NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 1349 of 2019

[Arising out of Order dated 06.09.2019 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench in Company Petition No. (IB)672/ND/2019)

IN THE MATTER OF:

Munish Kumar Bhunsali & Anr. **.....Appellants**

Vs.

Kotak Mahindra Bank Ltd. & Anr. **.....Respondents**

Present :

For Appellants: **Mr. Mohit Chaudhary, Ms. Garima Sharma, Mr. Imran Ali and Mr. Kunal Sachdeva, Advocates**

For Respondent: **Mr. Rajiv R Raj and Ms. Nidhi Vardhan, Advocates**

J U D G M E N T

VENUGOPAL M. J.

The Appellants have projected the instant Company Appeal being aggrieved against the order dated 06.09.2019 passed by the Adjudicating Authority who has admitted the application, filed by the 1st Respondent / Bank.

2. The Adjudicating Authority while passing the impugned order dated 06.09.2019 at para 7 had observed as under:-

> *"As per the averments of the petition no payment has been made by the Corporate Debtor after the default occurred in June, 2015 and as on dated 27.11.2018, an amount of Rs. 46,63,35,337.31/- is due and outstanding. The present petition being filed in January 2019 is within limitation, being within three years from the date of the cause of action. Further even though an attempt was made on the part of the Corporate debtor to project certain inconsistencies in relation to claim amounts, however it is seen that the amount in default in excess of Rs 1,00,000/- being the minimum threshold limit fixed under IBC, 2016. Considering the circumstances this Tribunal is inclined to admit this petition and initiate CIRP of the Respondent. Accordingly, this petition is admitted."*

3. The Learned Counsel for the Appellant submits that the 1st Respondent /Bank sanctioned various facilities which was extended from time to time to the 'Corporate Debtor' and the facility was lastly sanctioned on 07.02.2014 and later on

05.03.2014. As a matter of fact, the term loan I & II was taken over from Punjab National Bank.

4. The Learned Counsel for the Appellants brings to the notice of this Tribunal that the 1st Respondent / Appellant/Bank on 07.02.2014 had sanctioned a sum of Rs. 2036.00 Lakhs on certain terms and conditions. However, based on the request of the 'Corporate Debtor', the 1st Respondent/Banks had agreed to sanction the following facilities to the 'Corporate Debtor'/2nd Respondent which runs as under:-

i.	Cash Credit	:	Rs. 1000.00 Lakhs
ii.	WCDL(Sub Limit of CC)	:	Rs. 680.00 Lakhs
iii.	Invoice Finance discounting (submit of CC)	:	Rs. 680.00 Lakhs
iv.	Term Loan – I	:	Rs. 240.00 Lakhs
v.	Term Loan-II	:	Rs. 334.00 Lakhs
vi.	Term Loan-III	:	Rs. 462.00 Lakhs
vii.	Conditional WCDL	:	Rs. 200.00 Lakhs
	Total Exposure	:	Rs. 2036.00 Lakhs

5. It is represented on behalf of the Appellants that on 05.03.2014 certain terms and conditions were revised in respect of sanction dated 07.02.2014 in renewal of loan. In fact, the Board of Directors of the 'Corporate Debtor' in its Board Meeting dated 29.11.2012 and 15.03.2013 had passed a Resolution for accepting the terms of sanction and authorised Mr. Munish Kumar Bhunsali to execute loan and security documents. That apart, on 29.11.2012 the loan and security documents were executed between the 1st Respondent/Bank/Financial Creditor and the 'Corporate Debtor' M/s Kew Precision Parts Pvt. Ltd.

6. The Learned Counsel for the Appellants proceeds to point out that on 27.05.2013 between the 1st Respondent/Bank and the 'Corporate Debtor' loan and security documents were executed like 'Memorandum of Deposit of Title Deeds'.

7. The Learned Counsel for the Appellants contends that on 13.12.2013 mortgage was created in favour of 1st Respondent/Bank(Financial Creditor) by the 'Corporate Debtor' through Mr. Munish Kumar Bhunsali and on 23.11.2012,11.03.2013, 31.12.2013 amounts were disbursed. In this connection, it is to be pointed out that the default took place in June, 2015 in regard to the non-payment of dues and that on 30.09.2015, the Corporate Debtor's Account was declared as 'Non Performing Asset' ('NPA').

