

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1484 of 2023

[Arising out of order dated 10.11.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP (IB) 496/MB/2023]

IN THE MATTER OF:

Mr. Maneesh Kumar Singh

Carnival House, General A K Vaidya Marg,
Off Western Express Highway,
Dindoshi, Malad (E), Mumbai – 400 097.

...Appellant

Versus

1. State Bank of India

Having its Registered Office at:
State Bank of India Bhavan, Madame Cama Road,
Nariman Point, Mumbai – 400021.

Also at-

SBI Building, First Floor, Plot No.1,
Old Jail Road, Arera Hills,
Bhopla – 462 011.

2. Advantage Overseas Pvt. Ltd.

Through the Interim Resolution Professional
Mr. Sunit Jagdishchandra Shah
IBBI/IPA-001/IP-PQ0471/2017-2018/10814 414,
A-Wing, Express Zone Off,
Western Express Hwy, Malad (E), Mumbai,
Maharashtra 400097
E Mail: sunit78@gmail.com

3. Mr. Sunit Jagdishchandra Shah (IRP)

Registration No:IBBI/IPA-001/IP-P00471/2017-
18/10814
Having at 801-802, 8th Floor, Abhijeet 1 Mithakhali,
Six Roads, Navrangpura,
Ahemdabad-380009

...Respondents

Cont'd.../

Present:

For Appellant: Mr. Abhijeet Sinha, Sr. Advocate with Mr. Anuj Tiwari, Mr. Aditya Shukla, Ms. Heena Kochar, Ms. Monika, Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Pallavi Kumar, Ms. Fatema Kachwalla, Advocates for R-1.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Suspended Director of the Corporate Debtor has been filed challenging order dated 10.11.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-IV admitting Section 7 application filed by the State Bank of India. The Appellant aggrieved by admission of Section 7 application has come up in this Appeal. Brief facts of the case necessary to be noticed for deciding this appeal are:

- (i) The Corporate Debtor - Advantage Overseas Pvt. Ltd. was extended a financial facility by the State Bank of India. Initially a facility of Rs.10 Crores was granted on 15.03.2013. The Board of Directors of the Corporate Debtor resolved to avail the initial facility and to create an equitable mortgage over certain properties of the Corporate Debtor.
- (ii) A Loan-cum-Hypothecation Agreement dated 23.03.2013 was executed between the State Bank of India and the Corporate Debtor.

- (iii) A Guarantee Agreement was also executed in favour of State Bank of India by the Personal Guarantors - Mr. Jijo John and Mr. Maneesh Kumar Singh. Guarantee Agreement was executed on 23.03.2013.
- (iv) On a request made by the Corporate Debtor, facility was enhanced to an aggregate amount of Rs.51 Crore and Letter of Arrangement dated 17.12.2014 was issued.
- (v) On April, 2016, the Corporate debtor again approached the State Bank of India for renewal and an increase/ enhancement of the facility. By Letter of Arrangement dated 13.04.2016, extended facility of aggregating to Rs.6249.50 Crores was granted.
- (vi) Supplemental Agreement of Loan for increase in overall limit was executed on 12.05.2016.
- (vii) To secure the amount granted under the Supplemental Agreement of Loan, Supplemental Deed of Guarantee was executed by Mr. John and Mr. Maneesh Kumar Singh. Second Supplemental Deed of Guarantee for enhanced overall limit was executed by the Asian Business Connections Pvt. Ltd. in favour of the Financial Creditor. A Deed of Guranteee for overall limited executed by Advantage Oils Pvt. Ltd.
- (viii) Corporate Debtor defaulted in serving the facilities. On 08.08.2018, the Bank declared the account of Corporate Debtor as NPA.

