

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT III

I.A. 1039/2022

In

C.P.(IB)-266(MB)/C-III/2022

(Under Section 60(5), 65 and 75 of the Insolvency and Bankruptcy Code, 2016)

In the matter of

Lasa Supergenerics Limited

.....Applicant/ Corporate Debtor

Vs

Bank of Baroda

.....Respondent/ Financial Creditor

C.P.(IB)-266(MB)/C-III/2022

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016)

In the matter of

Bank of Baroda

Branch: P.O. Box 5294, AI Nahkeel Street, Next to Choitram Super Store, Ras AI Khaimah, UAE.

.....Petitioner/ Financial Creditor

Vs

Lasa Supergenerics Limited

Registered office at: C-105, MIDC Mahad, Maharashtra-402301.

.....Respondent/ Corporate Debtor

Order pronounced on: 28.02.2024

CORAM:

SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)

SMT. LAKSHMI GURUNG
HON'BLE MEMBER (J)

For the Financial Creditor: Adv. Rathina Maravarman.

For the Corporate Debtor: Adv. Nausher Kohli, Adv. Gaurav Gadodia i/b
CS Ashish Lalpuria

Per: Charanjeet Singh Gulati, Member (Technical)

ORDER

1. The present application is filed by **Lasa Supergenerics Limited** ("Corporate Debtor/Applicant) under Section 65 and 75 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), seeking the dismissal of the CP(IB)/266(MB)/2022, which is filed by **Bank of India** ("Financial Creditor/Respondent") to initiate of Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor.

2. **Relevant Brief Facts as narrated in the Application & Submission of the Applicant:**

i. Bank of India had sanctioned and granted ECB facilities vide sanction letter dated 21.08.2012 against the equitable mortgage and personal guarantees of the directors of the Company Mr. Pravin Shivdas Harlekar and Omkar Pravin Harlekar. On account of default in payment, the main Company Petition CP(IB)/266(MB)/2022 has been filed by **Bank of India** for a total dues of USD 3544514.98 (INR 267946546.25) u/s 7 of the Code with the date of default being 13.12.2018. In the background of this Company Petition filed under Section 7 of the Code, the Applicant has filed the present I.A seeking dismissal of the same.

ii. The applicant giving the chronology of exchange of emails with the Financial Creditors states that one-time settlement of Rs. 10 crores was arrived at towards full and final settlement in respect of ECB facility granted and FC requested the CD to resubmit the fresh proposal for OTS

wherein it was requested to deposit 50% of Rs. 10 crores to show bonafide and readiness to move forward with the OTS. It is also submitted that due to outbreak of Covid-19 pandemic in March 2020 and subsequent lockdown, the OTS proposal was kept on hold till July 2020.

- iii. After the month of August 2020, the discussion on the OTS rebegan and finally the FC gave consent to the terms and conditions of the OTS after obtaining necessary internal permissions. However, this OTS was never given effect to and thereafter an email dated 17.12.2020 was written by CD offering 11 crores as final OTS.
- iv. The important terms and conditions of the said final OTS offer of Rs. 11 Crore are as under:
 - a. *Applicant-Corporate Debtor has to deposit Rs. 1.10 Crore in the no lien account of Respondent-Financial Creditor to show bonafide of the Applicant-Corporate Debtor, which can be appropriated by Dubai Branch of the Respondent-Financial Creditor only upon the acceptance of OTS proposal with the conditions as specified by the Applicant-Corporate Debtor.*
 - b. *The alleged guarantee of Mr. Omkar Herlekar shall stand extinguished upon payment of entire OTS amount from any of the loans in any account under whatsoever name with the Respondent-Financial Creditor.*
 - c. *The property i.e. Unit No. D27/5, MIDC Badlapur, Badlapur (E), Thane, 421503, kept as security against the ECB facility shall be released upon payment of entire OTS amount. The balance OTS amount will be paid within 10 monthly EMI's.*
- v. The applicant submits that proposal for OTS by the Corporate Debtor was duly accepted, acknowledged and agreed by the Financial Creditor and the same was conveyed to the Corporate Debtor vide email dated 17.12.2020 by the Financial Creditor. The Financial Creditor by the very

same email directed the Corporate Debtor to deposit the preliminary amount of Rs. 1,10,00,000/- (Rupees One Crore Ten Lakhs only) in the account provided by the Dubai Branch of the Financial Creditor.

