about 10 years has not made any payment as per the Appellant itself after 30.06.2015 to the Bank. The Suspended Director of the Corporate Debtor has also written to the bank to take possession of the assets of the corporate debtor. The reply of the corporate debtor which was filed in Section 7 application has also not been brought on the record by the Appellant and as noted above, it was only after the order of this Tribunal the Section 7 application has been brought on the record by the appellant.

15. Counsel for the Appellant since has raised the issue of application being barred by time, we to satisfy ourselves have proceeded to examine the said contention on the basis of materials which are on the record of this Appeal. As noted above, corporate debtor has never raised any objection regarding maintainability of the application on the ground of limitation. Corporate debtor has acknowledged the debt time and again. Now, we proceed to look into the materials on the record to find out as to application filed by the Central Bank can said to be barred by time and deserve rejection.

- (i) In the Agreement dated 28.01.2014 which was entered with the Appellant and the corporate debtor, there is clear acknowledgment of the debt of the Central Bank of India.
- (ii) A compromise proposal dated 07.05.2014 was given by the corporate debtor to the Central Bank of India which was approved on 07.05.2014 by the Central Bank of India which order we have already extracted above.
- (iii) In Part IV of the Section 7 application which has been brought on the record by means of Affidavit, there is clear pleading that for an OTS submitted by the Appellant in the year 2018. Paragraph 15 of the Part IV of Section 7 application is as follows:-

“15. The Financial Creditor considering the aforesaid default on or about 13/09/2012 through its advocate issued recall, demand notice to the corporate debtor, copy whereof is annexed. Thereafter, sometime in the year 2018 the Corporate Debtor had prayed for One Settlement

which acceptable by the Time was not Financial Creditor. Later when there was a settlement and write off scheme available with the Financial Creditor the same was communicated to the Corporate debtor vide letter dated 04.05.2019 and a reply was also received from the Corporate Debtor. The Letter are collectively marked as Annexure "A-15".

- (iv) Copy of compromise letter referred as OTS of 2018 is part of Section 7 application and is at page 270 of the Affidavit where an offer of Rs.5 Crore was given by the corporate debtor. The bank also on 04.05.2019 sent a letter to the corporate debtor informing about bank outstanding as on 31.03.2019 and the OTS amount as Rs.6,07,28,000/-

16. The question to be considered is as to whether between 28.01.2014 where corporate debtor has acknowledged and 22.11.2018 which is also another OTS submitted by corporate debtor, there are any material to indicate that there is any acknowledgment within three years from the first acknowledgment. Acknowledgment has to be treated on 28.01.2014 as well as 07.05.2014 and we have to find out whether after 07.05.2014 within three years there are any other acknowledgment because the acknowledgment dated 22.11.2018 is beyond period of three years.

17. The Appellant himself in the appeal has brought on the record the order of the DRT in OA No.332 of 2020 filed by the Central Bank of India against the corporate debtor. It is relevant to notice that Appellant has also appeared

in the said proceeding and prayed for intervention. The Appellant was permitted to intervene in the said proceeding. The corporate debtor was Defendant in the said proceedings OA No.332 of 2020. Appellant has filed Annexure A-17 the orders of the DRT dated 05.06.2016 and 20.01.2017. In the order dated 15.06.2016 Annexure A-17, DRT has noticed the OTS of Rs.12.50 Crore and terms of the payment. The Agreement dated 28.01.2014 was also noted. It is useful to notice the order dated 05.06.2016/ 20.01.2017 which is as follows:-

“Learned Advocate Mr. Pankaj Kr. Mukherjee with Ms. S.R. Mishra appears for the applicant Bank, Mr. Rakesh Mangalbhair Leua, Chief Manager and Shri S.K. Senapati, Chief Manager of the Bank is also present.

Learned advocate appearing for the defendant lies written statement/objection to the application file by the bank.

Learned Advocates for the parties with respect to the prevention application of the intervener Mr. Alfazuddin Hanif Mallick.

The main contention of the intervener is that the bore is in default and they have entered into settlement with applicant Bank for the payment of their dues of Shima Edible Private Limited and other nine sister concerned account for rupees 1250 lacs. In terms of the settlement, the money has to be paid in a time bound manner. Accordingly, the consent term was filed before the student which form part of the order dated 15/7/2014. In terms of the side order out of Rs.1250

lakhs, rupees 170 lacs who paid and balance rupees 955 lacs was to be paid on monthly instalments of rupees 191 lacs from 01/07/2014.

In terms of the said order, in the event of failure in payment of instalment, the applicant Bank would be entitled to decree of the entire amount Rs 182417309/- along with interest from 11/3/2013.

