

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 940 of 2019

[Arising out of Impugned Order dated 28th August 2019 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench, Kolkata in C.P.(IB) No.1671/KB/2018]

IN THE MATTER OF:

Saurav Mukherjee
Erstwhile Director of RDH Technologies
Private Limited
Having registered office at:
3A, Shakespeare Sarani
Kolkata – 700017
Email Address: mukherjeesourav1958@gmail.com **...Appellant**

Versus

- 1. Oriental Bank of Commerce**
Having registered office at:
Plot No.5, Institutional Area
Sector-32, Gurgaon – 121001
Email: edp_kol@obc.co.in **...Respondent No.1**

- 2. RDH Technologies Private Limited**
Through Interim Resolution Professional
Having registered office at:
Plot No.F1, Block-GP,
Sector – V, Salt Lake City
Kolkata – 700091
Email: rdhtechnologies1987@gmail.com **...Respondent No.2**

Present:

For Appellant : Mr. Abhijeet Sinha, Mr. Rajat Sahgal, Mr. Mandavya Kapoor, Mr. Vikas Mehta and Mr. Saikat Sarkar, Advocates

For Respondent : Mr Piyush Beriwal and Mr Ankit Raj, Advocates for R-1

With
Company Appeal (AT) (Insolvency) No. 941 of 2019

IN THE MATTER OF:

**M/s Goodwill Tracon Private Limited
24/1, Ali Haider Road,
Sri Krishna Minstanno Bhandar,
District North 24 PGS
Kolkata - 700119
Email Address: goodwilltracon@gmail.com**

...Appellant

Versus

**1. Oriental Bank of Commerce
Having registered office at:
Plot No.5, Institutional Area
Sector-32, Gurgaon – 121001
Email: edp_kol@obc.co.in**

...Respondent No.1

**2. RDH Technologies Private Limited
Through Interim Resolution Professional
Address: Plot No.F1, Block-GP,
Sector – V, Salt Lake City
Kolkata – 700091
Email: rdhtechnologies1987@gmail.com**

...Respondent No.2

Present:

For Appellant : Mr. Saikat Sarkar, Advocate

**For Respondent : Mr Piyush Beriwal and Mr Ankit Raj, Advocates
for R-1**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These two Appeals emanates from the common order passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No.1671/KB/2018, whereby the Application filed by the

Oriental Bank of Commerce – Financial Creditors under Section 7 of the Insolvency and Bankruptcy Code (in short **‘I&B Code’**) for initiation of Corporate Insolvency Resolution Process (‘CIRP’) against the ‘Corporate Debtor’ - RDH Technologies Private Limited is admitted. Being aggrieved by the said order, the Appellants have filed this Appeal. Parties are represented by their original status, represented in the Company Application, for the sake of convenience.

2. Brief facts of the case are as follows:

The Financial Creditor, the Oriental Bank of Commerce had granted the term loan of Rs.23,00,00,000/- (Rupees Twenty Three Crores only) to the ‘Corporate Debtor’ RDH Technologies Private Limited, vide sanction letter dated 17th April 2007. The Board of Director of the ‘Corporate Debtor’ by way of Resolution accepted the said term loan of Rs.23,00,00,000/- (Rupees Twenty Three Crores only) and passed a Resolution to pledge the shares of 3 Companies M/s Gunwate Properties Private Limited, M/s Calcutta Nursing Private Limited and M/s Anurashi Commotrade Private Limited, held by the ‘Corporate Debtor’ as additional security to the bank to secure the overall credit limit of Rs.23 crores.

3. The ‘Corporate Debtor’ had created equitable mortgage on the entire fixed assets by simply depositing the title deeds of the Company, together with Hightech building, proposed to be constructed therein at Plot No. F1, Block GP Electronics Complex, Sector V, Salt Lake City, Kolkata, with an area of 0.34 acres of leasehold land in favour of the Financial Creditor Oriental Bank of Commerce. The ‘Corporate Debtor’ also executed an

agreement of Term Loan. It was observed by the Bank that the construction of Hightech building at the above-said plot was getting delayed for which a sum of Rs.6.70 crore approx had already been availed by the 'Corporate Debtor' without any corresponding work at the site. Thus, the entire outstanding amount, along with interest, was directed to be repaid by the 'Corporate Debtor' to the Financial Creditor vide its letter dated 06th March 2010. It is further stated that amount of Rs.7,54,68,438/- (Rupees seven crore fifty-four lacs sixty-eight thousand four hundred thirty-eight only) was due as on 30th September 2018 and the account of the 'Corporate Debtor' had been classified as an NPA as on 15th December 2012 when the amount of Rs.5,31,14,402/- was due.