- vi. Accordingly, the Corporate Debtor deposited an amount of Rs. 1,10,00,000/- (Rupees One Crore Ten Lakhs only) in the bank account as per details provided by the Financial Creditor, but after receiving the amount of Rupees One Crore Ten Lakhs, the Financial Creditor attempted to auction the mortgaged property of the Corporate Debtor in respect of the loan which was settled as per the OTS terms and conditions.
- vii. In the sale notice issued by the Financial Creditor, the said loan is shown to be of Omkar Specialty Chemicals Limited. Upon inquiry the Corporate Debtor came to know that the Financial Creditor had initiated proceedings under the SARFAESI Act, 2002 against Omkar Specialty Chemicals Limited. In the said petition the Financial Creditor claimed that the loan in question in the present petition belongs to Omkar Specialty Chemicals Limited and that the same has to be recovered from the said entity, which was opposed by Omkar Specialty Chemicals Limited vide their SARFAESI Application No. 130 of 2020.
- viii. The applicant further submitted that subsequent to the demerger scheme of one Unit of Omkar Speciality Chemical Ltd. into the Corporate Debtor effective since 02.05.2017 the ECB loan along with the associated property came to be transferred to the Corporate Debtor and that the Financial Creditor had not raised any objection to such a scheme being approved by the appropriate authority.
- ix. The applicant submits that the property at Unit No. D-27/5 is mortgaged toward the ECB facility availed by it. The subsequent email dated 17.03.2021 changing the terms and conditions of the OTS arrived through email dated 17.12.2020 is unilateral and arbitrary. The new timeline for payment of the entire amount by 31.03.2021 and non-release

of personal guarantee of Mr. Omkar Herlekar and associated property to the loan situated at Unit No. D-27/5 is in disregard to the OTS arrived.

- x. It is contended that the action of FC only reflect malafide intention to recover the loan both from the Corporate Debtor as well as from Omkar Speciality Chemicals Limited against which the Financial Creditor had filed OA no. 161 of 2021 before the Debt Recovery Tribunal, Mumbai.
- xi. Upon such circumstances, the Corporate Debtor wrote an email dated 01.04.2021, in view of the new email dated 17.03.2021 of the Dubai Branch of the Financial Creditor requesting to return the monies given by the Corporate Debtor. Similar emails were also written by the Corporate Debtor to the Financial Creditor till 15.04.2021. Also the Corporate Debtor filed a suit having number 600 of 2021 for specific performance of the contract in the Thane City Civil Court.
- xii. However, it is pertinent to note that the Hon'ble Debt Recovery Tribunal in SARFEASI Application No. 130 of 2020 filed by Omkar Speciality Chemicals Limited was pleased to hold in their Order dated 06.12.2021 that Notice u/s. 13(2) of the SARFEASI Act issued by the Financial Creditor suffered serious defect, which fact is not disclosed in the present Petition by the Respondent Financial Creditor.
- xiii. The Corporate Debtor further states that the Financial Creditor have deliberately and in contravention of the settled provisions of law have preferred the Insolvency Petition bearing No. CP(IB)266/MB/2022 without adhering to the rules as framed thereunder. It is pertinent to note that the Petition filed by the Financial Creditor is an afterthought and outcome of the observation made by the Hon'ble Debt Recovery Tribunal -III, Mumbai in the Securitization Application bearing No. 130/2020 as stated above.

