



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-208
IB-672/ND/2019

IN THE MATTER OF:

M/s. Kotak Mahindra Bank Ltd.

....Applicant

Vs.

M/s. Kew Precision Parts Pvt. Ltd.

.....Respondent

SECTION

U/s 7 IBC

Order delivered on 29.08.2023

CORAM:

SHRI P.S.N PRASAD,
HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets. IB-672/ND/2019 stands **dismissed**.

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (T)

Sd/-
(P.S.N PRASAD)
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V NEW DELHI BENCH**

COMPANY PETITION IB (IBC) NO. 672 of 2019

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

**Kotak Mahindra Bank Limited
27 BKC, C 27, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai- 400051**

...Applicant/Financial Creditor

Versus

**Kew Precision Parts Private Limited
41, DLF Industrial Area,
Kriti Nagar,
New Delhi- 110015**

...Respondent/Corporate Debtor

Order pronounced on: 29.08.2023

Coram:

**SHRI P.S. N. PRASAD, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

Appearances:

For the Applicant : Adv Aman Vasisth, AR Vikram Sharma
For the Respondent :

ORDER

PER: P.S. N. PRASAD, HON'BLE MEMBER (JUDICIAL)

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)



1. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity “the Code”) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by Kotak Mahindra Bank Limited (hereinafter referred to as ‘Financial Creditor’), represented by Mr. Dipanshu Singh, Manager- Legal, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against M/s Kew Precision Parts Private Limited [CIN: U74899DL1960PTC003280] (“Corporate Debtor”). The instant application was filed on 07.03.2019.
2. The Corporate Debtor was incorporated on 18.08.1960, having CIN: U74899DL1960PTC003280, under the Companies Act, 1956. Its registered office is at 41, DLF, Industrial Area, Kirti Nagar, New Delhi- 110015. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 07.03.2019 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make payment of a sum of Rs. 62,47,43,978/- (Sixty-two Crores Forty-seven Lakhs Forty-three Thousand Nine Hundred Seventy-eight) as on 18.11.2019 (date of default).

Submissions of learned Counsel appearing for the Financial Creditor are as under: -

4. The details of transactions leading to the filing of this petition as averred by the Financial Creditor is as follows:
 - a) In the present case, the Financial Creditor sanctioned financial facilities of exposure up to Rs. 22.46 Crores to the Corporate Debtor and the Financial Creditor lastly renewed and modified and sanctioned financial facilities on 05.03.2014. Further, from June, 2015, the Corporate Debtor started breaching to make payment and the installments become due for payment, and the Corporate Debtor was classified as NPA.



- b) Furthermore, the Financial Creditor raised demand and issues Loan Recall Notice recalling a sum of Rs. 18,19,40,434/- as on 07.10.2015 and even the Corporate Debtor issued 10 Cheques of Rs. 19,34,00,000/- as on account payment, however the same were dishonored and the proceedings initiated under Section 138 of the NI Act, 1881 proceedings are still pending adjudication.
- c) Thereafter, a notice was issued to the Corporate Debtor under Section 13 (2) of the SARFAESI Act for an amount of Rs. 34,79,70,950/- on 13.12.2017. On 12.12.2018, the Corporate Debtor acknowledged its default and proposed an OTS for a sum of Rs. 13 crores. On 19.12.2018, the Corporate Debtor once again proposed an OTS for an amount of Rs. 20.76 Crores and promised to pay within 15 days of acceptance by the Financial Creditor. On 20.12.2018, Corporate Debtor once again proposed an OTS for an amount of Rs. 24.55 Crores and promised to pay before 31.12.2018. Thereafter, the Financial Creditor accepted the OTS proposed by the Corporate Debtor and accepted the promise of the Corporate Debtor to pay a sum of Rs. 24.55 Crores towards the settlement of the Total Outstanding amount as on the date to be paid on or before 31.12.2018. Furthermore, both the parties signed the Acceptance in writing along with Board Resolution and complete authority.
- d) On 02.01.2019, Financial Creditor filed the present Section 7 Petition before this Adjudicating Authority for the Corporate Debtor having failed to honor its promise to pay and the OTS proposal being accepted. On 21.05.2019, Hon'ble DRT allowed the OA and issued the Recovery Certificate. On 06.09.2019, the Adjudicating Authority admitted the Section 7 petition thereby initiating the CIRP against the Corporate Debtor. On 08.01.2020, the Hon'ble Appellate Authority set aside the admission order on the grounds of limitation. On 05.08.2022, the Hon'ble Supreme Court set aside the Hon'ble Appellate Authority order and remanded back the petition to be reconsidered and to take into account the provision of Section 25 (3) of the Contract Act. Thereafter, the Financial Creditor on 10.10.2022 filed the Application bearing IA No. 4852 of 2022 for seeking restoration and the Hon'ble AA was pleased to restore the