4. The 'Corporate Debtor' had stood guarantee for the loan of M/s Bahubali Commercial Private Limited for a sum of Rs.3,03,17,328/- inclusive of interest till 27th March 2014, M/s Safal Dealers Private Limited for a sum of Rs.3,84,05,667.60 inclusive of interest till 27th March 2014, M/s Gandhyanya Properties Private Limited a sum of Rs.94,26,284.23 inclusive of interest till 30th April 2012, M/s Purushotam Trade Promotion Private Limited a sum of Rs.89,05,156.85 inclusive of interest till 30th April 2012 and M/s Rameshwaram Trexim Private Limited a sum of Rs.2,78,89,937.53 till 30th April 2012 the outstanding total comes to Rs.19,04,12,812.21 (Rupees Nineteen core four lacs twelve thousand eight hundred twelve and twenty-one paisa only) In support of the claim of the Financial Creditor has filed a copy of the Certificate of Registration for modification of charge registered with the Registrar of Companies, Kolkata

in respect of the Corporate Debtor as on 2nd November 2015 which confirms the charge on the mortgaged properties of the 'Corporate Debtor'.

5. The Appellant/'Corporate Debtor' filed its Reply before the Adjudicating Authority mainly on the ground that Section 7 petition is not maintainable in law as no default has been committed; the Application is incomplete; not in proper form and therefore deserves to be rejected. The 'Corporate Debtor' also took the plea that the entire claim of the Financial Creditor is barred by limitation. The Adjudicating Authority rejected the objections of the 'Corporate Debtor' and admitted the Application filed under Section 7 of I&B Code for initiation of CIRP against the 'Corporate Debtor' - RDH Technologies Private Limited, which is under-challenged this Appeal. The Appeal has been filed mainly on the ground that Adjudicating Authority erred in admitting the Application of the Respondent, even though no debt was payable in law. It is further contended that the alleged default was hopelessly barred by time and no right accrued in favour of the Respondent. The Adjudicating Authority has erred in admitted the application, in as much as, no debt is due and payable by the Appellant to the Respondent in law or fact.

6. We have heard the arguments of the Learned Counsel for the parties and perused the record.

7. On perusal of the impugned order, it appears that the plea of limitation was raised before the Adjudicating Authority. But the

Adjudicating Authority had rejected the contention of the ‘Corporate Debtor’ and observed that:

“From the Application and the documents placed on record by the Financial Creditor particularly the Bank statements, indicate that the Corporate Debtor paid part of the amount of loan till 29th July 2017 and the default had occurred in respect of Rs.7,54,68,438/- (Rupees seven crore fifty-four lacs sixty-eight thousand four hundred thirty-eight only) as on 30th September 2018. The total amount due from the Corporate Debtor in respect of the 5 (five) Companies for which the Corporate Debtor had stood as Corporate Guarantor for the total outstanding amount to the tune of Rs.19,04,12,812.21 (Rupees Nineteen crore four lacs twelve thousand eight hundred twelve and twenty-one paisa only) which the Corporate Debtor has failed to pay in terms of the agreement and sanction letter. The Bank, however, further secured its loan by the creation of equitable mortgage of the immovable properties of the Company including land”.

8. During argument Ld. Counsel for the Appellant emphasizes on the para 14 of Short Reply filed on behalf of the Oriental Bank of Commerce, filed through Diary No.16582, dated 03rd December 2019, which is given hereunder for ready reference:

“The particulars of the accounts are given herein below:

Sl. No. & Account	Date of Default	Date of NPA	Amount Outstanding	Remarks
M/s RDH Technologies	16.9.2012	15.12.2012	Rs.7,54,68,438/-	(i) Acknowledgement of debt and