3. Objections raised by the Corporate Debtor in IA/1039/2022, challenging the maintainability of the Main Company Petition:

The Corporate Debtor submits that the main petition is not maintainable on the following grounds;

- i. That the Financial Creditor have themselves claimed in Suit No. 161 of 2021 filed before DRT against Omkar Speciality Chemicals Limited that the loan in question in the present proceedings belongs to Omkar Speciality Chemicals Limited and not to the Applicant-Corporate Debtor.
- ii. The Financial Creditor cannot recover the same loan from two organisations in two different proceedings before two separate authorities. The said act is nothing but an abuse of the process of law.
- iii. That the Financial Creditor cannot use the Insolvency and Bankruptcy Code as an arm twisting method as against the Corporate Debtor to make them succumb to their illegal demands so as to enable them to recover loan of a separate entity i.e. Omkar Speciality Chemicals Limited.
- iv. That assuming the Financial Creditor make a statement on affidavit that the loan is that of the Corporate Debtor then they are bound by the contractual obligations of the OTS and in that light neither the date of default nor the amount of loan survives.
- v. Assuming that the Financial Creditor declare that the loan is of the Corporate Debtor then the Financial Creditor cannot be allowed under IBC to take advantage of their own wrong of causing delay as the Corporate Debtor are ready and willing to pay the entire amount as per the terms and condition of the OTS dated 17.12.2020.

- vi. That the IBC proceeding cannot be continued in light of the fact that a Specific Performance Suit No. 600 of 2021 is pending before the Civil Court which goes to the heart of the matter in as much as the said suit will determine both the amount of loan due and payable by the Corporate Debtor as well as the existence of default. It is pertinent to note that the Hon'ble NCLT does not have the jurisdiction to determine the question as it is not the fact- finding court.
 - vii. That the present proceedings is against the object of the Insolvency and Bankruptcy Code, 2016 which was created to promote entrepreneurship and maximisation of the assets by taking over the management from defaulting directors and officers and was not created for the purpose of making illegal demands and satisfying the same under the threat of CIRP as is being done in the present case.
4. The Corporate Debtor states that the above facts sufficiently establish that the respondents have concealed many facts and have attempted to show the present case as a simple matter of non-payment and default. The said attempt of the Respondent Financial Creditor in itself shows their malafide intention in initiating the present proceedings making them liable both under Section 65 and Section 75 of the Insolvency and Bankruptcy Code, 2016 which has been enacted to prevent a dishonest initiation of IBC, proceedings. In such circumstances, the Corporate Debtor has filed the present application to hold the Financial Creditor guilty under section 65 and section 75 of the IBC and to dismiss the main Company Petition no. CP(IB)/266(MB)/2022.

5. **Affidavit in Reply filed by the Financial Creditor:**

The Financial Creditor has filed a detailed reply, relevant contents of which are extracted herein under:

- i. Respondent Bank has sanctioned US \$ 12.00 Mn. bilateral ECB facility as requested by (i) Omkar Speciality Chemicals Ltd. ('OSCL') to part finance the project cost of the Company relating to expansion of the capacity of manufacturing speciality chemicals at the existing unit at Badlapur and setting up a new Unit at Khed, Ratnagiri. The facility was sanctioned vide Sanction Letter dated 22.07.2012 issued by Bank of Baroda, Ras Al Khaimah Branch, UAE (Applicant Bank).
- ii. Besides the company OSCL availed Rupee Facilities aggregating to Rs.113.75 Crore from Bank of Baroda, Fort University Branch, Mumbai. (Ref: MOE 24.06.2013)
- iii. The unit no 5 of OSCL situated at D27 /5 Lote Parshuram Industrial Area, Taluka Khed, Dist Ratnagiri was mortgaged to secure the ECB facility sanctioned by Bank of Baroda, Ras Al Khaimah Branch, UAE besides other facilities sanctioned by Bank of Baroda, Fort University Branch, Mumbai.
- iv. By virtue of the NCLT Order dated 13.04.2017, all the subsidiaries of the Original Borrower viz. LASA Laboratories Private Limited, Urdhwa Chemicals Company Private Limited, Rishichem Research Limited and Desh Chemicals Private Limited were merged with the Original Borrower - LASA Supergenerics Limited ("LASA") and the API Undertaking of the Original Borrower was de-merged/transferred to LASA under the said scheme.
- v. The effective date of Demerger was fixed as 02.05.2017. The Original Borrower Company have also obtained necessary approval of BSE, NSE and SEBI for the said demerger.
- vi. The Corporate Debtor have also issued their letter dated 16.05.2017 to the Bank whereby they pointed out that Unit No. 5 and 6 of OSCL (assets pertaining to ECB facility) by virtue of NCLT order have now