complete company petition for reconsideration in accordance with the Hon'ble Supreme Court.

- e) This Hon'ble Adjudicating Authority while passing Order dated 06.09.2019 had relied upon the OTS to hold that Section 7 is within limitation. Relevant Para of the Admission Order dated 06.09.2019 is reproduced herein below:

“5. Oral arguments were also heard on 17.10.2019 by this Hon'ble Tribunal and the prayer made in this petition were impugned by the Corporate Debtor on various grounds viz. Attestation of the affidavit, pendency of alternate proceeding under SARFAESI and the claim of the Financial Creditor being barred by limitation. It is being confirmed by the Ld. Counsel for the Financial Creditor that the account of the Corporate Debtor had been declared NPA in September 2015. The Financial Creditor relied upon the “One Time Settlement” dated 12.12.2018 given by the Corporate Debtor in acknowledgment of the interest liability. Ld. Counsel for the Financial Creditor has relied upon the provision of Article 62 of the Limitation Act. Both the parties were granted liberty to file citation in support of their arguments.

6. Given the facts and circumstances that the Corporate Debtor vide its Letter dated 12.12.2018 approached the Financial Creditor for one-time settlement of an amount of Rs. 15 crores, thereby admitting its default, there is a finding that there is a continuous cause of action.”

- f) While relying on the Order dated 06.09.2019, the Hon'ble Supreme Court also observed that rigor of Section 25(3) would come into play to protect the limitation of this Company Petition. However, this issue is left open to be answered by this Hon'ble Adjudicating Authority in the present proceeding.

The relevant Para of the Judgment dated 05.08.2022 passed by the Hon'ble Supreme court is reproduced herein below:

“67. The Adjudicating Authority proceeded on the basis that the offer of settlement made by the Corporate Debtor on 12th December 2018 and rejection thereof by the appellant showed the Corporate Debtor had conceded



that there was a continuous cause of action. It is however, the case of the appellant financial creditor in this appeal that terms of settlement were executed on 20.11.20218 whereby the corporate debtor agreed to repay the amount of Rs. 24,55,00,000/- within 31.12.2018. The adjudicating authority, however, did not refer to any settlement. Nor did it address the question of whether any agreement for repayment of debt came into existence in December 2018 and, if so, whether the agreement would attract Section 25(3) of the Contract Act. 68. The Appellate Tribunal (NCLAT) found that there was no acknowledgment of debt within the period of limitation of three years. Holding the application of the applicant financial creditor, under Section 7 IBC, to be barred by limitation, the appellate authority (NCLAT) allowed the appeal. 69. The Appellate Tribunal (NCLAT) also did not notice the terms of settlement stated to have been executed on 20.12.2018, possibly because the attention of NCLAT was not drawn to any terms of the settlement. The Appellate Tribunal (NCLAT) did not, therefore, have the occasion to consider whether Section 25(3) of the Contract Act would be attracted. The Appellate Tribunal (NCLAT), as observed above, proceeded on the basis that debt within the period of limitation, and closed the CIRP Proceedings in the NCLT, without considering the question of applicability of Section 5 of the Limitation Act, for condonation of delay, to proceedings under Section 7 IBC.”

- g) Section 25(3) of the Indian Contract Act, 1872 envisages that any promise made in writing by a person to pay wholly or in part a debt of which creditor might have enforced the payment but for the law of limitation. Thus such promise even though after period of limitation if made, would permit a creditor to initiate its legal action within the fresh period of limitation calculated from the date of such promise. The submissions of the Corporate Debtor that the Company Petition needs to be amended to plead the effect of Section 25(3) is erroneous since the Hon'ble Supreme Court had permitted the Financial Creditor to press upon Section 25(3) in support of this plea of limitation by filing additional affidavit and documents.