Pvt. Ltd. Page No.84 of Appeal paper book Volume- 1				security on 01.08.2017 (page No.317 & 318 of appeal paper book volume 2) (ii) Demand notice on 26.9.2018 (page No.323 to 325 of appeal paper book volume 2)
M/s Bahubali Comm. Pvt. Ltd. (page No.85 of Appeal paper book volume-1	19.2.2011	19.5.2011	Rs.3,03,17,328/-	As per paras No.10 & 11 herein before.
M/s Rameswaram Trexim Pvt. (page No.92 of Appeal paper book volume-1	28.6.2010	28.9.2010	Rs.2,78,89,937.53	As per paras No.10 & 11 herein before
M/s Safal dealers (P) Ltd. (page No.89 of appeal paper book volume-1	19.2.2011	19.5.2011	Rs.3,84,05,667.60	As per paras No.10 & 11 herein before
M/s Gandhnaya Properties (P) Ltd. (page No.90 of appeal paper book volume-1	28.6.2010	28.9.2010	Rs.94,26,284,23/-	As per paras No.10 & 11 herein before
M/s Purshottam Trade Promotion Pvt. Ltd. (page No.91 of appeal paper book voloume- 1	28.6.2010	28.9.2010	Rs.89,05,156.85/-	As per paras No.10 & 11 herein before
			Rs.19,04,12,812.21	

9. The account details submitted by the Financial Creditor – Bank itself shows that the account of the Corporate Debtor was declared NPA on 15th December 2012. The outstanding amount is shown as Rs.7,54,68,438/- (Rupees seven crore fifty-four lacs sixty-eight thousand four hundred thirty-eight only) as shown in the remark column. It is stated that **the acknowledgement of debt and security is Dt. 01st August 2017**, relating to the guarantee about the account of M/s Bahubali Commercial Private Limited. It is also pertinent to mention that the account of companies M/s Bahubali Commercial Private Limited, M/s Rameshwaram Trexim Private Limited, M/s Safal Dealers Private Limited, M/s Gandhyanya Properties Private Limited and M/s Purshottam Trade Promotion Pvt. Ltd., for which the Corporate Debtor gave the guarantee, all of them defaulted in repaying the loan amount in the year 2010-11. The Learned Counsel for the Financial Creditor contends that (account of the Corporate Debtor was declared NPA on 15th December 2012) but after that, on several occasions, the corporate debtor acknowledged the liability, and the last acknowledgement of the debt and security was done on 01st August 2017. Therefore the limitation got extended.

Section 18 of the Limitation Act 1963, which deals with the effect of acknowledgement in writing is given below for ready reference:

“18. Effect of acknowledgement in writing. – (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through

whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence or its contents shall not be received.

Explanation. – For the purpose of this section, -

- (a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,*
- (b) the word “signed” means signed either personally or by an agent duly authorised in this behalf, and*
- (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.*

Notes

Introduction. – The section corresponds to Section 19 of the repealed Act IX of 1908 in all respects. It lays down the law as to effect of acknowledgement in writing on the computation of the period of limitation for institution of a suit or making an application.

10. Therefore, it is clear that a limitation can be extended based on acknowledgement in writing, **provided the said acknowledgement is made before the expiration of the prescribed period of limitation for a suit or**

application in respect of any property or right. An acknowledgement of liability in respect of such property or right has been made in writing, signed by the party, against whom such property or right is claimed, or by any person through whom he derives his title or liability, if the acknowledgement is made before the expiry of the period of limitation, then a fresh period of limitation shall be computed, from the time, when the acknowledgement was so signed.

11. Admittedly, in this case, the account of the Corporate Debtor was classified as NPA on 15th December 2012. The Financial Creditor has also admitted that date of default of the Corporate Debtor account is on 16th September 2012. Therefore, any acknowledgement of liability could only be made within a period of limitation; i.e. three years.

12. Hon'ble Supreme Court in case of Sagar Sharma Vs. Phoenix ARC (P) Ltd. (2009) 10 SCC 353 has held that:

"13. Admittedly, 'I&B Code' has come into force since 1-12-2016, therefore, the right to apply accrued to 1st Respondent on 1-12-2016. Therefore, we hold that the application under Section 7 was not barred by limitation.

2. We had also made it clear beyond any doubt that for applications that will be filed under Section 7 of the Code, Article 137 of the Limitation Act will apply.

*However, we find in the impugned judgment [Sagar Sharma v. Phoenix ARC (P) Ltd., 2019 SCC OnLine NCLAT 617] that Article 62 (erroneously stated to be Article 61) was stated to be attracted to the facts of the present case, **considering that there was a deed of mortgage***

which was executed between the parties in this case. We may point out that an application under Section 7 of the Code does not purport to be an application to enforce any mortgage liability. It is an application made by a financial creditor stating that a default, as defined under the Code, has been made, which default amounts to Rs 1,00,000/- (Rupees one lakh) or more which then triggers the application of the Code on settled principles that have been laid down by several judgments of this Court.”

