National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 371 of 2020

(Arising out of Order dated 10th January, 2020 passed by National Company Law Tribunal, Mumbai Bench, in C.P. (IB) No.- 2671/NCLT/MB/2019).

IN THE MATTER OF:

Tejas Khandhar
Residing at Tej Gaurav
109, Telang Road,
3rd Floor, Matunga,
Mumbai – 400019. **...Appellant**

Versus

Bank of Baroda
A Body Corporate Constituted under The Banking Companies (Acquisition and Transfer of undertakings) Act, 1980 and having its Head Office at Mandvi, Baroda and a Branch Office amongst other Places at Zonal Stressed Asset Recovery Branch Meher Chambers, Ground Floor, Sunderlal Behl Marg, Balard Estate,
Mumbai – 400 001. **...Respondent**

For Appellant: **Mr. Pulkit Deora, Advocate.**

For Respondent No.1: **Mr. Brijesh Kumar Tamber (Bank of Baroda), Advocate for R-1.**

For RP: **Mr. Lzafeer Ahmad B.F (RP)**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 10.01.2020 passed by the Learned Adjudicating Authority, (National Company Law Tribunal, Mumbai) in C.P. (IB) No.- 2617/NCLT/MB/2019, the suspended Director of the 'Corporate Debtor' preferred this Appeal under Section 61 of the Insolvency and

Bankruptcy Code, 2016 (hereinafter referred to as 'The Code'). By the Impugned Order, the Learned Adjudicating Authority has admitted the Section 7 Application preferred by M/s. Bank of Baroda/the 'Financial Creditor' observing as follows:

> *"30. It is seen that the Applicant has initiated proceedings before District Magistrate and The Debts Recovery Tribunal within the period of limitation and by virtue of orders passed in these proceedings, deposits have been made in the loan accounts in 2018. The Application is well within the period of limitation.*
>
> *31. The Applicant has annexed the Commercial Credit Information Report of the Corporate Debtor issued by TransUnion CIBIL, showing that the Corporate Debtor's account is classified as "doubtful'.*
>
> *32. The Corporate Debtor's email dated 27.02.2018 providing the revised One time settlement proposal is in itself admission of its liability to repay amounts above Rupees One Lakh. The default of financial debt and its admission is found in the Reply, and the email annexed to the Reply in addition to the orders passed in various proceedings.*
>
> *33. It is established that the Corporate Debtor owes financial debt above a sum of $1,00,000/- and the default is established on perusal of the Commercial Credit Information Report of the Corporate Debtor and the Balance Sheet.*
>
> *34. In this regard, it is imperative to note that in Sesh Nath Singh and an v. Baidyabati Sheoraphuli Cooperative Bank Ltd and anr, in Company Appeal (Insolvency) No.672 of 2019, it was held by the Hon'ble NCLAT that:*
>
> > *"The respondent was quite vigilant in his rights and cannot be said that the respondent was negligent. He has bonafidely prosecuted his application under SARFAESI Act, 2002. Therefore, as per section 14(2) of Limitation Act in computing the period of limitation the time during which the respondent has been*

> *prosecuting with due diligence another civil proceedings against the corporate debtor for the same relief shall be excluded".*
>
> *35. In light of the above decision, and the facts of the instant Application, amount of default being above a sum of Rupees One Lakh and the Application having filed on proper form, this Application deserves to be admitted."*

2. Learned Counsel for the Respondent Bank filed I.A. No. 455 of 2021 in Comp. App. (AT) (Ins) No. 371 of 2020 seeking to take on record some additional documents, which the Learned Counsel for the Appellant has opposed. Vide Order dated 15.12.2021, this Tribunal has observed that the Order in I.A. 455/2021 would be delivered after hearing the parties on merits in the main Appeal.