8. The Learned Counsel for the Appellants submits that the loan was recalled on 9.10.2015 and the guarantee was invoked and that the 1st Respondent/Bank had issued a statutory notice as per section 13(2) of the SARFAESI Act on 13.12.2017.

9. The Learned Counsel for the Appellants emphatically takes a plea that the application filed by the 1st Respondent / Bank before the Adjudicating Authority is barred by limitation and to escape from the rigours of limitation, the 1st Respondent / Bank relied upon on one time settlement letter dated 12.12.2018 of the 'Corporate Debtor' to revive the period of limitation.

10. Advancing his argument, the learned Counsel for the Appellants contends that the period of limitation in the present case was calculated from the date of One Time Settlement letter dated 12.12.2018, to show the 'acknowledgement of liability'

and viewed in that perspective the Adjudicating Authority had admitted the application.

11. Expatiating his submission, the Learned Counsel for the Appellants forcefully takes a stand that the application filed by the 1st Respondent/Bank (Financial Creditor) before the Adjudicating Authority is barred by limitation because of the fact that in an application u/s 7 of 'I&B' Code, the (limitation) period is to be computed as per Article 137 of Limitation Act, 1963.

12. The Learned Counsel for the Appellants contends that "the right to sue" emanates when a default occurs and the Section 7 application filed by the 1st Respondent/Bank is barred under Article 137 of Limitation Act, 1963, for the simple reason that the date of default was 30.09.2015(date of declaration of account as NPA) whereas the application was filed on 30.01.2019 viz. three years after the occurrence of default. In this regard, the Learned Counsel for the Appellants places reliance on the decision of Hon'ble Supreme Court in ***B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates (Civil Appeal No. 23988/17)*** wherein it is held that the 'right to sue' accrues when default occurs. Further, it is observed that if the default had occurred beyond three years before the date of filing of the application, the application would be barred under Article 137 of Limitation Act, 1963 save and accept in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing the application.

13. The Learned Counsel for the Appellant cites the decision in ***Shibcharan Das Vs.(Firm) Gulab Chand Chhotey Lal (AIR 1936 ALL 157)*** and contends that the 1st Respondent / Bank is barred by Section 23 of the Indian Evidence Act, 1872

from relying upon the 'One Time Settlement Letter' dated 12.12.2018 as it constitutes a privileged communication. Moreover, the Learned Counsel for the Appellants comes out with a plea that the statements exchanged between the parties during 'without prejudice' negotiations and settlements, cannot be read in or considered during the court proceedings, being privileged communications.

14. The Learned Counsel for the Appellants refers to the decision of Hon'ble Supreme Court in ***Sampuran Singh and Ors Vs. Niranjan Kaur and Ors. (AIR 1999 SC 1047)*** and submits that in the instant case the ingredients of Section 18 of the Limitation Act, 1963 are not fulfilled and even assuming that the 'One Time Settlement Letter dated 12.12.2018' is admissible in the proceedings, it is necessary that the alleged admission must be made during the period of three years limitation for a continuous cause of action'.

15. Continuing further, the Learned Counsel for the Appellants takes a stand that the 'One Time Settlement Letter' dated 12.12.2018 relied upon by the 1st Respondent/Bank was issued after the period of limitation had expired and the period of limitation whether calculated from 30.09.2015 (date of classification of Account is NPA) or from 09.10.2015) the date of loan recall does not support the case of Bank.

16. The Learned Counsel for the Appellants takes a legal plea that in the decision of Hon'ble Supreme Court dated 18.09.2019 in ***Gaurav Hargovindbhai Dave V. Asset Reconstruction Company (India) Ltd. and Another (Civil Appeal No. 4952/2019;SC)*** had observed that an application u/s 7 of 'I&B' Code would fall only within the residuary Article 137 of Limitation Act.

17. The Learned Counsel for the Appellants cites the decision of Hon'ble Supreme Court in ***Vashdeo R Bhojwani Vs. Abhyudaya Co Operative Bank Ltd. (Supreme Court; Civil Appeal No. 11020/2018*** wherein it is observed that the right to sue accrues when a default occurs. If the default had occurred over three years prior to the date of filing of application, the application would be barred under Article 137 of Limitation Act.