(Quoted verbatim)

13. Hon’ble Supreme Court has laid down the law that Article 137 of Limitation Act, providing three years limitation period, while Article 62 of the Limitation Act, for recovery of debts secured with immovable property, provides 12 years period for limitation, **but Article 137 will apply to the Application filed under Section 7 of the I&B Code**, even when the debt is secured by mortgaged or otherwise charged upon movable property.

14. The Learned Counsel for the Respondent – Financial Creditor contended that Hon’ble Supreme Court in case of Gaurav Hargovind Dave Vs. ARC India Limited (2019) 2 SCC 572 and Sagar Sharma Vs. Phoenix ARC (2019) 10 SCC 353 has laid down the law **that for an Application under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 Article 137 of the Limitation Act shall apply from the time of coming into force of the Code.**

15. **Hon’ble Supreme Court in case of B.K. Educational Services Vs. Parag Gupta (2018) SCC OnLine SC 1921 has held that Article 137 of the Limitation Act, 1963 applies to Applications filed under Section 7 or 9 of the Code.**

16. Hon'ble Supreme Court in case of *J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd.*, (2008) 2 SCC 444: (2008) 1 SCC (Civ) 582 on page 456 has held that:

“20. Section 18 of the Limitation Act, 1963 deals with effect of acknowledgment in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The explanation to the section provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right. Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, 1963) this Court in *Shapoor Freedom Mazda v. Durga Prosad Chamaria* [AIR 1961 SC 1236] held: (AIR p. 1238, paras 6-7).

“6. ... acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the

intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. ... Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. ... In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered.

7. ... The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document....”

21. It is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgment of liability should consciously admit his liability to

pay or admit his intention to pay the debt. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs 1 lakh due under a promissory note executed by the debtor and the debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgment of liability. If a writing is relied on as an acknowledgment for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgment should necessarily be in respect of the subject-matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgment will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. Again, we may illustrate. If a house is constructed under the item rate contract and the amount due in regard to work executed is Rs two lakhs and certain part-payments say aggregating to Rs 1,25,000 have been made and the contractor demands payment of the balance of Rs 75,000 due towards the bill and the employer acknowledges liability, that acknowledgment will be only in regard to the sum of Rs 75,000, which is due. If the contractor files a suit for recovery of the said Rs 75,000 due in regard to work done and also for recovery of Rs 50,000 as damages for breach by the employer and the said suit is filed beyond three years from completion of work and submission of the bill but within three years from the date of acknowledgment, the suit will be saved from bar of limitation only in regard to the liability that was acknowledged, namely, Rs 75,000 and not in regard to the fresh or additional claim of Rs 50,000 which was not the subject-matter of acknowledgment. **What can be acknowledged is a present subsisting liability. An acknowledgment made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural**

relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages.”

(Quoted verbatim)

17. Based on the above judgment of the Hon’ble Supreme Court, it is apparent that Section 18 of the Limitation Act, provides that where before the expiration of the prescribed period of limitation **for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing then fresh period of limitation shall be computed from the time when acknowledgement was so signed.** In the case of J.C. Budhraj (supra) Hon’ble Supreme Court has specified that explanation to Section 18 provides that an acknowledgement may be sufficient though it omits to specify the exact nature of the right and avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off or address to a person other than a person entitled to the right.

18. In the case mentioned above, Hon’ble Supreme Court has relied on its earlier judgment passed in Shapoor Freedom Mazda Vs. Durga Prasad Chamaria AIR 1961 SC 1236. In the said case, Hon’ble Supreme Court has clarified that acknowledgement as prescribed by Section 19 merely renews debt; it does not create any new right. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or either by implication. The statement of which the plea of **acknowledgement is based must relate to the present**

subsisting liability, though the exact nature of the specific character of the said liability may not be indicated in words.