3. In the meantime, the defendant enter into an agreement dated 28/1/2014, with the intervener were in it was agreed between the intervener and the defendant borrow that the interview will pay rupees 12 crore for acquiring the assets of the Shima Edibles. Accordingly the interveners have deposited rupees 67200000/- with the bank. The intervener is in position of the cold storage and want to pay part of the settlement amount on account of Shima Edibles only to acquire the assets. All payment has been made with the knowledge and consent of the bank. Hence they are necessary party to the proceeding.

4. It is contended by the advocate of the defendant that, with the consent of the bank, what the settlement amount has been deposited by the intervener and possession of the cold storage was handed over to Shima Edibles and presently they are running the cold storage. They have no objection if the interveners are made party to the proceeding.

5. The advocate for the defendant for the submitted that the intervener may be made party and maybe permitted to deposit balance settlement amount along with interest. The applicant bank is entitled to balance

amount on one time settlement amount plus interest at PLR rate.

6. Learner advocate for the bank on the contrary submits that, they are not party to the agreement between proposed interveners and the defendant and opposed the application of the intervener to be made party to the proceeding as the applicant is proceeding as for the consent decree. Since there is a failure in payment of the decree as per the consent terms, the applicant is entitled to recover the dues from the assets of the defendants.

7. Though agreement dated 28/1/2014 stipulate for payment of Rs 12 crore towards payment only settlement amount but do not stated anything specifically that they are entitle to pay the settlement amount in respect of the Shima Edibles only. However, as per the correspondence is available on the record, the bank was aware that the money i.e. Rs 67200000/- has been deposited by the intervener for acquiring the property and they are now in possession of the cold storage which has been admitted by the defendants. In the above circumstances, they are deemed as necessary party to the proceedings and made parted the proceedings.

8. Learned advocate appearing to the bank dresses today's moved an application praying, inter alia, for passing a decree in terms of the earlier order of the tribunal for the entire amount as also restraining the defendant's from transferring, eliminating or otherwise dealing with, or disposing of our party with deposition of any properties and assets the properties mentioned

in scheduled X-1 to X-34 without permission of the Tribunal. For the prayed for appointment of receiver including the properties as mentioned in schedule X-1 to X-34 to sell the same either by private treaty or public auction.

9. Learned advocate appearing for the defendant file written statement/objection stating, inter alia, that since there is an OTS of Rs. 5.78 crores to be paid with overdue interest at PLR on reducing balance. It was further stated in the said application that the entire balance amount along with interest at the rate PLR and the money be accepted. In this connection, learned advocate refers to the judgement of the Hon'ble Calcutta High Court in the matter of Eastern Paper Mill Machinery Private Limited. Learned advocate for the submit that the intervenor are duty bound to pay the balance amount with overdue interest and may take ownership of the cold storage.

Advocate appearing for the intervenor submitted that they want refund of the money before any action of the Bank.

In the present facts and circumstances, it is necessary to sell the property. However, the intervenes who has deposited the money and the money have been appropriated by the Bank as part of the settlement amount and is in possession of the cold storage.

Hence in the above circumstances Shri Biswapati Da Advocate cell No.9831146794 is appointed as Receiver to inspect the cold storage with a direction to take

possession of the cold storage and the intervenor to act as agent of the Receiver till the property is sold.

Ld. Receiver is directed to appoint a valuer from the panel valuer of the Bank for valuation of the asset and place the same before the Tribunal for fixing the reserve price for sale.

The matter is adjourned to 25/4/2017.

Copy of this order be given to the parties.”

18. It is necessary to notice paragraph 9 of the order which paragraph 9 for ready reference is again extracted which is as follows:-

“9. Learned advocate appearing for the defendant file written statement/objection stating, inter alia, that since there is an OTS of Rs. 5.78 crores to be paid with overdue interest at PLR on reducing balance. It was further stated in the said application that the entire balance amount along with interest at the rate PLR and the money be accepted. In this connection, learned advocate refers to the judgement of the Hon'ble Calcutta High Court in the matter of Eastern Paper Mill Machinery Private Limited. Learned advocate for the submit that the intervenor are duty bound to pay the balance amount with overdue interest and may take ownership of the cold storage.

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deposited the money and the money have been appropriated by the Bank as part of the settlement amount and is in possession of the cold storage.

Hence in the above circumstances Shri Biswapati Da Advocate cell No.9831146794 is appointed as Receiver to inspect the cold storage with a direction to take possession of the cold storage and the intervenor to act as agent of the Receiver till the property is sold.

Ld. Receiver is directed to appoint a valuer from the panel valuer of the Bank for valuation of the asset and place the same before the Tribunal for fixing the reserve price for sale.