- h) Hence, it is thus submitted that the OTS Proposal dated 20.12.2018 made by the Corporate Debtor and thereafter Letter dated 20.12.2018 issued by the Financial Creditor accepting the OTS proposal and duly signed and acknowledged by both the parties is nothing short of an acknowledgement of the outstanding due & payable Financial Debt as also an implied promise to pay reduced into writing and accepted by both the parties and is a valid contract dated 20.12.2018 entered into between the parties for the payment of the outstanding financial debt. And as established hereinabove, under Section 25(3) of the Indian Contract Act, 1872, a promise in writing to pay in whole or in part, a time barred debt is not void.
- i) Hence the present Company Petition filed in January, 2019 against the default being committed by the Corporate Debtor in the repayment of the Financial Debt which is due & payable by the Corporate Debtor to the Financial Creditor is well within limitation and hence the Company Petition should be allowed and the CIRP should be initiated against the Corporate Debtor having defaulted in payment of Rs. 62,47,43,978/- of the public monies sanctioned by the FC calculated as on 18.11.2019.
5. The Financial Creditor has placed the following documents on record:
- a) Copy of Sanction Letter dated 11.03.2013, 07.02.2014, 05.03.2014.
 - b) Copy of Statement of account
 - c) Copy of Recall Notice dated 09.10.2015
 - d) Copy of One Time Settlement of Term Loan dated 12.12.2018, 19.12.2018 and 20.12.2018.
6. The Financial Creditor has proposed the name of Mr. Ashwani Kumar Gupta, registration number IBBI/IPA/001/IP-P00626/2017-18/11082, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to



Adjudicating Authority] Rules, 2016 along with a copy of registration certificate with IBBI.

Submissions of learned Counsel appearing for the Corporate Debtor are as under:

7. The details of the submissions made by the Corporate Debtor are as follows:
 - a) It is submitted that the Respondent has been a pioneer in the automobile segment having one of the largest integrated plant of its kind for manufacturing auto and tractor components in North India spread over an area of 12000 sq. metres at Noida. The Petitioner sanctioned several credit facilities to the Respondent for an aggregate amount of Rs. 2036 Lakhs between the year 2012 to 2014. Thereafter, the Petitioner illegally classified loan account as NPA and on 19.11.2015, the Petitioner issued a Demand Notice under Section 13 (2) of SARFAESI Act, 2002.
 - b) In the year 2016, the Respondent assailed the enforcement measures by the Petitioner in S.A. No.250/2016 before the Hon'ble DRT, Lucknow. The Petitioner also filed an Original Application bearing' O.A. No. 576/2016 against the Respondent herein. The Hon'ble DRT, Lucknow on 10.04.2017 allowed S.A. No. 250/2016 and quashed the entire SARFAESI measures taken by the Petitioner against the Respondent. Further, the Petitioner was directed to handover the possession of the secured asset to the Respondent within one month from 10.04.2017.
 - c) Furthermore, on 13.12.2017 a fresh Demand Notice under Section 13 (2) of SARFAESI Act, 2002 for an amount of Rs.34,79,70,950- as on 07.12.2017 was issued to the Corporate Debtor. On 12.12.2018, the Corporate Debtor acknowledged its default and proposed and OTS for a sum of Rs. 13 crores. On 19.12.2018, the Corporate Debtor once again proposed an OTS for an amount of Rs. 20.76 Crores and promised to pay within 15 days of acceptance by the Financial Creditor. On 20.12.2018, Corporate Debtor once again proposed an OTS for an amount of Rs. 24.55 Crores and promised to pay



before 31.12.2018. Thereafter, the captioned petition was filed by the Petitioner seeking initiation of CIRP of the Respondent. A perusal of Form I Part II of the Petition reveals that the Petitioner is claiming Rs. 46,63,35,337.31 as on 27.11.2018 which is premised on an alleged default that took place in June, 2015.