become assets of the LASA and the liability of ECB facility has also been shifted to LASA.

- vii. The Respondent Bank vide its Review Proposal letter dated 28.03.2018 have also provided its approval for de-merger of Veterinary API undertaking of the Original Borrower Company with LASA subject to compliance with RBI Guidelines pertaining to ECB for change in borrower and on other terms and conditions as laid down in the said proposal.
- viii. Bank vide its letter dated 14.05.2018 have also provided it's No Objection for transfer of Unit at Plot No. D-27/5, MIDC, Lote Parshuram Industrial Area, Chiplun, Ratnagiri, Maharashtra (Unit No. 5) from OSCL to LASA.
- ix. Copy of e-form MGT- 14 was also filed by LASA with the Registrar of Companies for the resolution dated 02.05.2017 passed by LASA for the assets being transferred to LASA from OSCL including B-15 and B-16, both located at Lote Parshuram Industrial Area, Khed, Ratnagiri, Maharashtra along with property located at D-27/5, as aforesaid. Thus, by virtue of Order of NCLT there is transfer of all liabilities and assets pertaining to the External Commercial Borrowings which is in accordance with the Scheme as approved by NCLT.
- x. By virtue of operation of Law (NCLT Order), the conditions regarding the transfer of ECB to LASA have been met and the assets of OSCL have been transferred to LASA and all the liabilities pertaining to ECB have also been transferred from effective date to LASA.
- xi. The Corporate Debtor issued a Board Resolution on 02.05.2017 acknowledging its liability towards ECB loan availed from Bank of Baroda and acknowledging the charge on Unit no 5 of Omkar Speciality Chemicals Ltd situated at D27/5 Lote Parshuram

Industrial Area, Taluka Khed, Dist Ratnagiri as security for the ECB loan from Bank of Baroda. Also, the Corporate Debtor in its Annual Report of 2017-18 have also acknowledged their liability under the ECB Loan.

- xii. Regarding maintainability of the petition, it is stated that the Corporate Debtor has taken over under De-merger the Veterinary API undertaking along with the liability under ECB Loan sanctioned. The Corporate Debtor have also shown the said liability (ECB Loan) as also the assets (Veterinary API undertaking) in their Books, and therefore, the main petition filed them is maintainable against the said Corporate Debtor.
- xiii. Regarding limitation it is stated that the Corporate Debtor has failed to service the ECB Loan since the Month of December, 2018 (date of default being 13.12.2018). The account of the Corporate Debtor has been declared as NPA after expiry of 90 days on 31.03.2019 and the present Application has been filed on 21.03.2022 (within the period of limitation of 3 years). Hence the Petition filed by the Financial Creditor is within limitation.
- xiv. In respect of filing recovery proceedings against two entities, it is stated that originally the ECB facility of USD 12.00 Mn. (subject to maximum INR equivalent to Rs.63.00 Crores) was sanctioned to M/s. Omkar Speciality Chemicals Ltd. Upon de-merger, all assets (including Unit No. V i.e. D-27/5, MIDC) and liabilities (including ECB facility) of Veterinary API undertaking as per scheme of arrangements approved by the Hon'ble High Court of Bombay were transferred from M/s. Omkar Speciality Chemicals Ltd. to M/s. LASA Supergenerics Ltd. Since the necessary documentation for the split of security structure could not take place due to non-cooperation of borrower, the entire security structure package as per original sanction is available to the Bank for securing domestic as well as ECB facility. Accordingly, Bank has initiated recovery measures