- (ix) On 07.01.2019, Bank issued a notice calling upon the Corporate Debtor to repay the amount of Rs.1388,87,36,968/- being the outstanding amount as on 30.11.2018 along with further interest.
- (x) On 30.01.2019, the State Bank of India filed an OA under Section 19 of the Debts Due to Banks and Financial Institutions Act, 1993 being OA No.107 of 2019 for recovery of Rs.1408,57,30,754/-.
- (xi) The Corporate Debtor on 11.03.2020 sent a letter to the Bank requesting for settlement of dues. The said request letter was again sent on 05.05.2020.
- (xii) On 05.09.2020, the Bank addressed a letter providing an One Time Settlement Offer, which offer was agreed and accepted by the Corporate Debtor as well as the Guarantors.
- (xiii) In compliance of the Terms of the OTS, Corporate Debtor issued undertaking on 11.05.2021.
- (xiv) The parties arrived at amicable settlement and on 25.06.2021, parties jointly filed an application for Consent Decree before the Debts Recovery Tribunal (DRT).
- (xv) On 26.04.2022, DRT passed a Consent Decree. The judgment clearly stated that in the event defendants to the OA filed to adhere to the terms of the decree, the entire outstanding amount will be payable by them.
- (xvi) The Corporate Debtor failed to adhere to the terms of the OTS.
- (xvii) The State Bank of India by letter dated 02.01.2023 intimated the Corporate Debtor that OTS has failed.

- (xviii) The Corporate Debtor has also acknowledged the outstanding amount in its financial accounts ending 31.03.2019 and 31.03.2020.
- (xix) The State Bank of India filed an application under Section 7 on 13.03.2023 claiming an amount of Rs.2730,51,66,175.58/- as on 28.02.2023 with further interest.
- (xx) The Adjudicating Authority issued notice in the Section 7 application. Reply was filed by the Corporate Debtor. The Adjudicating Authority after hearing both the parties by impugned order dated 10.11.2023 admitted Section 7 application. Appellant, the Suspended Director of the Corporate Debtor aggrieved by the admission order has filed this appeal.

2. We have heard Shri Abhijeet Sinha, learned senior counsel for the Appellant and Shri Arun Kathpalia, learned senior counsel appearing for the Respondent No.1 – State Bank of India.

3. Shri Abhijeet Sinha, learned counsel for the Appellant in support of the appeal submits that the Application filed by the State Bank of India under Section 7 was barred by Section 10A and the Adjudicating Authority committed error in admitting Section 7 application. It is submitted that as per the OTS dated 05.09.2020 amount of Rs.165.96 Crore was to be paid within six months from the date of conveying sanction of OTS with regard to which payment default occurred on 04.03.2021 i.e. after six months, which was within 10A period, hence, the application being hit by Section

10A was liable to be rejected. It is further submitted that the payment within six months of Rs.165.96 Crores was to be paid from the source of funds to come from the surplus available through sale proceeds of I.T. Parks at Kochi and Trivandrum, which were mortgaged to erstwhile Syndicate Bank which sales were prohibited by DRT, hence, the I.T. Parks at Kochi and Trivandrum could not be sold and there was no source of fund for making the said payment. Learned counsel submitted that due to default committed in compliance of OTS terms dated 05.09.2020, there shall be fresh cause of action, which cause of action arose during 10A period, hence, the application was liable to be rejected. It is submitted that the Section 7 application filed by the State Bank of India is an attempt to execute the Consent Decree passed by the DRT dated 26.04.2022. Section 7 application cannot be filed for execution of a Consent Decree. Learned counsel for the Appellant has also referred to notice dated 02.01.2023 issued by the State Bank of India, which clearly indicate that default took place on 04.03.2021 i.e. within 10A period. The application filed by the Bank under Section 7 was barred by time since the date of alleged default is mentioned as 08.08.2018 from which date three years' period came to end on 08.08.2021 and thereafter petition was not filed within the time allowed by Hon'ble Supreme Court in Suo Motu Writ Petition (Civil) No. 03 of 2020.

4. Shri Arun Kathpalia, learned senior counsel appearing for the Respondent Bank refuting the submissions of the Appellant submits that the Corporate Debtor having committed default in payment of debt, for