- d) Furthermore, The Hon'ble DRT, Delhi on 21.05.2019, allowed O.A. No. 576/2016 for a sum of Rs. 16,13,40,574.89/- together with pendent lite and future interest @ 13% p.a. compounded at monthly rests plus levy of penalty @ 3% p.m. from date of fling the O.A till realization. On 06.09.2019, the Adjudicating Authority admitted the Section 7 petition thereby initiating the CIRP against the Corporate Debtor. The Respondent filed an appeal bearing Company Appeal (AT) (Insolvency) No.1349/2019 against order dated 06.09.2019. The Hon'ble NCLAT, vide judgment dated 08.01.2020, ' . set aside, the order dated 06:09.2019, whereby this Adjudicating Authority initiated the CIRP of the Respondent.
- e) The Petitioner filed a Civil Appeal bearing Civil Appeal No. 2176/2020 against judgment dated 08.01.2020 passed by the Hon'ble NCLAT, Delhi. Vide judgment dated 05.08.2022, the Hon'ble Supreme Court allowed the appeal to the extent that the CIRP proceeding was closed. While holding that the captioned Petition is barred by limitation, the Hon'ble Supreme Court directed this Hon'ble Adjudicating Authority to consider the Petition afresh, in light of observations made by the Hon'ble Apex Court, after giving the parties opportunity to file additional affidavits disclosing documents.
- f) Further, this Petition under Section 7 of the Code is barred by limitation as it is a settled law that the period of limitation to prefer a petition for commencement of process of Resolution of Insolvency is three years which is to be reckoned from the date of the classification of credit facilities as NPA and that the Code does not apply to debts and causes that had already become barred by time, in terms of Section 3 read with Article 137 of the Limitation Act, 1963. On an interpretation of the provisions of the Code, the date of



default under the Code is the date on which the account of the Corporate Debtor is declared as NPA. Since the debts against which the Creditors are empowered to proceed against the Corporate Debtors is the debt which is declared NPA, the cause of action has to necessarily commence from the date of such classification as NPA.

- g) Moreover, it is the case of the Petitioner that the cause of action accrued on 30.09.2015. Further, the Petitioner, through the Additional Affidavit, has averred that the cause of action was extended by the Respondent by issuance of 'communications w.r.t, OTS dated 12.12.2018, 19.12.2018 and 20.12.2018. However, the communications dated 12.12.2018, 19.12.2018 and 20.12.2018 have been issued solely with the intention of bringing the disputes between the parties to a quietus and do not in any way or manner acknowledge any debt. Firstly, there are no-such assertions or pleadings set forth in the entire Petition filed under Section 7 as to any purported extendable limitation from 17.11.2015 in view of any OTS or communications relating thereto. The statutory form and Petition make no such pleadings. There is also no amendment sought even seeing to incorporate any such facts or pleadings. Pertinently, the said communications took place after the period of limitation had already 'expired. 'It is a settled law that an acknowledgment given after the expiry of period of limitation cannot resuscitate a barred claim. Further the burden was upon the Petitioner to prove that the alleged acknowledgments were made within the period of limitation; which burden the Petitioner has failed to discharge. Thus, the OTS proposals having not been made during the limitation period of three years and, therefore, the provision of Section 18 of the Limitation Act, 1963 are not attracted in the facts of the instant case.
- h) Further, without prejudice, it is an admitted fact that no payments have been made, after classification of the loan account as NPA on 30.09.2015. Thus, the alleged acknowledgment made on 12.12.2018 or later i.e., after the expiry of over three years from 30.09.2015, would not save limitation. Without prejudice, it is a settled law that mere communications sent to higher authorities to settle the issue does not amount to acknowledgement. Further,



without prejudice, the One-Time Settlement communications/negotiations cannot be relied upon by the Petitioner as the same constitutes a privileged communication and cannot be read in or considered as evidence in a court proceeding.