18. The Learned Counsel for the Appellants refers to the decision in ***Anil Partap Singh Chauhan Vs. OnidaSavak Ltd. (AIR 2003 Delhi 252)*** wherein it is held plaintiff is not entitled to the benefit of exclusion of time during which the winding up petition pending for computing the limitations of the suits instituted by the plaintiff etc.

19. The Learned Counsel for the Appellant points out the decision of this Tribunal in ***V Hotels Limited vs. Asset Reconstruction Company(India) Limited (NCLAT); Company Appeal (AT) (Insolvency) No. 525 of 2019*** wherein it is held that there is no continuous cause of action and the Financial Creditor cannot derive any benefit of the action taken under 'SARFAESI Act, 2002' which is guided by separate provision of limitation.

20. Contending contra, it is the submission of the Learned Counsel for the 1st Respondent / Bank that in the instant case there was a 'recurring and continuous cause of action' from both the parties viz. the borrower / 'Corporate Debtor' and the 1st Respondent.

21. The Learned Counsel for the 1st Respondent contends that the default occurred in June, 2015 due to non-payment of dues and on 30.09.2015 the amount

was declared as NPA as per RBI guidelines. Moreover, the 1st Respondent recalled the loan on 09.10.2015 and invoked the present guarantee. In this case, the Learned counsel for the 1st Respondent points out that the cheques issued towards repayment of loan were presented for encashment and they got bounced due to 'insufficient funds' upto February, 2017 against which a complaint u/s 138 of Negotiation Instrument Act, 1881 is pending before the concerned court.

22. The Learned Counsel for the 1st Respondent / Financial Creditor submits that on 26.03.2016 the 'Corporate Debtor' made a written complaint against the 1st Respondent to the Reserve Bank of India for not restructuring its Debts and in the said letter there is no denial of debt. However, there is admission of liability for which they wanted re-structuring. Therefore, the plea is taken on behalf of the 1st Respondent that unless there was a debt, there is no question of restructuring.

23. The Learned Counsel for the 1st Respondent contends that the 1st Respondent initiated action under the provision of SARFAESI Act, 2002 in 2016 which was challenged by the 'Corporate Debtor' on technical grounds without disputing its financial liability. This apart, the 'Corporate Debtor' challenged the SARFAESI action before the Debt Recovery Tribunal, Lucknow in SA No. 250/16 and the said application was allowed as per judgement dated 10.04.2017.

24. The Learned Counsel for the 1st Respondent / Bank points out that the 1st Respondent filed proceedings before the Debt Recovery Tribunal, Delhi against the 'Corporate Debtor' and 3 others in OA No. 576/2016 which was decreed on 21.5.2019 whereby the defendents therein was directed to pay to the 1st Respondent / Bank over a period of 30 days, a sum of Rs. 16,13,40,574.79/- together with

pendentelite and future interest @ 13% p.a. compounded at monthly rests + levy of penalty @ 3% p.m. thereafter from the date of filing of original application till its realisation etc.

25. The Learned Counsel for the Respondent / Bank submits that after passing of the decree in OA No. 576/2016 by Debt Recovery Tribunal, Delhi, the 'Corporate Debtor' filed a counter claim in OA 576/2016 as Section 19(8) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 claiming damages and less of profit on the basis of non-restructuring dues of 'Corporate Debtor'. The Learned Counsel for the 1st Respondent contends that on 13.02.2017 a fresh notice u/s 13(2) of the SARFAESI Act was issued by the 1st Respondent to which 'Corporate Debtor' submitted its reply dated 09.08.2018 without denying its liability.

26. The Learned Counsel for the 1st Respondent points out that during the pendency of the Recovery proceedings before the Debt Recovery Tribunal, Delhi the 'Corporate Debtor' viz. Kew Precision Parts Private Limited again approached the 1st Respondent / Bank for settlement of its dues and submitted another proposal on 12.12.2018 wherein it was mentioned by the Managing Director of the Company that his Company was non-functional since the last three years and the Bank by taking a sympathetic view of his precarious situation accept the 'One Time settlement' amount of Rupees Thirteen crores to help close this long pending matter.