3. Learned Counsel for the Appellant Mr. Pulkit Deora strenuously contended that the Adjudicating Authority has erroneously relied upon the overruled Judgement *'Sesh Nath Singh & Anr.' Vs. 'Baidyabati Sheoraphuli Cooperative Bank', (2021) 7 SCC 313,* wherein Section 14(2) of the Limitation Act was applied and time spent during SARFAESI was excluded from the Limitation period. It is submitted that the 'date of default' is 01.07.2013; that the date of NPA mentioned in the Section 7 Application is 22.09.2013 and the Application 2671/MB/2019 was filed by BoB on 11.07.2019 and as three years Limitation period has expired on 22.09.2016, the Application was 'barred by Limitation'. Learned Counsel in support of his submission placed reliance on the Judgements of this Tribunal in *'Corporation Bank' Vs. 'SJN Energy Infrastructure Pvt. Ltd.', (2020) SCC Online NCLAT 408, 'Bimal Kumar Manubhai Savalia' Vs. 'Bank of India' (2020) SCC Online NCLAT 400,*

and in *'Bishal Jaiswal' Vs. 'Asset Reconstruction Company', Company Appeal (AT) (Insolvency) No. 385 of 2020.*

4. Learned Counsel further stated that the Respondent Bank did not raise the plea of extension of Limitation or 'acknowledgement of debt' under Section 18 of the Limitation Act, and therefore cannot now agitate this plea at such a belated stage. It is contended by the Learned Counsel that the additional documents sought to be placed in I.A. 455/2021 is only to support its belated plea of extension of Limitation and cannot be permitted at the appellate stage. Morever, the same can be admitted only if conditions under Order 41 Rules 27, 28 & 29 of CPC are complied with.

5. Briefly put, Bank of Baroda has extended financial assistance to the 'Corporate Debtor' through various term loans for an amount of Rs.9,91,00,000/- a lone recall Notice dated 08.10.2013 under Section 13(2) of the SARFAESI Act, 2002 was issued demanding payment of Rs.6,11,42,097/-. On 30.09.2016, the Debt Recovery Tribunal ('DRT') allowed the Bank to recover a sum of Rs.50,00,000/- and thereafter a sum of Rs.20,00,000/- towards interest. It is the case of the Respondent Bank that a One Time Settlement ('OTS') dated 27.03.2018 was entered into between the parties. It is not in dispute that an OTS proposal was extended vide Order dated 07.03.2018 which the Bank vide letter dated 27.03.2018 has accepted the same. For ready reference, the said letter is reproduced as under:

Annexure-R-5 (71)

बैंक ऑफ़ बड़ौदा Bank of Baroda

ARMD/OTS/2018/1435

Date 27.03.2018

M/S Renaissance Education Pvt. Ltd. (Prudence International School)
Old Survey No. 264, Hissa No. 1B, Apta Phata,
Village Karnala, Panvel, 410206

Dear Sir,

Re: Your offer for settlement of Accounts through Compromise

We refer to your offer letter date 06.03.2018 submitted to our bank for settlement of accounts through compromise offer of payment of Rs 660.00 Lakh in full & final settlement of your dues in account M/S Renaissance Education Pvt. Ltd.

We are pleased to inform that our bank has accepted your offer on following terms and condition:-

1. Rs 100.00 Lakh is already deposited in No Lien Account will be appropriated immediately on conveying the sanction.
2. Remaining balance amount of Rs. 560.00 Lakh to be deposited as under:

Date	Amount in Lakh
On or before 25.05.2018	Rs 50.00
On or before 25.06.2018	Rs 50.00
On or before 25.07.2018	Rs 150.00
On or before 25.08.2018	Rs 150.00
On or before 25.09.2018	Rs 160.00
Total	Rs 560.00