19. Based on the above judgment in case of Shapoor Freedom Mazda (supra), J.C. Budhraj (supra) it is thus clear that before expiration of the period of limitation, acknowledgement of liability in writing, renews the debt but does not create a new right or action and it is also the Hon'ble Supreme Court, that by acknowledgement in writing a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

20. The Learned Counsel for the Financial Creditor/Respondent relying on the above case law emphasized that in the present case, the account of the Corporate Debtor was classified as NPA on 15th December 2012. Therefore, as per Article 137 of Limitation Act, limitation of three years, i.e. up to 14th December 2015 was available to file an application under Section 7 or 9 I&B Code. It is further contended that by implication of Section 18 of the Limitation Act, a fresh period of limitation started from the date of acknowledgement of debt. The Learned Counsel for the Respondent/Financial Creditor has placed reliance on agreement stipulating liquidation of claims of the Financial Creditor – Oriental Bank of Commerce with the Corporate Debtor RDH Technologies (P) Limited dated 04th March 2015. Copy of the said agreement is annexed with the Appeal as Annexure A-5 (at page 245) of the Appeal paper book.

21. On perusal of the above document, it is clear that the Financial Creditor entered into an agreement stipulating liquidation of claims whereby

the Financial Creditor revised the original sanction plan of Rs.23 crores at the request of the Corporate Debtor, and it was agreed to release the residual portion of the term loan sanctioned to the Respondent herein. It is stated in the said agreement that the Corporate Debtor RDH Technologies (P) Limited has utilized the loan only to the extent of Rs.7,38,61,086, against the sanctioned limit of Rs.23 crores. After the modification revised sanctioned plan is being approved and the bank has agreed to release the residual portion of the term loan. It is also stated in the said agreement that the lending bank has agreed to release 1 to 9 floors in favour of the borrower to repay the lending bank proportionately from the outcome of the sale proceeds thereof and complete the unfinished portion of the building. This agreement has been executed by both parties.

22. The acknowledgement mentioned above has been signed by the Financial Creditor and the Corporate Debtor on 04th March 2015. Therefore the limitation period to claim its right, was up to 14th December 2015 as per provision of Article 137 of Limitation Act. But by implication of Section 18 of the Limitation Act, and by acknowledgement signed by the Corporate Debtor on 04th March 2015, a fresh period of limitation started from 04th March 2015. Therefore, the limitation period was available up to 03rd March 2018 to claim its right.

23. The Learned Counsel for the Financial Creditor has further emphasized on the acknowledgement of balance and security confirmation letter, which is at page no.317 & 318 of the paper book. The scanned copy of page No.317 & 318 is as under:

अतिशेष और प्रतिभूति पुष्टिकरण
BALANCE & SECURITY CONFIRMATION

317

प्रबंधक,
ओरिएंटल बैंक ऑफ़ कॉमर्स,

The Manager,
Oriental Bank of Commerce,

महोदय/महोदया,
Sir/Madam,

उधारकर्ता का (उधारकर्ताओं के) नाम/Name of borrower(s): BDH Technologies Pvt. Ltd.

मेरा/हमारा उधार खाता/My/Our Loan account(s)

मैं/हम निम्नलिखित उधार खातों में बैंक को देय बकाया डेबिट अतिशेष के सही होने की पुष्टि, अस्वीकृति और स्वीकृति करता/करते हैं:-

I/We, hereby confirm, acknowledge and admit the correctness of the debit balance due to the bank in the following loan accounts:-

उधार सुविधा की प्रकृति/उधार खाते का नाम Nature of loan facility/Name of loan account	बकाया डेबिट अतिशेष Debit balance outstanding as on <u>28.05.2019</u>	बकाया की सही दर को अंतरणों पर वार्षिक ब्याज दर Rate of interest per annum with <u>monthly rests as on date of outstanding</u>	प्रतिभूति Security
1. <u>Term loan</u>	<u>Rs. 6,63,31,730.00 @ B.R.+1%</u>		<u>ESM of Basement and Floor 1st & 2nd of the property situated at Plot No. F1, Block G.P. Section - 1, Salt Lake, Kolkata-71 and personal Guarantee of Mr. English Sarda.</u>
2.			
3.			
4.			
5.			

यदि अन्य प्रतिभूतियाँ हों तो उनका विवरण/Details of other securities, if any:-

मैं/हम यह भी पुष्टि करता/करते हैं कि अधोलिखित उधार दस्तावेज मेरे/हमारे द्वारा उधार सुविधा के प्रतिफलस्वरूप निष्पादित किए गए थे और यह भी पुष्टि करता/करते हैं कि बैंक द्वारा मुझे/हमें संचित/अनुदान/नगुर उधार/क्रेडिट सुविधा का प्रयोग/उपयोग कर लिया है।

I/We also confirm that the undermentioned loaning documents were executed by me/us in consideration of the loan facility(s) and hereby also confirm having used/used and availed the loan/credit facility(s) disbursed/allowed/granted to me/us by the bank.