27. The Learned Counsel for the 1st Respondent by referring to the 'One Time settlement' proposal of the 'Corporate Debtor' dated 12.12.2018 submits that the 'Corporate Debtor' had clearly mentioned in the said proposal that if the said one

time settlement was accepted by the Bank, the amount would be paid within 15 days from the date of its acceptance.

28. The Learned Counsel for the Respondent / Bank refers to the judgement of this Appellate Tribunal in ***Company Appeal(AT)(Ins.) No. 672 of 2019 in the matter of Sesh Nath Singh Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd.*** wherein it is held that the period from which SARFAESI action were pending should be excluded for the purpose of limitation.

29. The Learned Counsel for the 1st Respondent seeks in aid of the judgement of this Tribunal in Company Appeal (AT)(Insolvency) No. 118/2019 dated 23.07.2019 wherein at para 18 it is held that there is continuous cause of action and the same is as follows:-

> *……"It will be evident that the winding up petition was filed before the Hon'ble High Court of Judicature at Madras which had not reached finality and in the meantime, as the 'I&B' Code came into force, the demand notice under Section 8(1) was issued on 14th November, 2017 for payment of outstanding amount along with the interest. Thus, as we find that there is continuous cause of action the claim is within the period of limitation. The Appellant had moved before an appropriate forum for appropriate relief in time, in accordance with law and so we hold that the claim of the Appellant is not barred by limitation as the petition under Section 433 & 434 of the*

Companies Act, 1956 become infructuous, by operation of law."

and ultimately the impugned order dated 02.01.2019 of the Adjudicating Authority was set aside and the case was remitted to the Adjudicating Authority for admission of the case after notice to the parties.

30. Before the Learned Adjudicating Authority, the 'Corporate Debtor' Kew Precision Parts Private Limited had took an objection that the 1st Respondent/Applicant had failed to disclose about the measures taken by it against the assets of the 'Corporate Debtor' secured with the Bank under SARFAESI Act, 2002 in once but twice u/s 13(2) of the Act firstly on 19.11.2015 and subsequently on 13.12.2017 prior to the filing of the application before the learned Adjudicating Authority and in fact concealed the information to be shared under Part V sub-heading 2 of the application.

31. The grievance of the Appellant is that the 1st Respondent /Bank had supressed the fact of SARFAESI proceedings initiated against the 'Corporate Debtor' before the Debt Recovery Tribunal, Lucknow and the same was not disclosed in the original application filed before the Debt Recovery Tribunal, New Delhi nor before the Learned Adjudicating Authority. It is also represented on behalf of the Appellants that the 1st Respondent / Bank had initiated recovery proceedings against the 'Corporate Debtor' on the one hand and on the other hand had initiated 'Corporate Insolvency Resolution Process' against the Company.

32. The 'Corporate Debtor' / Company had also averred in it Reply before the Learned Adjudicating Authority that the settlement of Account of the Company

would show that the account was never out of order and why the 1st Respondent/Bank as an Applicant before the Adjudicating Authority had mentioned in the application in part IV under the caption 'details of the facilities sanctioned by the Appellant that the WCDL of Rs. 200 lakhs was availed by the 'Corporate Debtor' which was an incorrect one. However, since November, 2012 though the amount of WCDL of 200 lakhs was sanctioned the same was not disbursed despite repeated requests for the reason best known to the Bank. In short, the 'Corporate Debtor' had made an endeavour to project certain inconsistencies in relation to the claimed amount and that the Adjudicating Authority found that the default was in excess of Rs. one lakh, being the minimum threshold limit fixed under 'I&B' Code, 2016 and resultantly admitted the application.

33. The 1st Respondent or Bank's plea is that there was continuous and recurring cause of action from both sides i.e. the borrower and the 'Corporate Debtor' and the Bank also, that if any decree is passed by any civil court is pending or in existence of execution, it would amount to a 'continuous cause of action'. In fact the 1st Respondent / Bank projects the plea that the 'continuous cause of action' means the 'cause of action' which arise from repetition of acts or omission of the same kind is that for which the action was brought.