- i) Further, before the Hon'ble Apex Court, it was argued for the first time by the Petitioner that there was a settlement between the parties on 20.12.2018 for an amount of Rs.24.55 Crore. Thus, while holding that the captioned Petition is barred by limitation, the Hon'ble Supreme Court vide judgment dated 05.08.2022 remanded the matter back to this Hon'ble Tribunal to determine whether any agreement for repayment came into existence in 2018 and, if so, whether the said agreement would attract Section 25(3) of the Indian Contract Act, 1872 or not. As per Section 25(3) of the Indian Contract Act, 1872, 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 an agreement. However, there must be a written promise to pay the time barred debt in order to attract Section 25(3) of the Indian Contract Act, 1872. For application of Section 25(3) of Contract Act, the promise must be express and unequivocal. In the instant case, no such promise to pay the time barred debt was made by the Respondent, rather the Respondent merely submitted to pay a settlement amount of Rs. 24.55 Crore with the sole intention of bringing the disputes to a quietus. Thus, Section 25(3) of the Indian Contract Act, 1872 is not attracted in the facts of the instant matter.
- j) In law, there is a distinction between acknowledgment under Section 18 of the Limitation Act, 1963 and a promise to pay a time barred debt under Section 25(3). If at all, a promise under Section 25(3) will constitute novation and can form the basis of a suit independent of the original debt but the remedy under Section 7 of the Code, 2016 shall still be barred by law of limitation. It is not even the case of the Petitioner that it is approaching this Hon'ble Tribunal to recover the default of the OTS amount of Rs. 24.55 Crore. The captioned Petition has instead been filed from claims arising from the alleged liability in 2015 itself. As pointed out above, the pleaded date of default in the Petition



and statutory form is 17.11.2015. Therefore, looking at it from any angle, the instant Petition is liable to be dismissed.

- k) Without prejudice to the aforesaid, the Petitioner has neither as stated above sought any amendment nor even filed an application seeking condonation of delay in filing the captioned Petition. It is a settled law that the delay is to be condoned only if the Petitioner is able to show sufficient cause for not filing the Petition within the period of limitation. In the instant case, the Petitioner has neither filed an application seeking prayer to condone the delay nor has it provided any sufficient cause to seek condonation of delay. In light of the above itself, the captioned Petition is liable to be dismissed being barred by limitation. It is a settled law that onus is cast upon a court/tribunal to examine the issue of limitation and, under Section 3 of Limitation Act, 1963, there is a mandate upon the court/tribunal to dismiss any suit which is barred by the law of limitation even though it has not been set up as a defence.
- l) Further, it is submitted that the Petitioner has been proceedings against the alleged mortgaged property belonging to the Respondent under provisions of SARFAESI. Act 2002. However, vide judgment dated 10.04.2017, the Hon'ble DRT, Lucknow dismissed the entire measures of Petitioner under SARFAESI Act, 2002 and directed it to give back the possession of the property to the Respondent. Further, the Petitioner has also procured a Recovery-Certificate from the Hon'ble DRT, Delhi and the execution proceedings are pending before the Learned Recovery Officer, DRT, Delhi. At the instant of the Petitioner, the Learned Recovery Officer has, on several occasions, put the alleged mortgaged property on auction sale. However, the said auction sale(s) have failed. Clearly, the Petitioner having proceeded in execution of a Recovery Certificate issued in its favour and participating in the execution proceedings throughout cannot be permitted to take recourse to proceedings under Section 7 of the Code. The settled law is that proceedings under the Code are not enforcement/recovery proceedings, they are for legitimate resolution of the Corporate Debtor. However, clearly in this case, the Petitioner is seeking to invoke proceedings



under the Code not for legitimate resolution but as an enforcement/ recovery proceeding, which is, impermissible in law.

- m) Thereafter, having failed to proceed against the property of the Respondent under the provisions of SARFAESI Act, 2002 and Recovery of Debts, and Bankruptcy Act, 1993, the Petitioner is now using the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") merely as recovery proceedings to proceed against the property, of the Respondent. In fact, the instant Petition is merely attempted to circumvent the execution proceedings pending before the Learned Recovery Officer at DRT, Delhi and proceedings pending before the Hon'ble High Court relating to the Commercial Tax Department, Noida. Thus, the Petitioner is trying to do indirectly, what it was unable to do directly.
- n) Merely because the auction proceedings have not culminated into the ultimate sale of the property, the Petitioner cannot be permitted to use the process under the Code only to recover money as the intention of the Petitioner is not for resolution of the Corporate Debtor, as envisaged under the Code. There are numerous decisions which hold that the proceedings under the Code are not recovery proceedings. Therefore, the captioned Petition is liable to be rejected on this ground alone. In light of the above, it is prayed that this Hon'ble Adjudicating Authority may exercise its discretion in not admitting the Petition under Section 7 of the Code.