against both M/s. Omkar Speciality Chemicals Ltd. (for execution of security interests as also for review) & M/s. LASA Supergenerics Ltd. Further, bank has initiated recovery proceedings against OSCL for the Rupee Loan Facilities availed from Bank of Baroda, Fort University Branch, Mumbai. Bank has initiated recovery proceedings against Lasa Supergenerics Ltd for the ECB facility granted from Bank of Baroda, Ras Al Khaimah Branch, UAE.

- xv. In respect of the SARFAESI measures, it is stated that OTS in the account was sanctioned by the Respondent Bank on 17.03.2021. Following payment terms have been stipulated in the said sanction:

	US \$ in Mn.	INR in Crores
OTS Compromise Amount	1.513	11.00
Amount already deposited in No-Lien account	0.151	1.10
Residual Amount to be paid under OTS before 31.03.2021	1.362	9.90

Compromise amount was of US \$ 1.513 Mn. and the amount sacrificed is of US \$ 1.774 Mn.

- xvi. Further it was clearly stipulated in the said letter that the Guarantee of Mr. Omkar Pravin Herlekar will not be released and further the property bearing No. D-27 / 5 at Dist. Ratnagiri cannot be released (at present). Further a condition was put forth that OTS is valid up to 31.03.2021 and the Corporate Debtor has to pay the residual OTS amount of Rs.9.90 Crores on or before 31.03.2021. Though the Corporate Debtor has made initial payment of Rs. 1.10 Crores, they have failed to make further payment of Rs.9.90 Crores by 31.03.2021 which led to the failure of OTS sanctioned and the OTS sanction was rescinded.

xvii. It is also stated that the Respondent Bank has not suppressed any material facts with the dishonest intention of admitting the CIRP proceedings. Accordingly, the Respondent Bank denied that the filing of the NCLT Application against the Corporate Debtor is incorrect in law and not maintainable.

OBSERVATIONS & FINDINGS

6. Heard the Parties and on perusal of the application along with the annexures, we observe that the unit no. 5 of Omkar Speciality Chemicals Ltd. situated at D-27/5, Lote Parshuram Industrial Area, Taluka khed, Dist Ratnagiri was mortgaged to secure the ECB facility (amounting to US \$12.00 Mn.) by Bank of Baroda, Ras A1 Khaimah Branch, UAE and same unit was also mortgaged to secure the other facilities (amounting to Rs. 113.75 Crore) sanctioned by Bank of Baroda, Fort University Branch, Mumbai.
7. Upon de-merger, all assets (including Unit No. V i.e. D-27/5, MIDC) and liabilities (including ECB facility) of Veterinary API undertaking as per scheme of arrangements approved by the NCLT were transferred from M/s. Omkar Speciality Chemicals Ltd. to M/s. LASA Supergenerics Ltd, the applicant.
8. Further, the ECB facility was degraded due to non-payment of contractual dues (date of default being 13.12.2018) and the account was declared as NPA on 31.03.2019. Even other loan facilities provided by Bank of India, Fort University Branch, Mumbai was also declared as NPA. In regard to ECB facility, the Corporate Debtor, on 17.06.2019 offered an OTS proposal for Rupees Ten Crores towards full and final settlement and same was confirmed by the Dubai Branch of the Respondent vide email dated 24.06.2019. However, the Financial Creditor vide their email dated 08.01.2020 requested Corporate Debtor to deposit 50% of Rs. 10 crores to show their bonafide and readiness.