34. A perusal of the application in form I part II filed by the 1st Respondent / Bank to initiate 'Corporate Insolvency Resolution Process' under 'I&B' shows that the amount claimed to be default as on 17.11.2015 was Rs. 18,65,05,035.86 and

that the default took place in June, 2015. However, as on 27.11.2018 the outstanding balance was mentioned as Rs. 46,63,35,337.31.

35. It is evident from the judgement in SA 250/2016 dated 10.04.2017 filed by the 'Corporate Debtor' and another against the 1st Respondent / Bank before the Debt Recovery Tribunal, Lucknow that the Bank had failed to comply with statutory provisions of Section 13(3)(a) of its SARFAESI Act, 2002 and finally the application was allowed and that all the actions initiated by the Bank under the SARFAESI Act, 2002 were set aside. Also, that the 1st Respondent / Bank was directed to hand over the possession of the secured asset to the Applicants within one month from the date of pronouncement of judgement but the Debt Recovery Tribunal had granted liberty to the 1st Respondent / Bank to proceed afresh under the provisions of SARFAESI Act, 2002 and Rules made thereunder.

36. As per Section 2(j) of SARFAESI Act, 2002 'default' means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as 'Non performing asset' (NPA) in the books of account of a secured creditor.

37. Section 2(1)(ZF) of the SARFAESI Act defines the term 'Security Interest'. Section 2(1)(n) of the Act defines hypothecation. However, Section 58 of the Transfer of Property Act, 1882 defines mortgage and there are six types of mortgages mentioned therein.

38. It must be borne in mind and Article 62 of the Limitation Act, 1963 relates to enforcing the payment of money procured by mortgaged or otherwise charged upon

the immoveable property. A suit to enforce a mortgage is governed by Article 62 and has to be filed within 12 years from the date when the money became due unless the limitation period prescribed was extended under any other provision of the Limitation Act. Article 137 of the Limitation Act constitutes the residuary article as regards the application. To put it succinctly, Article 113 pertains to the 'Suits', the Article 137 relates to 'Applications'. The language of Article 137 clearly postulates that the applicability of the said article will be restricted to the applications not mentioned in the 3rd division of the schedule to the Limitation Act, 1963.

39. It is to be pertinently pointed out that the Transfer of Property Act, 1882 created and recognised the rights and obligations of the mortgagor and mortgagee and that the acknowledgement as per Section 18 of the Limitation Act can be made by either / any party to a transaction and such acknowledgement may be made with reference to all suits involving properties or rights for which the Limitation is specified under the Limitation Act, as per decision **Prabhakaran and Others Vs. M.Azhagiri Pillai (Dead) by LRS. And Others (2006)** 4 Supreme Court cases page 484 at Spl. Page 485. Apart from this, in the aforesaid decision at page 486 it is held that "acknowledgement u/s 18 can be by a mortgage also, and such an acknowledgement will extend the limitation of suit against the mortgage in respect of the property or right claimed against him.

40. Coming to the aspect of the ingredients of Section 14 the Limitation Act relating to the exclusion of time proceeding bonafide in court without jurisdiction, it is to be pointed out that litigant prosecuting the suit in good faith in a court of

law having no jurisdiction is entitled to exclusion of the said period. To invoke the Section 14 of the Limitation Act, the earlier suit and the latter suit must relate to the subject matter in issue.

41. In so far as Section 18 of the Limitation Act 1963 pertaining to the effect of acknowledgement in writing under Limitation Act is concerned, it is to be taken note of that an acknowledgement of liability must be in writing and also to be signed by a party against whom the property or right is claimed and that too, the same must be within the Limitation period. It cannot be gainsaid that an acknowledgement given after the expiry of the usual period is not sufficient to keep the 'debt' alive. If a claim is barred, the fact that there was an acknowledgement of liability will not resuscitate a barred claim because of the reason that in any Law, there can only be an acknowledgement of an existing / subsisting liability.

42. In law, the onus is always on the Creditor to establish that an acknowledgement was made within time. Further, the acknowledgement does not create any new right and it only extends the limitation period as per decision P.Sreedevi Vs. P.Appu AIR 1991 Ker page – 76.