which date of default was clearly mentioned in the Section 7 Application as 08.08.2018. There is no question of application under Section 7 being barred by Section 10A when default is committed prior to 10A period and application cannot be held to be barred by Section 10A. It is submitted that on the basis of OTS dated 05.09.2020 both the parties agreed to obtain the Consent Decree from the DRT where original application filed by the Bank was pending. After the OTS dated 05.09.2020, the Corporate Debtor executed an undertaking on 11.05.2021 and thereafter on 05.06.2021 the Corporate Debtor and the Bank jointly filed an application for Consent Decree which decree was passed on 26.04.2022 by the DRT. The undertaking dated 11.05.2021, date of filing of joint application 25.06.2021 and date of decree i.e. 26.04.2022 were all subsequent to the 10A period. There is no occasion for dismissing the application as barred by 10A. It is further submitted that the submission that payment of Rs.165.96 Crore was from sale of proceeds of I.T. Parks at Kochi and Trivandrum, which sale could not take place, cannot absolve the Corporate Debtor from making payment under the OTS. The OTS itself contemplates that in case of any shortfall from the source of funds indicated, the company promoters shall meet the same from other sources. It is submitted that the submission that application is barred by time is wholly erroneous and incorrect. There was acknowledgement by the Corporate Debtor in its Financial Accounts ending 31.03.2019 and 31.03.2020 and limitation shall clearly stand extended. The Bank had recalled entire loan by Recall Notice dated 02.01.2023. The Corporate Debtor is liable to pay the entire amount.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. The main thrust of the submission of learned counsel for the Appellant is based on Section 10A. Section 10A provides:

“10A. Suspension of initiation of corporate insolvency resolution process. *Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

7. In the Section 7 application which was filed by the State Bank of India, date of default as mentioned in Part IV was 08.08.2018. Part IV of the Section 7 application with regard to total amount of debt and amount claimed to be in default and date of default states following:

“PART IV

PARTICULARS OF FINANCIAL DEBT	
1. TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<i>Rs. 2730,51,66,175.58 (Rupees Two ED Thousand Seven Hundred and Thirty Crores Fifty One Lakhs Sixty Six Thousand One Hundred and Seventy Five and Fifty Eight Paise Only) as on February 28, 2023 together with further interest and other charges as per contractual rate, w.e.f. March 1, 2023 until payment under the Facilities (as defined hereinafter).</i>
2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFUALT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<p><i>The total amount in default due to the Applicant by the Corporate Debtor under the Facilities, as on February 28, 2023 is Rs. 2730,51,66,175.58 (Rupees Two Thousand Seven Hundred and Thirty Crores Fifty One Lakhs Sixty Six Thousand One Hundred and Seventy Five 5 and Fifty Eight Paise Only) with further interest and other charges as per contractual rate w.e.f. March 1, 2023 until full repayment.</i></p> <p><i>The computation chart showing the workings for the computation of default (including principal and interest due and payable) and the days in default is annexed herewith as Annexure I-D.</i></p> <p><i><u>Date of default: August 8, 2018.</u></i></p> <p><i>As detailed hereinafter, the debt of the Applicant was acknowledged by the Corporate Debtor in its financial statements.</i></p> <p><i>Lastly, on April 26, 2022, the Corporate Debtor committed another default as the Corporate Debtor</i></p>

	<p><i>failed to adhere to the terms of the Judgement (as defined hereinafter).</i></p> <p><i>In any event, an explanation of the manner in which the present application falls within the limitation period is set out hereunder.</i></p>
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8. The date of default claimed in Section 7 application was 08.08.2018. Computation chart showing the workings for the computation of default was also Annexed with Section 7 application. The submission which was pressed by learned counsel for the Appellant was that per the OTS dated 05.09.2020 amount of Rs.165.96 Crore was to be paid within six months from the date of conveying sanction of OTS. He has referred to Clause (c) of the OTS dated 05.09.2020, which is as follows:

“c. Balance amount of Rs.394.37 Crores is to be paid as per Schedule mentioned below

Terms of Payment of Compromise Settlement:

(Rs. in Crores)			
Sr. No.	Repayment Schedule	Amount	Source of funds
1	<i>Upfront on conveying sanction of OTS.</i>	31.70	<i>Already parked in No lien account at Stressed Assets Management Branch, Bhopal, which will be appropriated upon the acceptance of the Compromise offer.</i>
2	<i>Within One (01) month from the date of conveying of sanction of OTS.</i>	1.07	<i>Miscellaneous sources.</i>

3	<i>Within Six (06) months from the date of conveying sanction of OTS.</i>	165.96	<i>Surplus available through sale proceeds of I.T.parks at Kochi and Trivandrum, which are mortgaged to e-Syndicate Bank.</i>
4	<i>Within Three (03) years from the date of conveying of sanction of OTS.</i>	203.00	<i>Divestment of Carnival Films Pvt. Ltd. (Brand Name Carnival Cinemas) through sale of stake.</i>
5	<i>Within Three (03) years from the date of conveying of sanction of OTS.</i>	24.34	<i>Miscellaneous sources.</i>
Total	Three (03) years	426.07	