Due to certain reasons, the Corporate Debtor failed to comply with the aforesaid OTS. Therefore, on 17.12.2020, the Corporate Debtor proposed a fresh OTS amounting to Rs. 11,00,00,000/-

9. On January, 2022, the Financial Creditor filed the petition under section 7 of the Code. In consequence thereof, the Corporate Debtor filed the present application and raised preliminary objections, as follows:

- i. The existence of two separate companies, Lasa Super Generics (“LASA”) & Omkar Speciality Chemicals Ltd. (“Omkar”), operating independently. Only the veterinary business of Omkar was merged with Lasa. Filing the application in NCLT against Lasa is not maintainable due to this distinction.
- ii. The Bank filed an O.A. against Omkar in DRT (under RDDB Act), while proceedings against Lasa in NCLT are contradictory and incorrect in law, as the Corporate Debtor has no involvement with Omkar’s loan. Thus, the petition is not maintainable.
- iii. The date of default is noted as 31.12.2018, yet the Petition was filed in January 2022, potentially rendering it barred by limitation.
- iv. Despite the OTS being sanctioned, the Financial Creditor unilaterally altered the terms. Additionally, they refused to release the Guarantee/Securities, breaching the terms of settlement by demanding the entire amount be paid by 31.03.2021.

10. In relation to the contention that only the veterinary business of Omkar was demerged with Lasa, we note that upon de-merger, all assets (including Unit No. V i.e. D-27/5, MIDC) and liabilities (including ECB

facility) of Veterinary API undertaking as per scheme of arrangements approved by NCLT were transferred from M/s. Omkar Speciality Chemicals Ltd. to M/s. LASA Supergenerics Ltd. Therefore, for the default of the ECB facility petition u/s 7 is maintainable against LASA, if valid otherwise.

11. In relation to the contention that the Financial Creditor proceeded separately against each of the Entity, we note that the two separate facilities were sanctioned by two different branches of Bank of Baroda. Moreover, facilities of Rs. 113.75 Crores by Bank of Baroda, Fort Branch are still showing in the name of Omkar. Therefore, O.A. has been filed under RDDB against Omkar. ECB facility US\$ 12.00 mn was sanctioned by UAE branch and same was transferred to LASA by the order of Demerger of this Tribunal. Therefore, the Petition has been filed under section 7 of the Code against LASA.

12. In regards to the contention that the petition is barred by **limitation** as the date of default is 13.12.2018 and the Company Petition is filed on 21.03.2022, we rely on the ***Misc Application no.21 of 2022 in Misc. Application no.665 of 2021 in Suo Motu Writ Petition (Civil) No. 3 of 2020*** wherein the Hon'ble Supreme Court in view of the situation arising from the massive outbreak of coronavirus pandemic excluded the period from 15.03.2020 to 28.02.2022 for the purposes of computing the limitation. Therefore, the limitation is still continuing for filing the present Application.

13. In relation to the contention that despite the OTS being sanctioned, the Financial Creditor unilaterally altered the terms. Additionally, they refused to release the Guarantee/Securities, breaching the terms of settlement by demanding the entire amount be paid by 31.03.2021, it is important that before delving into the aforementioned contentions, the content of email (dated 17.12.2020) by the Applicant/Corporate Debtor to the Financial Creditor proposing an OTS, and response

thereof by the Financial Creditor vide email dated 17.12.2020, be looked into.