Analysis and Findings

8. We have heard the Learned Counsels for the Financial Creditor and the Corporate Debtor and perused the averments made in the petition, reply and rejoinder. Since the registered office of the Corporate Debtor is in Delhi, this Tribunal which has territorial jurisdiction over the Union Territory of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of the respondent Corporate Debtor under Section 7 of the Code.



9. In order to affirm that this petition falls within the ambit of Section 7, we need to see whether there is a “debt” owed to the Financial Creditor and whether there is a “default” with respect to such debt.
10. In the present case, the Appellant Financial Creditor has since November 2012 sanctioned loan facilities to the Corporate Debtor from time to time. In November 2012 necessary documents with regard to the loan/credit facilities were executed by and between the Financial Creditor and the Corporate Debtor. The Loan amounts were disbursed between 23rd November, 2012 and 31st December, 2013. The Financial Creditor sanctioned financial facilities of exposure up to Rs. 22.46 Crores to the Corporate Debtor and the Financial Creditor lastly renewed and modified and sanctioned financial facilities on 05.03.2014.
11. Further, from June, 2015, the Corporate Debtor started breaching to make payment and the installments become due for payment, and the Corporate Debtor was classified as NPA. Furthermore, the Financial Creditor raised demand and issued Loan Recall Notice recalling a sum of Rs. 18,19,40,434/- as on 07.10.2015 and even the Corporate Debtor issued 10 Cheques of Rs. 19,34,00,000/- as on account payment, however the same were dishonored.
12. Thereafter, a notice was issued to the Corporate Debtor under Section 13 (2) of the SARFAESI Act for an amount of Rs. 34,79,70,950/- on 13.12.2017. On 12.12.2018, the Corporate Debtor acknowledged its default and proposed an OTS for a sum of Rs. 15 crores. On 19.12.2018, the Corporate Debtor once again proposed an OTS for an amount of Rs. 20.76 Crores and promised to pay within 15 days of acceptance by the Financial Creditor. On 20.12.2018, Corporate Debtor once again proposed an OTS for an amount of Rs. 24.55 Crores and promised to pay before 31.12.2018. Thereafter, the Financial Creditor accepted the OTS proposed by the Corporate Debtor and accepted the promise of the Corporate Debtor to pay a sum of Rs. 24.55 Crores towards the settlement of the Total Outstanding amount as on the date to be paid on or before 31.12.2018. Furthermore, both the parties signed the Acceptance in



writing along with Board Resolution and complete authority. The breach continues and the amount remains unpaid by the Corporate Debtor which amount to default under Section 7 of the IBC, 2016.

13. In light of the averment made by the Financial Creditor and Corporate Debtor, and the observations made by the Hon'ble Supreme Court, this Adjudicating Authority needs to consider Section 25(3) of Indian Contract Act, 1872 in order to determine that whether the said debt falls within the period of limitation. Section 25 (3) of the Indian Contract Act, 1872 states that:

“An agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.”

14. The main defense of the Corporate Debtor is limitation. Therefore, we need to examine the issue with reference to the following questions:
- I. Whether the Section 7 application has been filed within 3 years of date of default as applicable under Article 137 of the Limitation Act, 1963?
 - II. If the answer to the Question I is in the negative, whether there has been an acknowledgement of debt or part payment of debt by the Corporate Debtor in terms of Section 18 or 19 of the Limitation Act, 1963, within the original period of Limitation, so as to extend the Limitation from the date of such acknowledgement or part payment?
 - III. If the answer to Question II is also in the negative, whether there has been a promise to pay under Section 25(3) of the Indian Contract Act, 1872, albeit after expiry of the original period of Limitation of 3 years?
 - IV. If the answer to the Question III is in the affirmative, whether the Application filed in Form I is based on the debt amount promised to be paid



by the Corporate Debtor under Section 25(3) of the Contract Act but defaulted in such payment?