9. When we look into the OTS, Clause (e) clearly indicates that Consent Terms will be filed before Presiding Officer or DRT/Court for obtaining Consent Decree. Clause (j) of the Consent Terms provides as follows:

“j. If, for any reason, the compromise amount or any instalment, as agreed, is not received within the schedule period approved, the Bank reserves the right to cancel the compromise settlement and entire dues of the Bank, as claimed in DRT/ Court in the original application with interest and costs will become due for payment.”

10. It is not in dispute that Bank vide letter dated 02.01.2023 has communicated that OTS between the parties has failed. Further in Consent Terms Clause (k) with other terms at (k) (iii) provides as follows:

“k. (iii) The borrowers and the Bank jointly will file an application for obtaining Consent Decree from the DRT incorporating therein a clause that in the event,

the borrowers/ guarantors fail to adhere to the terms of compromise, the compromise settlement shall stand automatically cancelled and the Bank will be entitled to recover the entire outstanding amount together with interest at the contractual rate after adjusting the initial amount/ amount paid till then, if any.”

11. The sequence of facts indicate that both the parties had jointly filed the application before the Debts Recovery Tribunal. Joint Application has been brought on record by the Appellant along with the Affidavit dated 04.12.2023. Para 3 of the Joint Application is as follows:

3. The applicant Bank duly considered the settlement offer of the defendants and after due consideration, the appropriate authority accepted the offer of Rs. 425.00 crore on the following terms and conditions, which was communicated to the defendants vide applicant's letter dated 05.09.2020. The defendants accepted the terms and conditions of the settlement by signing the aforesaid letter, copy of which is enclosed as annexure J1 and shall form part of this Joint application.

(i) That the defendant No.1 company would pay a total amount of Rs. 425.00 crores towards full and final settlement of the account.

(ii) An upfront amount of Rs. 31.70 crores already paid by the defendant company and has been appropriated towards the aforesaid settlement amount.

(iii) The defendant company has also paid an amount of Rs. 37.20 crores on 17 November 2020; and, Rs. 36.30 crores on 12 March 2021 which also have been appropriated towards aforesaid settlement.

(iv) The balance amount of Rs. 319.80 crores would be paid as per the schedule mentioned below:-

Sr. No.	Repayment Schedule	Amount (in crores)
1.	Upfront on conveying sanction of OTS	31.70
2.	1 st Part of 2 nd Instalment – paid on 17 November 2020	37.20
3.	2 nd Part of 2 nd Instalment- paid on 12 March 2021	36.30
4.	Within Six (06) months from the date of conveying sanction of OTS.	92.46
5.	Within Three (03) years from the date of conveying of sanction of OTS	203.00
6.	Within Three (03) years from the date of conveying of sanction of OTS	24.34
Total	Three (03) years	425.00

v) That the applicant Bank would release its charge on the properties and other securities on payment of the entire compromise amount of Rs. 425.00 crores.

(vi) Interest would be charged at MCLR (three years (7.30%) tenor) + 2%, i.e. present effective rate being 9.30% p.a. on the balance amount of compromise paid after four months and the same shall be charged from first day from the date of letter conveying approval of the compromise to the borrower. The interest to be charged will be compounded at monthly rests. No interest will be charged, if the entire OTS amount is paid within four months.

(vii) That, if the defendants fail to make payment of the settled amount of Rs. 425 crores within the stipulated period with applicable rate of interest or fail to adhere to the terms of compromise as per the discretion of the Bank, the instant compromise settlement would stand cancelled and the entire dues of the applicant Bank as claimed in the aforesaid OA with interest and cost would immediately become due for payment and in such case Bank can proceed with the execution of the recovery certificate without any further reference to defendants. The defendants have agreed to abide by the decision of the Bank as regards to whether there is a failure to adherence to terms and conditions of the compromise settlement and same will be conclusive. In terms of the OTS sanctioned by the Bank, the defendants have already filed the affidavit for withdrawal of their counter claim of Rs. 30,158,478,918/- filed against the Bank in OA. No. 107/2019 vide its application dated 27/5/2021 and the same has been pending before this

Honourable DRT for withdrawal of counter claim. The defendants agreed that in case of failure of aforesaid settlement terms agreed between the parties, the aforesaid counter claim shall not revive as an application to withdraw the same has been filed unconditionally. The Bank has agreed not to take any steps to pursue or prosecute, in any manner, any legal proceedings except as agreed in the Sanction Letter dated 05.09.2020(Annexure J1).