14. The contents of the email dated 17.12.2020 from the Applicant to the Financial Creditor, are as follows:

“Just to be double sure before transferring initial amount of Rs.1.1 Cr in no lien account we would like to re-confirm terms & conditions of No lien account and re-clarify our proposal which is already submitted as below

- 1.) Initial Amount of Rs. 1.10 Cr to be funded in No Lien account bearing No. 3582023286001 will be bonafide of our commitments and bank can take the same into account only if the OTS proposal is accepted with all the stipulations there on in unlikely event the proposal is approved with any modifications or other terms it is upto Lasa to accept or otherwise. In case of non-acceptance of approval by Lasa, amount lying in No-Lien account be returned to Lasa immediately.*
- 2.) OTS Proposal of Lasa amounting Rs. 11 Crore against outstanding ECB is independent of any other company or person.*
- 3.) Upon demerger and reclassification of promoters Mr. Omkar Herlekar is only liable personally for dues of Lasa Supergenerics Ltd which is also already intimated to Bank of Baroda in various occasions and the same is being reiterated in Our OTS Proposal and this email, upon re-payment of all dues of Lasa Supergenerics Ltd as per OTS Mr. Omkar Herlekar will be free from all guarantees in Bank of Baroda, there shall be no guarantee against any other account in Bank of Baroda.*
- 4.) Further, upon payment of OTS amount security against ECB i.e. Unit No. D27/5, MIDC will be free from all encumbrances and released in favour of Lasa Supergenerics Ltd.*
- 5.) Balance of OTS amount will be paid in within 10 monthly EMIS.**

Once the above is acknowledged by your good office we shall immediately fund the account with 10% of 11 Cr in USD as instructed by you.”

15. The content of the email dated 17.12.2020 from the Financial Creditor to the Corporate Debtor, is as follows:

*“We refer to your below email and we agreed upon your request. We request you to kindly arrange to deposit initial amount of Rs 1.10 crs in our below mentioned office account: Correspondent Bank: Standard Chartered Bank, New York
A/c No. -3582023286001
SWIFT CODE: SCBLUS33XXX
Beneficiary: Bank of Baroda, Dubai Branch
Reference: Upfront amount in -M/s Lasa Supergenerics Ltd.
IBAN: Sundry Deposit General Excl Margin Money
AE600110090010113201001.*

Kindly share with us copy of the SWIFT message upon remittance.”

16. It is also important to refer & reproduce email dated 17.03.2021 of the Financial Creditor addressed to Corporate Debtor wherein it is stated that-

“This has reference to the captioned facility, the OTS proposal submitted & subsequent deliberations we had on various issues pertaining to the Facility.

In this connection, it is to advise that the Competent Authority of our Bank has approved the OTS proposal submitted & details of which is as under:

Particulars	USD in Mn.	INR in Crore
<i>OTS (Compromise) Amount</i>	<i>1.513</i>	<i>11.00</i>
<i>Amount already deposited in No-Lien account</i>	<i>0.151</i>	<i>1.10</i>
<i>Residual Amount to be paid under OTS before 31.03.2021</i>	<i>1.362</i>	<i>9.90</i>

We further advise that the Competent Authority has not approved the following request of the Company:

- *Release of Personal Guarantee of Mr. Omkar Herlekar (Promoter Director) of the Company from the domestic facilities of M/s Omkar Speciality Chemicals Limited.*
- *Release of Property bearing No. D-27/5, Lote Parshuram Industrial Area, Taluka Khed, district Ratnagiri, Maharashtra upon receipt of full & final payment of the OTS approved as the documentation for split of security from Omkar speciality Chemicals Ltd. to Lasa Supergenerics Ltd. are yet to be executed, the said property is still mortgaged in the account of M/s Omkar Speciality Chemicals Ltd.*

Please note that the instant OTS approval is valid up to 31.03.2021 & Company to deposit residual OTS amount of INR 9.90 Crore on or before 31.03.2021.”

