National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 993 of 2020

(Arising out of Order dated 15th October, 2020 passed by National Company Law Tribunal, Kochi Bench, Kochi, in IBA/01/KOB/2020).

IN THE MATTER OF:

Air Travel Enterprises India Ltd.,
Founder Promoter and Shareholder of
M/s. Green Gateway Leisure Ltd.,
(the Corporate Debtor)
1st Floor, New Corporation Building,
Palayam, Thiruvananthapuram,
Kerala – 695033. **...Appellant**

Versus

1. Union Bank of India,
Chalai Bazar Branch,
Chalai, Thiruvananthapuram, **...Respondent No.1/**
Kerala – 695036. **Financial Creditor**

2. Green Gateway Leisure Limited,
Through its Interim Resolution Professional,
1st Floor, New Corporation Building,
Palayam, Thiruvananthapuram, **...Respondent No.2/**
Kerala – 695033. **Corporate Debtor**

3. Shri E.M. Najeeb Elias Muhammed,
6D, Kowdiar Manjor,
Jawahar Nagar,
Trivandrum – 695041. **...Respondent No. 3**

4. Dr. Sahadulla M.I, 69, Rastannra,
RPD Marg, Kuravakonam, Kowdiar,
Trivandrum – 695033. **...Respondent No. 4**

Appellant: **Dr. KS Ravichandran, (PCS).**
Ms. S. Manjula Devi, Advocate.

Respondents: **Mr. Alok Kumar, Advocate for R-1/Union Bank of India.**
Mr. Shinoj K. Narayanan and Mr. Client Li Johny,

Advocate for R-4.
Mr. Raju P. K., for R.P.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order of Admission of Section 7 Application in IBA/01/2020 filed by the Respondent Bank/Union Bank of India, the Appellant/Air Travel Enterprises India Ltd. (arrayed as a second Respondent in the Original Application), preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code (in short the **'IBC'**). By the Impugned Order dated 15.10.2020, the Adjudicating Authority has observed as follows:-

> *"14. Accordingly, the following points are considered to arrive at a decision in this application.*
>
> *(a) Whether the applicant granted financial assistance to the Corporate Debtor, the same was disbursed to the Corporate Debtor and there was a due from the Corporate Debtor to the Financial Creditor and that there was default in repayment of the said dues?*
>
> *(b) Whether the nature of debt is a "Financial Debt" as defined under Section 5 (8) of the Code?*
>
> *15. It appears from the records that the Corporate Debtor nowhere denied the debt amount nor filed any documents to show that the claim is false, but in reply by way of counter the Corporate Debtor simply prayed to dismiss the application without showing any commendable and acceptable reasons. The contentions raised in the reply will not come in the way of the admission of the application in view of the categorical ruling of the Hon'ble Supreme Court in the case* ***"Innoventive Industries Ltd. (Supra),*** *that the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under Sub-Section (7), the adjudicating*

authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be. The applicant produced the statement of account for the loan account which shows that as on 30.11.2019 a sum of ₹ 32,39,45,078/- (Rupees Thirty-Two Crores Thirty-Nine Lakhs Forty-Five Thousand and Seventy-Eight Only), is due from the Corporate Debtor. It has also been established that admittedly there is a "Default" as defined under Section 3 (12) of the Code on the part of the Corporate Debtor and the nature of debt is a 'financial debt' as defined under Section 5(8) of the Code.

16. The application on behalf of Financial Creditor is complete and there is default in the payment of the financial debt. Therefore, as per Section 7(5)(a) of the code, the present application filed U/S 7 of the I&B Code deserves to be admitted against the Corporate Debtor ('M/s. Green Gateway Leisure Ltd').

17. The Financial Creditor has suggested the name ***Mr. Raju Palanikunnathil Kesavan, IBBI/IPA-001/IP-P00801/2017-2018/11356, email id rajupkin@gmail.com*** *for appointment as Interim Resolution Professional (IRP). He has filed a declaration in Form 2 affirming that he is a Registered Insolvency Professional and no disciplinary proceedings are pending against him."*

Facts in brief:

2. The Appellant is a major Shareholder of the 'Corporate Debtor' which has been in the business of Travel and Tourism Sector for more than four decades; the Appellant originally obtained leasehold rights over 55.33 acres of land from Bekal Resorts owned by the Government of Kerala, the promoters of the Appellant formed the 'Corporate Debtor' as a Special Purpose Vehicle (**'SPV'**) for implementation and operation of the project which is a Resort at Bekal; the 'Corporate Debtor' obtained financial assistance in the year 2010 for ₹ 20 Crores from State Bank of India (**'SBI'**),

₹ 25 Crores from Union Bank of India (**'UBI'**) and ₹ 20 Crores from State Bank of Travancore (**'SBT'**), during the implementation of the project several changes were made in the project and there was escalation on the project cost requiring an additional term loan to the tune of ₹ 24 Crores; an Agreement for granting an additional term loan to the tune of ₹ 24 Crores by the lenders was agreed upon, with a condition that the loan repayment would commence from 2014 and close by 2020.