The Parties shall have no claims and disputes over each other save and except the claims arising in the present consent decree in terms of Sanction Letter and hereby withdraw all other allegations against each other, subject to the contents of Sanction Letter (Annexure J1).”

12. It is admitted fact that the Consent Terms were filed before the DRT on 25.06.2021 and Consent Decree was passed on 26.04.2022. Joint Application was filed on 25.06.2021, six months' period from conveying sanction of OTS has already come to an end and the Joint Application also noted the two payments which were made by the Corporate Debtor on 17.11.2020 and 12.03.2021.

13. The present is a case where admittedly default was committed by the Corporate Debtor much prior to 10A period i.e. 08.08.2018 as was claimed by the State Bank of India in its application. When default was committed by the Corporate Debtor prior to 10A period, it is not open for the Appellant

to claim that application deserve to be rejected on the ground of Section 10A.

14. Learned counsel for the Respondent has relied on judgment of this Tribunal in **“Raghavendra Joshi vs. Axis Bank Limited and Another, 2023 SCC OnLine NCLAT 498”** where this Tribunal while considering Section 10A has laid down that when default has been committed by the Corporate Debtor prior to 10A period and debt was acknowledged Section 10A cannot be pressed into service. In Para 10 and 15 of the judgment following has been held:

“10. Section 10A never intended to cover the default which is continuing before Section 10A period. The present is a case where admittedly default has been committed by the Corporate Debtor since 2016. Admittedly NPA was declared on 19th July, 2016. Learned Counsel for the Respondent has rightly referred to acknowledgement made by the Corporate Debtor in its balance sheets for the financial year 2018-19, 2019-20 and 2020-21 where the dues were clearly acknowledged. Thus, the present is the case where default was committed prior to commencement of Section 10A period.

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15. The submission that since default was also committed by the Corporate Debtor during the Section 10A period of the OTS amount which ultimately withdrawn on 25th January, 2021, the Application

should be barred by Section 10A does not commend us. There being categorical default by the Corporate Debtor prior to Section 10A period, the Appellant was not clearly entitled for the benefit of Section 10A Period.”

15. The above judgment clearly supports the submission of the Respondent. Learned counsel for the Appellant has placed reliance on judgment of Hon'ble Supreme Court in **“Gimpex Private Limited vs. Manoj Goel, (2022) 11 SCC 705”**. Reliance was placed on Para 41 of the judgement, which is as follows:

“41. *When a complainant party enters into a compromise agreement with the accused, it may be for a multitude of reasons – higher compensation, faster recovery of money, uncertainty of trial and strength of the complaint, among others. A complainant enters into a settlement with open eyes and undertakes the risk of the accused failing to honour the cheques issued pursuant to the settlement, based on certain benefits that the settlement agreement postulates. Once parties have voluntarily entered into such an agreement and agree to abide by the consequences of non-compliance of the settlement agreement, they cannot be allowed to reverse the effects of the agreement by pursuing both the original complaint and the subsequent complaint arising from such non-compliance. The settlement agreement subsumes the original complaint. Non-compliance of the terms of the settlement agreement or dishonour of cheques issued subsequent to it, would then give rise to a fresh cause of action attracting*

liability under Section 138 of the NI Act and other remedies under civil law and criminal law.”

16. The observation made in Para 41 wherein reference to Section 138 of NI Act has been made, the observation made by the Court was that non-compliance of terms of settlement agreement or dishonor of cheques issued subsequent to it, would then give rise to a fresh cause of action. There can be no dispute to the proposition that dishonor of cheques gives fresh cause of action. The above judgment does not come to any aid of the Appellant in interpretation of Section 10A of the IBC which is subject matter of the issue.