3. The borrower/guarantor to pay interest @ 12% p.a. from 01.07.2018 on the reducing balance.
4. The borrower/guarantor to submit an undertaking that all present and future statutory liabilities, other dues and claims ,if any shall be settled by the borrower/guarantor directly and the Bank is not under obligation to undertake any liability in this regard and this should be a part of consent terms to be filed in Hon'ble DRT.
5. Consent terms with default clause to be filed in DRT, Mumbai and consent decree to be obtained.
6. Recovery proceedings to be kept in abeyance till full and final settlement, including interest, under this settlement.
7. On acceptance of compromise sanction, the borrowers and the Guarantors should withdraw all cases filed by them (if any) against the Bank and officials. They should also give an undertaking that they shall not file any case against the Bank or its official in future.
8. All the relief/concession given under subject compromise shall be withdrawn and entire contractual dues shall become payable by the Company, if the Company fails to honour any of the terms and conditions of compromise whether fully or partially. The decision of the Bank in this regard shall be conclusive and binding on the Company.
9. Any default in compliance of any of the terms and conditions stipulated herein above will be treated as default and which will result in termination of sanction automatically and Bank will proceed to recover the dues through appropriate legal/recovery action without any notice to the Company. Any amount deposited till the time will be adjusted towards the dues and shall not be refunded.
10. No dues certificate & NOC for the property shall be issued only after receipt of settlement amount of the accounts M/S. Renaissance Education Pvt. Ltd. as per agreed terms in account and branch may move application before DRT for recording satisfaction of decree under compromise proposal after full payment by the Companies.

Kindly append your signature for having been accepted terms & conditions in the duplicate copy of this letter.

Yours faithfully

(P. Pattanayak)
Dy. Gen. Manager
ARM Branch, Mumbai

(Emphasis Supplied)

6. The question of Limitation, keeping in view, the facts of the attendant case, is to be decided on the touchstone of the ratio laid down by the Hon'ble Supreme Court in *'Laxmi Pat Surana' Vs. 'Union Bank of India & Anr.', (2021) 8 SCC 481* and *'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.', (2021) 10 SCC 330.*

7. The Judgement of *'Bishal Jaiswal' Vs. 'Asset Reconstruction Company', Company Appeal (AT) (Insolvency) No. 385 of 2020,* reversed by the Hon'ble Supreme Court and the other Judgements relied upon by the Learned Appellant Counsel are prior to what the Hon'ble Supreme Court has recently held in *'Laxmi Pat Surana' Vs. 'Union Bank of India & Anr.', (2021) 8 SCC 481,* that in fact that the expression 'default' has been consciously used and not the date of notifying the loan account of the Corporate Person as an NPA. It is held that Section 7 comes into play when the 'Corporate Debtor' comes to default. At this juncture, we find it relevant to reproduce paras 42 and 43 of the *'Laxmi Pat Surana' (Supra)* Judgement:

> *"42. Notably, the provisions of the Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238-A predicates that the provisions of the Limitation Act shall, as far as may be, apply to the proceedings or appeals before the adjudicating authority, NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238-A IBC on 6-6-2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing Application under Section 7 IBC would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code.*

43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 IBC ensures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 IBC."

(Emphasis Supplied)

8. In the same para of the aforenoted Judgement, the Hon'ble Apex Court speaks about the Application of Section 18 of the Limitation Act, 1963 under the Code. *'Section 18 of the Limitation Act, 1963 gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate Resolution Process under Section 7 of IBC ensures. Section 18 of the Limitation Act would come into play every time when the Principal Borrower and/or the Corporate Guarantor (Corporate Debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to 'acknowledgment of the debt', from time to time, for institution of the proceedings under Section 7 of IBC. Further, the acknowledgment must be of a liability in respect of which the 'Financial Creditor' can initiate action under Section 7 of IBC.'*

9. Paras 138 to 141 of the Judgment of Hon'ble Supreme Court in *'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.', (2021) 10 SCC 330* are reproduced as hereunder:

> *"138. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years vide from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.*
>
> *139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to*

proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.