BDH Technologies Private Limited

S. K. Chakrabarty
Director / Authorized Signatory



Certified True Copy



दस्तावेजों की सूची/List of document(s)	दस्तावेजों की तारीख/Date of document(s)
1	
2	
3	31/8
4	
5	

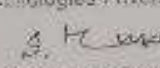
मैं/हम लेखा विवरण और/या उधारे की तारीख तक क्रेडिट सुविधा/उधार खाते में बैंक द्वारा प्रभारित अन्य प्रभारों के बॉरे प्राप्त करने की पुष्टि और अभिसूचित भी करता हूँ/करते हैं। मैं/हम यह भी पुष्टि करता हूँ/करते हैं कि मैंने/हमने ऊपर वर्णित डेबिट अतिशेष की तारीख तक प्राप्त ऊपर वर्णित उधार खाते का पूर्ण लेखा विवरण पढ़ लिया है और उसकी पड़ताल कर ली है। मैं/हम उपरोक्त आंकड़ों/रकमों के सही होने की प्रशंसा या आक्षेपित या विवादित नहीं करूँगा/करेंगी और उपरोक्त उधार सुविधा के संबंध में कोई लेखा विवरण तथा/या लेखा पुस्तकें और/या कोई आउथर को प्रकट या डेबिट अतिशेष की तारीख के बाद में तत्सम प्रस्तुत किसी अधिकारण/न्यायालय/प्राधिकरण के समक्ष ऊपर वर्णित उधार खाते/सुविधा के संबंध/या उस पर आधारित किसी मुकदमे में प्रस्तुत करने का आग्रह और/या ध्यान नहीं करूँगा/करेंगी।

I/We further confirm and acknowledge having received the statement of account(s) and details of interest / and other charges, charged by the bank in the credit facilities/loan account(s) upto the date of debit balance outstanding as on _____. I/We confirm that I/We have gone through and checked the complete statement of account(s) of the above mentioned loan account(s) received upto the date of debit balance mentioned above. I/We shall not challenge or question or dispute the correctness of the said figure(s)/amount(s) and shall also not insist/ and or demand for production of and statement of account(s) and / or books of account/ and / or any voucher(s), in respect of above mentioned loan facility(ies) upto the date of debit balance outstanding as on _____ later on, in any litigation related to/ or based on above mentioned loan account(s)/facility(ies) before any Tribunal/Court/authority for the time being in force.

* कम्पानियों/न्यायों की दशा में लागू/ *Applicable in case of Companies/Trusts

* कम्पनी की ओर से डेबिट अतिशेष/देय राशि/व्यय का अभिलेखीकरण/सुचिकरण पत्र कम्पनी के निदेशक बोर्ड द्वारा को (तारीख) आदेशित बैंक में पारित संकल्प के अनुसरण में दिया जाता है। उक्त संकल्प की सत्य और सही सम्बन्ध प्रमाणित प्रतिनिधि बैंक को प्रस्तुत की जाती है/होने प्रस्तुत की जा चुकी है। कम्पनी और अन्य निष्पादकों के दायित्व और सम्बन्ध निम्नांकित गारंटियों सहित सभी उधार दस्तावेजों के अधीन जारी है और प्रस्तुत रहेगी तथा उधार/डेबिट सुविधा के लिए आवश्यक रहेगी।

*This letter of acknowledgement and confirmation of debit balance/sum due/outstanding on behalf of the company is given in pursuance to the resolution passed by the board of directors of the company in their meeting held on _____ (Date). The copy of said resolution duly certified to be true and correct, is submitted herewith/ready submitted to the bank. The liability and obligation of the company and other executants hereto continues under all the loaning documents including guarantee(s), executed shall be in force and binding for the loan/credit facility(ies).

31 Technologies Private Ltd.

 Director / Member of Board of Directors
 हस्ताक्षर (रसीद रिफ्ट के अंतर्गत)

24. On perusal of the above document, it is clear that the Corporate Debtor acknowledgement and admitted correctness and debit balance due to the bank on 30th June 2017 amounting to Rs. 6,63,31,700.00.

25. By implication of Section 18 of the Limitation Act, a fresh period of limitation of three years started from 01st August 2017 and this petition has been filed on 08th December 2018, which is within limitation.