17. Reliance has also been placed by leaned counsel for the Appellant on the judgment of Hon'ble Supreme Court in **“Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Ltd., (2011) 10 SCC 420”**. In Para 32 and 34 of the judgement following was laid down:

“32. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

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34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where

one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593; C.I.T. Vs. MR. P. Firm Maur, AIR 1965 SC 1216; Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329; P.R. Deshpande v. Maruti Balaram Haibatti, AIR 1998 SC 2979; Babu Ram v. Indrapal Singh, AIR 1998 SC 3021; Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, AIR 2004 SC 1330; Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors., AIR 2009 SC 713; and Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr., (2011) 5 SCC 270)”

18. The above judgment clearly lays down that where one knowingly accepts the benefits of a contract or an order, is estopped to deny the validity or binding effect on him of such contract or order. Present is a case where none of the parties have questioned the OTS dated 05.09.2020, as noted above. The OTS itself contemplate that in event amount under the OTS is not paid, the Bank shall be entitled to recover the entire outstanding amount together with interest, which liberty was utilised by the Bank while declaring the OTS as failed. Thus, the above judgment of Hon'ble Supreme Court does not help the Appellant in its case.

19. As observed above, there are two reasons for not accepting the submissions of the Appellant that the application under Section 7 was barred by Section 10A. Firstly, the default was committed by the Corporate Debtor prior to 10A period w.e.f. 08.08.2018, which was date of default mentioned in Section 7 application. When Section 7 application mentions date of default which default was committed prior to 10A period, application under Section 7 cannot be held to be barred by Section 10A. Further, although OTS was communicated by the Bank by letter dated 05.09.2020 but the OTS itself contemplates that parties shall jointly file an application before the DRT where original application filed by the Bank was pending and obtain the Consent Decree. Joint Application could be filed on 25.06.2021 and Consent Decree could be passed on 26.04.2022 by DRT. As noted above, an undertaking was given by the Corporate Debtor on 11.05.2021, which undertaking has been brought on record by the Appellant as Annexure – 37 to the Appeal. The undertaking admittedly was issued on 11.05.2021. When the Joint Application was filed subsequent to 10A period and Consent Decree was obtained only on 26.04.2022, we are unable to accept the submission of the Appellant that application under Section 7 was barred by 10A.

20. Learned counsel for the Appellant has placed much reliance on notice dated 02.01.2023 which was communication that OTS has failed and the Corporate Debtor to pay entire outstanding dues along with interest within 14 days from the date of letter. OTS terms itself contemplate clauses that in cause of nonpayment of dues, the Bank shall have liberty

to treat the OTS as failed and proceed to recover entire outstanding dues. The next submission of the Appellant is that since the properties i.e. I.T. Parks at Kochi and Trivandrum could not be sold due to restraining order of the DRT, Corporate Debtor was not obliged to make payment as was contemplated in the OTS. Learned counsel for the Respondent has referred to Clause K(iii), which is as follows:

“(iii) The borrowers and the Bank jointly will file an application for obtaining Consent Decree from the DRT incorporating therein a clause that in the event, the borrowers/ guarantors fail to adhere to the terms of compromise, the compromise settlement shall stand automatically cancelled and the Bank will be entitled to recover the entire outstanding amount together with interest at the contractual rate after adjusting the initial amount/ amount paid till then, if any.”

21. Thus, the submission that Appellant was unable to sell the I.T. Parks at Kochi and Trivandrum cannot be ground for the Appellant to not make payment as agreed.

22. Coming to the submission of the Appellant that Section 7 application which was filed by the Bank was barred by time. It is relevant to notice that the date of default was mentioned as 08.8.2018 and OTS proposals were given by the Corporate Debtor on 11.03.2020 and 05.05.2020. The application under Section 7 was filed by the Bank on 13.03.2023 i.e. well within three years from submission of OTS proposal. OTS proposal submitted by the Corporate Debtor was clearly acknowledgement of debt

and the benefit of Section 18 of the Limitation Act shall be available to the Financial Creditor. Further, admittedly Consent Decree was passed by Debts Recovery Tribunal on 26.04.2022 and from the date of decree of the DRT, there shall be further period of three years for filing application which has been held by Hon'ble Supreme Court in "**Kotak Mahindra Bank vs. A. Balakrishnan; (2022) 9 SCC 186**".

23. We, thus, are of the view that no grounds have been made out in this appeal to interfere with the impugned order admitting Section 7 application. There is no merit in the Appeal. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

13th May, 2024

Archana