15. In the present case, admittedly, the Date of Default falls within June 2015 and recall notice was issued on 07.10.2015. The present Application under Section 7 of the Code was filed on 07.03.2019 which is beyond the Limitation period of 3 years, even from the date of recall notice. Therefore, Question I is to be answered in the Negative.
16. As regards the existence of acknowledgement of debt by the Corporate Debtor, the Applicant itself has claimed the OTS proposals dated 12.12.2018, 19.12.2018 and 20.12.2018 as acknowledgement of debt by the Corporate Debtor. It can immediately be discerned that even the earliest of these OTS proposals was made on 12.12.2018, i.e. beyond a period of 3 years from the date of default (date of NPA) and date of recall notice. Therefore, provisions of Section 18 of the Limitation Act, 1963 shall not apply in the instant case. Since, there has not been any claim of part payment made by the Corporate Debtor, provisions of Section 19 of the Limitation Act shall also not be applicable. Question II is, therefore, to be answered in the Negative.
17. Now we need to examine whether the OTS proposals dated 12.12.2018, 19.12.2018 and 20.12.2018 may be treated as a promise to pay under Section 25(3) of the Contract Act. Here, we must keep in view that an 'acknowledgement' under Section 18 of the Limitation Act, 1963 and a 'Promise to pay' under Section 25(3) of the Indian Contract Act, 1872 are different even though both have the effect of creating a fresh limitation period. Where Section 18 of Limitation Act, grants a fresh period of limitation only in cases where acknowledgement is made before the expiry of original limitation period, Section 25(3) of the Contract Act can be invoked in cases where the period of Limitation has already expired. A promise to pay under Section 25(3) of the Contract Act is a fresh contract, independent of the original debt, which may or may not have been acknowledged within the limitation period. Whether an acknowledgment of liability can also be construed as a 'promise to pay' has been answered by



Hon'ble Delhi High Court in the case of State Bank of India Vs Kanhaiya Lal & Anr., RSA No. 248/2015. Therefore, we conclude that the OTS proposals made after expiry of limitation period may be construed as 'promise to pay' under Section 25(3) of the Indian Contract Act, 1872. The Question III, is therefore, answered in the Affirmative.

18. It is pertinent to note here again that a 'promise to pay', under Section 25(3) of the Contract Act, 1872, gives rise to a fresh contract, independent of the original debt, which may or may not have been acknowledged. In the instant case both parties are ad idem on the fact that the OTS proposal dated 20.12.2018 was accepted by the Applicant herein. Therefore, a fresh contract, independent of the original debt, was entered into by both the parties on acceptance of the OTS proposal by the Applicant Bank. Now, we need to examine, whether the instant application under Section 7 of the Code is based on this fresh contract between the parties or not?
19. When we examine the facts of the present application we find that, the original debt of the Applicant is already time barred, and the Applicant's claim can only survive on the basis of the fresh contract i.e. on the basis of the One Time Settlement Agreement entered between the Financial Creditor and the Corporate Debtor. However, we find that, the Debt mentioned in Part IV of the petition is the original debt which is time barred. The OTS dated 20.12.2018 which was agreed between the Financial Creditor and the Corporate Debtor is for an amount of Rs. 24.55 Crores only, which is agreed to be paid by the Corporate Debtor as per the OTS. However, the Financial Creditor claims that the debt due and payable as on 18.11.2019 is for an amount of Rs. 62,47,43,978/-, which is not in accordance with the OTS which was entered between the parties for an amount of Rs. 24.55 Crores only.
20. We are of the considered view that according to the fresh contract under Section 25 (3) of the Indian Contract Act, 1872 i.e. the promise to pay the time barred debt in writing by the Debtor, the Corporate Debtor's liability arises only with respect to the amount agreed in the OTS and not the entire amount of original



debt. The Financial Creditor's contention that the limitation period for the previous debt will be increased further on the basis of the One Time Settlement does not hold ground for the reasons discussed supra. As the quantum of debt claimed and the quantum of debt agreed to be paid in OTS is different, the instant application cannot be held to be maintainable on the basis of promise to pay under Section 25 (3). We have already concluded, that the debt claimed on the basis of the previous loan agreements by the Financial Creditor does not hold ground, as it is barred by limitation under Article 137 of the Limitation Act.

21. In the light of the above this Adjudicating Authority concludes that, the instant petition ***COMPANY PETITION IB (IBC)/672(ND) 2019*** cannot be admitted and is hereby dismissed.

Sd/-
DR. BINOD KUMAR SINHA
Member (Technical)

Sd/-
P.S. N. PRASAD
Member (Judicial)