43. It may not be out of place for this Tribunal to make pertinent mention that when a party claiming benefit of Section 14 of the Limitation Act, 1963 failed to secure relief in earlier proceeding not because of any defect in jurisdiction or some other cause of like nature, he cannot derive the benefit u/s 14 of the Limitation Act as per decision Z.Khan Vs. Board of Revenue, 1984 ALL LJ. However, in the decision 'Ajob Enterprises' V. Jayant Vegoiles & Chemicals AIR 1991, Bombay at page 35 it is held that the time taken to prosecute suit against the Company for

recovery of debt, such proceedings cannot be excluded in calculating the limitation period because the matter in issue in suit and winding up proceedings is not the same.

44. In the decision Yashant Vs. Walchand reported in AIR 1951 Supreme Court page 16, the Hon.Supreme Court had observed that the time consumed in insolvency proceedings cannot be excluded u/s 14 of the Limitation Act for filing the execution case on the basis of money decree obtained against the alleged Insolvency. Section 14 of the Limitation Act, 1963 will not aid a person who is guilty of inaction, lapse or malafide. In the decision Jayaramma Vs. V.Raj Gopalan reported in AIR 1965, Madras at page 459, it is held that Section 14 of the Limitation Act will not be attracted when the plaint is filed in a wrong court out of time.

45. In the present case, the 1st Respondent / Bank/Financial Creditor was given the liberty in SA 250/2016 (filed by the 'Corporate Debtor' by the Debt Recovery Tribunal, Lucknow and another) Appellants on 10/04/2017 to recover the dues from the Appellants by proceeding afresh under the provisions of SARFAESI Act, 2002 and the Rules made thereunder. Later the 1st Respondent/Bank filed OA 576 before the Debt Recovery Tribunal, Delhi against the 'Corporate Debtor' and others and obtained decree on 2.05.2019. Therefore, it is not open to the 1st Respondent/Bank to turn around and seek exclusion of time as per Section 14 of the Limitation Act. Undoubtedly, the 1st Respondent / Bank had invoked the right Forum viz. Debt Recovery Tribunal, Delhi for recovery of its dues and 'Corporate Debtor' etc.

46. Likewise, the 'Corporate Debtor' and another filed SA 250/2016 had rightly moved before the Debt Recovery Tribunal, Lucknow and whereby the Tribunal on 10th April, 2019 had allowed the application by setting aside all the actions initiated by 1st Respondent / Bank under the provisions of SARFAESI Act. In short, the 'Corporate Debtor' and another (Appellants) in the SA 250/2016 had succeeded and in the instant case the respective parties had approached the right Forum namely Debt Recovery Tribunal and obtain the necessary relief. Hence, the plea taken on behalf of the 1st Respondent / Bank seeking exclusion of time period in terms of Section 14 of the Limitation Act does not arise, in the earnest opinion of this Tribunal. Even the1st Respondent /Bank cannot seek assistance of Section 14(2) of the Limitation Act because of the fact that the parties have prosecuted the Debt Recovery proceedings filed by them under SARFAESI Act before the Debt Recovery Tribunals when SA 250/2016 and later OA No. 576/16 were filed. The concerned Tribunals had jurisdiction and that the parties prosecuted the proceedings diligently before the right forum. There was no defect of jurisdiction or other cause of like nature for the reason that pendency of either SA 250/2016 or the OA No. 576/16 does not bar the filing of an application under 'I&B' for initiation of 'Corporate Insolvency Resolution Process' by an aggrieved person.

47. In regard to the plea of the 1st Respondent/Bank that on 26.03.2016, a complaint was made by the 'Corporate Debtor' against the Bank for not rejecting their debts and in the said letter there was an admission of debt liability, it is to be pointed out that the same cannot come to the rescue of the Bank because of the fact that the debt of non-payment of dues by the 'Corporate Debtor' took place in

June, 2015 and Section 7 application was filed by the 1st Respondent / Bank before the Adjudicating Authority on 30.01.2019 which is beyond the period of limitation as enshrined in Article 137 of the Limitation Act. Also that in the decision Kalpana Trading Co. Vs. Executive Officer Town Panchayat AIR 1999 Mad37, it is observed that just sending a letter to the higher authorities to settle the issues does not amount to an 'Acknowledgement'.