The matter is adjourned to 25/4/2017.”

19. The written statement of the Defendant as noticed by the Court is clear acknowledgment of the dues of the bank. OTS amount of Rs.5.78 Crores was noted to be payable with overdue interest at PLR on reducing balance. Defendant further stated that interveners are duty bound to pay the balance amount with overdue interest. The order of the DRT, thus, clearly records the acknowledgment of the corporate debtor about the dues of the bank. The above is also clear acknowledgment of the corporate debtor recorded by the Court on 15.06.2016/ 20.01.2017. Thus, after 07.05.2014 there is acknowledgment within three years. Thus, from the above, it is clear that there are innumerable acknowledgments by the corporate debtor on the record capable of extending the period of limitation and the application which was filed on 13.11.2019 (24.01.2020 as noted by the Adjudicating Authority) is well within the time and cannot be thrown out on this ground. We reiterate

that the debtor having acknowledged the debt time and again and have not pleaded that debt is time barred, it is not open for Appellant, an illegal occupier to plea that there is no acknowledgment within three years from 07.05.2014. The assets of the corporate debtor were given in security to the bank which is apparent from the materials brought on the record. The agreement dated 28.01.2014 entered between the corporate debtor and the appellant was not with the consent of the bank. The Appellant undertook to pay the entire amount of OTS Rs.12.5 Crores, the corporate debtor has failed to honor the OTS dated 07.05.2014. One of the conditions was “in case party fails to pay the compromise amount within stipulated period, entire concessions will stand withdrawn and to be treated as if there was no compromise settlement in the account and in that case suit shall be pursued vigorously”. The case of the appellant is that no payment has been made by the appellant after 30.06.2015. Payments made by the appellant are also reflected in the bank statement brought on the record. The entire OTS amount was not paid within time as allowed by the OTS letter dated 07.05.2014. OTS has come to an end. It is also relevant to notice that after receiving OTS letter dated 07.05.2014, as noted above, the corporate debtor has written letter to the bank on 16.05.2019 where the corporate debtor has requested the bank to restore possession to the corporate debtor so it can arrange to pay the OTS amount may be at a time. Letter of the corporate debtor to the bank dated 16.05.2019 is as follows:-

“To
The Chief Manager
CENTRAL BANK OF INDIA
HALDIA BRANCH

16.05.2019

East Medinipur

Dear Sir,

With reference to your proposal for O.T.S in the Loan A/C. Of Shima Edibles pvt ltd, I am Inclined to settle the same. But following Impediments have to be sorted out first.

(I) The bank has to take back physical possession of the entire cold storage from the present occupant

(II) The payment of Rs.6.72 crores paid by the said occupants and appropriated by the bank has to be sorted out.

(III) The occupancy of the present occupant is no doubt illegal, as he has failed to pay full amount of Rs. 12.50 crores to the Bank as per agreement which is now voidable.

(IV) Can not bank take action u/s 13(2) and then 13(4) of SARFASSI Act, 2004 and restore possession to me, where after I can-arrange to pay you OTS amount may be at a time.

(V) Since present occupant enjoyed the cold storage for 2014 years and reaped full benefits, Bank may not be bound to refund the amount already received from the present occupant.

Please sort out these issues before your proposal for OTS Is Implemented.

Yours faithfully,

(AKRAM HOSSAIN)”

20. Appellant is illegally continuing in the possession of the assets of the corporate debtor being not paid any payment after 30.06.2015 i.e. for the last 10 years. It is enjoying possession of cold storage and as noted above, Resolution Professional has filed application for taking possession before the Adjudicating Authority where Adjudicating Authority has directed the Resolution Professional to take possession which could not be taken in view of the interim order passed by this Tribunal. Resolution Professional has also filed an application seeking recovery for amount on account of illegal gains obtained by the appellant by utilising and running the valuable assets of the corporate debtor.

21. In view of the foregoing discussions, we dispose of this appeal in following manner:-

- (i) The order passed by the Adjudicating Authority admitting Section 7 application against the corporate debtor is upheld. The interim order passed in this appeal on 29.08.2022 is vacated. Resolution Professional to proceed with the CIRP in accordance with law.
- (ii) The period from 29.08.2022 till date is excluded from CIRP period.
- (iii) The Appellant is directed to handover possession of the assets of the corporate debtor within 30 days to the Resolution Professional, failing which Resolution Professional may take possession of the assets of the corporate debtor with the help of the district administrative and police authorities.

- (iv) Resolution Professional shall be at liberty to file an appropriate application before the Adjudicating Authority with regard to any amount as it is being claimed by the Resolution Professional against the Appellant.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi

Anjali