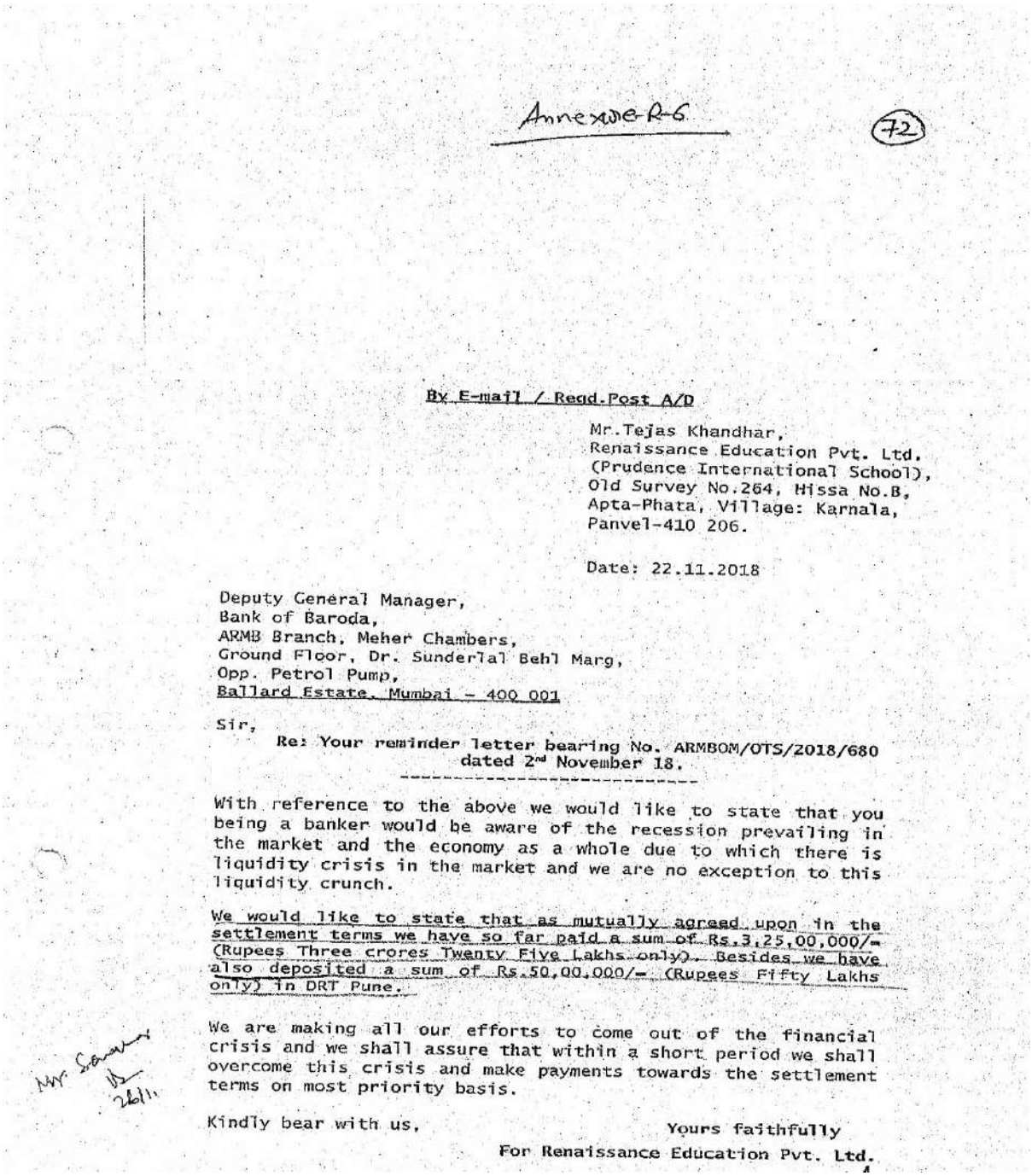
140. To sum up, in our considered opinion an application under Section of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

141. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid."