48. As a matter of fact, and that on 9.10.15 the loan was recalled by the Bank. The 'One Time Settlement' proposal given by the 'Corporate Debtor' dated 12.12.2018 was not accepted by the 1st Respondent / Bank. The application u/s 7 of the 'I&B' Code was filed by the 1st Respondent / Bank before the Adjudicating Authority on 30.01.19.

49. In the 'One Time Settlement' of term loan of M/s Kew Precision Parts Pvt. Ltd. dated 12.12.2018 signed by the Managing Director of the 'Corporate Debtor' was addressed to the 1st Respondent / Bank it was among other things mentioned that the Company was non-functional for the last three years and, therefore, a reference was made to take a sympathetic view of the precarious situation and accept the 'One Time Settlement' amount of Rs. 13 crores. Also, it was categorically made mention of in the said One time settlement proposal of the 'Corporate Debtor' that if the said proposal was accepted then, within 15 days from the date of acceptance by the Bank, the said amount would be paid. However, the fact of the matter is the 1st Respondent Bank had not accepted the One Time Proposal dated 12.12.2018 of the 'Corporate Debtor'.

50. Admittedly, the 1st Respondent / Bank has filed OA 576/2016 before the 'Debt Recovery Tribunal', New Delhi in which the 'Corporate Debtor' had remained absent and a decree was passed on 21st May, 2019. In fact, an application for execution of decree is pending before the 'Debt Recovery Tribunal'. After passing of the decree by the 'Debt Recovery Tribunal' in OA 576/2016 the 'Corporate Debtor' projected a counter claim of Rs. 111.75 crores on 27.06.2019 claiming damages, loss of profit (including loss of opportunity) on the basis of non-restructuring of its dues.

51. In view of the fact that the default made by the 'Corporate Debtor' took place in June, 2015 and that the application u/s 7 of the 'I&B' Code was filed by the 1st Respondent of the Bank before the Adjudicating Authority on 30.01.19 and that the account of the 'Corporate Debtor' was declared as NPA on 30.09.15, it is held by this Tribunal that the application filed by the Bank before the Adjudicating Authority is barred by Limitation.

52. One cannot brush aside a significant fact that if a person initiates the 'Corporate Insolvency Resolution Process' or liquidation proceeding fraudulently or with malicious intent for any purpose other than for Resolution of Insolvency or Liquidation, then it will attract section 65 of the 'I&B' Code. To levy a penalty in terms of Section 65 of the 'I&B' Code, the Adjudicating Authority is to form an ex-facie opinion and also is to provide an adequate opportunity of hearing to the concerned person, to explain his stand.

53. For the foregoing reasons, this Tribunal sets aside the impugned order dated 6th September, 2019 passed by the Adjudicating Authority, New Delhi Bench in Company Petition No. (IB)672/ND/2019 in furtherance of substantial cause of justice and dismisses the application filed by the 1st Respondent / Bank u/s 7 of the 'I&B' Code.

54. In the result, the 'Corporate Debtor' 'M/s Kew Precision Parts Pvt. Ltd.' is released from the rigour of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional' / 'Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set aside. The 'Resolution Professional' is directed to hand over the records and assets of the 'Corporate Debtor' to the promoter/Directors of the 'Corporate Debtor' forthwith.

55. The matter is remitted to Adjudicating Authority ('National Company Law Tribunal') New Delhi Bench to determine the 'Fee and Cost' of 'Corporate Insolvency Resolution Professional' as incurred by him, which is to be borne and paid by 1st Respondent / Bank('Financial Creditor'). Before parting with the case, it is made crystal clear that the dismissal of the application filed by the 1st Respondent / Bank before the Adjudicating Authority will not preclude it from pursuing / seeking appropriate remedy before the Competent Forum for redressal of its grievances, if it so desires/advised.

The Appeal is allowed with aforestated observations and directions. No Costs. Connected IA No. 3842/19 and IA No. 3843/19 are closed. However, the Appellants are directed to file certified copy of the impugned order of the Adjudicating Authority ('NCLT'), New Delhi within one week from today.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

New Delhi

8th January, 2020

ss