17. As regards the OTS, there seems to be no formal documents executed between the Financial Creditor and Corporate Debtor. It is based on these emails that the Corporate Debtor seeks to challenge the action of the Financial Creditor citing breach of concluded contracts and unilateral change of the terms of contract. In this regard, it is mentioned that in the so called OTS proposal submitted by the Applicant vide email dated 17.12.2020 an initial amount of Rs. 1.10 crores out of OTS amounts of Rs. 11 crores was offered to be deposited in the “No Lien Account” of the Financial Creditor. On the same date i.e. 17.12.2020 the Financial Creditor wrote an email mentioning “*we agreed upon your request*” and further asked the Corporate Debtor to deposit an initial amount of Rs. 1.10 crores in their designated account mentioned in the email. It is noteworthy that such communication by the Financial Creditor could not be termed as the complete acceptance of the OTS proposal by the Corporate Debtor as it does not mention that their ‘Proposal’ has been accepted and further it only mentions to “*Arrange to deposit **initial** amount of Rs. 1.1 crores.....*”. The said email of the Financial Creditor does not contain anything about remaining instalments payments as proposed in the OTS by the Corporate Debtor and does not mention anything about acceptance of proposal in toto.

18. For a contract to be concluded there has to be Ad-Idem. It is important that both parties to the contract agree to each term of the contract unequivocally and clearly. In this case, there is no such meeting of mind between the parties wherein principles of Ad-Idem and thereby creation of binding contract could be said to exist. In this regard, it is useful to make a reference to the decision of Hon'ble Supreme Court in case of ***Rickmers Verwaltung GmbH Vs. Indian Oil Corporation Ltd. In Civil Appeal No. 5810/1998 dated 19.11.1998, (1999) 1 SCC.*** Wherein the Hon'ble Apex Court at para 13 have observed as under:

*13. In this connection the cardinal principle to remember is that **it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them** but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. **Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.***

(Bold for emphasis)

19. Also, the Hon'ble Supreme Court in the case of ***Karnataka Power Transmission Corporation Limited Vs. JSW Energy Limited*** in Civil Appeal No.8714 of 2022 have observed that the parties can be said to have entered into a contract or a contract would be said to be concluded

only when they are ad-idem on all the essential terms of the contract. In the case on hand the concept of ad-idem does not appear to have reached in respect of terms of payment proposed in the OTS. Accordingly, there appears no concluded contract which may have come in to existence.

20. We take note of another very important aspect of the case, in the email dated 17.12.2020 which accordingly to the applicant is the proposal, the condition laid down “*Balance of OTS amount will be paid in within 10 monthly EMIs.*” Even if it is assumed that the FC has accepted the proposal and a legally enforceable contract has been executed then the CD was required to perform its obligations under the contract, by making monthly EMIs payments of Rs. 1.1 crore each from January 2021 onward.

21. It is undisputed fact that the CD has failed to perform its obligations under the said contract as it has not paid any monthly EMIs of Rs. 1.1 crore in the months of January 2021 or February 2021 or even March 2021. In other words when CD itself has not performed its obligations under the contract, therefore, FC was entitled to rescind the contract. It would have been a different situation if CD had acted upon its proposal and made the monthly EMIs of Rs. 1.1 crore. Thus, in whichever way, we look at the facts of the present case, we are of the considered opinion that the OTS contract dose not subsist.

22. As far as the objection of the Applicant regarding pending suit for specific performance of contract or case pending before the DRT, we have considered the same. It is trite law that the in a Section 7 petition the Adjudicating Authority is required to consider the existence or other wise of the debt. Once the Adjudicating Authority is of the view that there is no subsisting OTS contract then there is no bar in entertaining the petition filed u/s 7 of the IBC against the Corporate debtor if the petition is otherwise valid.

23. In the facts and circumstances of the case, the contentions and submissions of the Applicant are not found to be acceptable and liable to be rejected. Accordingly, the I.A. is **dismissed**. No order as to cost.

24. In result, I.A. 1039/2022 is **dismissed** and the main C.P.(IB)-266(MB)/C-III/2022 to be listed for hearing on **04.03.2024**.

Sd/-
CHARANJEET SINGH GULATI
Member (Technical)

Sd/-
LAKSHMI GURUNG
Member (Judicial)