(Emphasis Supplied)

10. It is seen from the record that vide letter dated 22.11.2018 sent via email and registered post, the 'Corporate Debtor' has addressed to the DGM

Bank of Baroda that as per *'Mutually Agreed Settlement Terms'* they had so far paid a sum of Rs.3,25,00,000/- and have also deposited a sum of Rs.50,00,000/- in DRT Pune. As the issue is with respect to whether the Application is 'barred by Limitation', at this juncture, we find it relevant to reproduce the said letter:



Annexure R-6 (72)

By E-mail / Regd.Post A/D

Mr.Tejas Khandhar,
Renaissance Education Pvt. Ltd.
(Prudence International School),
Old Survey No.264, Hissa No.8,
Apta-Phata, Village: Karnala,
Panvel-410 206.

Date: 22.11.2018

Deputy General Manager,
Bank of Baroda,
ARMB Branch, Meher Chambers,
Ground Floor, Dr. Sunderlal Behl Marg,
Opp. Petrol Pump,
Ballard Estate, Mumbai - 400 001

Sir,

Re: Your reminder letter bearing No. ARMBOM/OTS/2018/680 dated 2nd November 18.

With reference to the above we would like to state that you being a banker would be aware of the recession prevailing in the market and the economy as a whole due to which there is liquidity crisis in the market and we are no exception to this liquidity crunch.

We would like to state that as mutually agreed upon in the settlement terms we have so far paid a sum of Rs.3,25,00,000/- (Rupees Three crores Twenty Five Lakhs only). Besides we have also deposited a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) in DRT Pune.

We are making all our efforts to come out of the financial crisis and we shall assure that within a short period we shall overcome this crisis and make payments towards the settlement terms on most priority basis.

Kindly bear with us,

Yours faithfully
For Renaissance Education Pvt. Ltd.

(Emphasis Supplied)

11. A brief perusal of I.A. 455 of 2021 shows that the documents required to be taken on record include the copy of the OTS, the copy of the I.A. 1155/2016 filed before the DRT Pune and other letters dated 18.03.2019 addressed to by the 'Corporate Debtor' to the Bank. The main document in these additional documents is the terms of OTS which is not disputed therefore, we are of the considered view that no prejudice would be caused if the said OTS document is taken on record. The other documents relied upon by the Bank is pursuant to the OTS and also a copy of I.A. 1155/2016 which is a public document and we see no substantial reasons not to take these documents on record as they are relevant to the facts of the case.

12. It is seen from the record that the date of default has been mentioned as 13.09.2013, which stood revived with the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 before the DRT Pune, well within the three year period. Subsequently, another settlement proposal dated 07.03.2018 was accepted by the Bank on 27.03.2018, wherein a timeline was provided for the payment of the balance amount. We are of the considered view that the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 falls within the ambit of 'acknowledgement of debt' as defined under Section 18 of the Limitation Act, 1963, which is further fructified by the admitted OTS dated 27.03.2018 again within three years of the previous proposal where the 'debt' is acknowledged to be 'due and payable'. Therefore, we are of the view that the ratio of the Hon'ble Supreme Court in *'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.', (2021) 10 SCC 330,* is squarely applicable to the facts of this case as there is a jural relationship between

the 'Corporate Debtor' and the Respondent Bank and there is an 'acknowledgement of debt' vide the OTS dated 27.03.2018, which falls within the ambit of Section 18 of the Limitation Act, 1963.

13. The Resolution Professional filed the Status Report stating that on 11.08.2020 a third CoC Meeting was held whereby it was taken into consideration that the 180 days CIRP period was coming to an end and having deliberated upon this issue, it was suggested that the RP should apply for liquidation under Section 33 of the Code. On 05.09.2020 an Application for initiation of the 'liquidation of Corporate Debtor' was filed and is pending before the Adjudicating Authority.

14. Keeping in view the aforenoted ratio laid down by the Hon'ble Apex Court in *'Dena Bank (now Bank of Baroda)' (Supra),* this Tribunal is of the considered view that the OTS proposal dated 01.08.2016 and the subsequent one on 27.03.2018 falls within the definition of the ambit of 'acknowledgement of debt' as envisaged under Section 18 of the Limitation Act, 1963 and is therefore squarely covered by the aforenoted Judgement.

15. For all the aforenoted reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
12th July, 2022
Himanshu