26. It is pertinent to mention that the Corporate Debtor has also filed the certified copy of the bank statement with a certificate of the bank under Bankers Book of Evidence Act, 1891. On perusal of the bank relating to the loan account to the Corporate Debtor, it is clear that the Corporate Debtor made the part payment against the said loan on different dates as mentioned below:

Sl. No.	Date	Amounts (Rs.)
1.	28.12.2013	1,25,000
2.	13.03.2015	10,00,000
3.	30.06.2015	50,00,000
4.	10.07.2015	68,00,000
5.	05.02.2016	10,00,000
6.	06.06.2016	19,00,000
7.	21.03.2017	39,40,000
8.	23.03.2017	30,00,000
9.	29.07.2017	99,000

Based on the above part payment in the loan account, it is clear that the Corporate Debtor-Financial Creditor made the last payment on 29th July 2017.

27. The Learned Counsel for the appellant has placed reliance on the following judgments.

In case of *Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd.*, (2019) 10 SCC 572: 2019 SCC OnLine SC 1239 at page 574 Hon'ble Supreme Court held that:

“6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of *B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates*, (2019) 11 SCC 633] , suffice it to say that the Report of the Insolvency Law Committee [**Ed.**: Report of the Insolvency Law Committee (March, 2018), Ministry of Corporate Affairs, Government of India] itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.”

In the case of *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528 : 2018 SCC OnLine SC 1921 at page 656 Hon'ble Supreme Court held that:

“30. Shri Dholakia also referred to and relied upon Sections 60 and 61 of the Contract Act, which are set out hereunder:

“60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him

from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.”

These sections also recognise the fact that limitation bars the remedy but not the right. In the context in which Section 60 appears, it is interesting to note that Section 60 uses the phrase “actually due and payable to him....” whether its recovery is or is not barred by the limitation law. The expression “actually” makes it clear that in fact a debt must be due and payable notwithstanding the law of limitation. From this, it is very difficult to infer that in the context of the Contract Act, the expression “due and payable” by itself would connote an amount that may be due even though it is time-barred, for otherwise, it would be unnecessary for Section 60 to contain the word “actually” together with the later words, “whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits”.-----

22. Coming to the next argument that, in any case, Section 238-A, being clarificatory of the law and being procedural in nature, must be held to be retrospective, it is necessary to refer to a few judgments of this Court. In *M.P. Steel Corpn. v. CCE* [*M.P. Steel Corpn. v. CCE*, (2015) 7 SCC 58: (2015) 3 SCC (Civ) 510], this Court held: (SCC pp. 97-101, paras 54-60)

“54. It is settled law that periods of limitation are procedural in nature and would ordinarily be applied retrospectively. This, however, is subject to a rider. In *New India Insurance Co. Ltd. v. Shanti Misra* [*New India Insurance Co. Ltd. v. Shanti Misra*, (1975) 2 SCC 840], this Court held: (SCC p. 844, para 5)

A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.”

In case of *Jignesh Shah v. Union of India*, (2019) 10 SCC 750 : (2020) 1 SCC (Civ) 48 : 2019 SCC OnLine SC 1254 at page 764 Hon’ble Supreme Court held that:

“8. ... To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the

period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted.”-----

21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding.”

28. Thus in the case mentioned above, the Hon’ble Supreme Court has held that the limitation can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period.

29. In this case, it is clear that on the day of filing the petition U/S 7 of the Code, there was a subsisting liability on the corporate debtor, and due to the acknowledgement of debt in writing, though the account of the corporate

debtor which was classified as NPA on 15th Dec 2012, its validity got extended from time to time by acknowledgement of debt in writing and a fresh period of limitation started after the acknowledgement of debt as per provision of Sec 18 of the Limitation Act.

30. The Learned Counsel for the Appellants have assailed the impugned order only on the Limitation point. Based on the discussion as above, we are of the considered opinion that the petition filed by the Respondent Oriental Bank of Commerce is not barred by limitation. Hence Appeals are rejected. No order as to costs.

31. By the order of this Tribunal dated 11th September, 2019 the IRP was restrained from Constitution of Committee of Creditors'. Since Appeal has failed therefore, IRP is directed to proceed with the CIRP forthwith. Copy of the order may be communicated to the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata by e-mail so that CIRP may be started immediately.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
14TH FEBRUARY, 2020

pks/nn