3. It is stated that while promoters of the 'Corporate Debtor' had infused their part of the equity capital, lenders delayed the grant of additional term loan; SBI sanctioned ₹ 8 Crores on 28.05.2014 after a lapse of 1½ years with additional terms and conditions which were not acceptable to the Appellant; SBT sanctioned another sum of ₹ 8 Crores on 09.02.2015 but UBI was not ready to sanction the additional loan contrary to the Agreement dated 22.10.2013.

4. It is only on account of delay in sanctioning of the additional loan that the project cost got enhanced. Union Bank of India communicated their inability to grant the additional term loan after almost two years of the Agreement of 22.10.2013, thereby leading to severe hardships and losses. It is stated that an additional 61.40 Crores was incurred till May 2017 in addition to the interest, the total amount invested as on date as per the Appellant is ₹ 185 Crores out of which ₹ 89 Crores is the loan amount and ₹ 96 Crores is the promoter's contribution. On 01.07.2016, Union Bank of India issued a sanction communication informing renewal of the term loan of ₹ 25 Crores. On 07.11.2016, the Joint Lenders Forum (**'JLF'**) Meeting was convened and a Techno Economic Viability study was conducted by M/s.

Dun & Bradstreet. Based on the report, the lead bank SBI sanctioned their share of ₹ 15.70 Crores on 29.03.2017. On 27.09.2017, in the Sixth JLF Meeting, the Banks informed the Appellant that they would not provide any additional funds and declared their account as NPA. SBI issued a Demand Notice on 29.12.2017 under Section 13(2) of the SARFAESI Act, 2002 demanding to pay a sum of ₹ 96,04,97,895/- within 60 days. The 'Corporate Debtor' filed WP(C) No. 6464/2018 before the Hon'ble High Court of Kerala seeking a direction against the lenders for providing additional funds. SBI issued a letter dated 12.04.2018 stating that it is not a consortium leader and the loan availed by the 'Corporate Debtor' from lenders are distinct and separate. It is stated that the Demand Notice under 29.12.2017 issued by SBI is therefore without any authority. On 15.04.2018 SBI issued the possession Notice under Section 13(4) of the SARFAESI Act 2002.

5. The 'Corporate Debtor' filed SA No. 274/2018 before the Debts and Recovery Tribunal (DRT) No. 1, Ernakulam and the same is pending consideration. The lenders including the Union Bank of India filed OA No. 417/2018 before DRT No. 1, Ernakulam. It is stated that the 'Corporate Debtor' was servicing the interest component till 2017 and paid ₹ 61.40 Crores towards interest and principal against a loan of ₹ 89 Crores. A One Time Settlement (**'OTS'**) proposal was sent to SBI, the lead Bank which informed the Appellant to give a fresh proposal enhancing the offer to ₹ 65 Crores. On 22.08.2019, a JLF Meeting was conducted and the OTS proposal given by the 'Corporate Debtor' was rejected on the ground that there was no upfront payment made by the 'Corporate Debtor'. The 'Corporate Debtor' came to know about the same only after verifying the Minutes of the JLF

Meeting. The Union Bank of India also gave an OTS proposal dated 10.10.2019 to settle the dispute for the sum of ₹ 20 Crores and agreed vide a letter dated 05.11.2019 for an amount of ₹ 17,05,00,000/-, which was accepted by the 'Corporate Debtor' vide a letter dated 26.11.2019 and an amount of ₹ 25 Lakhs was transferred to Union Bank of India as part of the settlement amount. Thereafter Dhanlaxmi Bank filed a Section 7 Application before NCLT Kochi, the Adjudicating Authority and the same was settled by the 'Corporate Debtor' on payment of ₹ 3.195 Crores and Dhanlaxmi Bank withdrew the Application and the same was disposed of on 06.01.2020.

6. Having agreed to the OTS, without giving sufficient time, Union Bank of India filed this Application under Section 7 causing grave miscarriage of justice, the project at this stage, if liquidated would result in huge economic loss as it is at the threshold stage and the first phase is ready to be rolled out.

7. **Submissions on behalf of the Learned Counsel appearing for the Appellant:**

- It is submitted that the Section 7 Application is barred by Limitation as the date of NPA is 30.09.2015, whereas the Application was filed on 27.12.2019. The period of 3 years specified under Article 137 of the Limitation Act, 1963 expired long before the date of initiation of the proceeding under Section 7, hence it is ex-facie time barred.
- The Learned Counsel relied on the ratio of the Hon'ble Supreme Court in ***'Babulal Vardharji Gurjar' Vs. 'Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.' reported in SCC 6347 of 2019, 'Jagdish Prasad Sarada' Vs. 'Allahabad Bank' in Company***

Appeal (AT) (Insolvency) No. 183 of 2020, 'Asset Reconstruction Company (India) Limited' Vs. 'Bishal Jaiswal & Anr.' reported in 2021 SCC OnLine SC 321, 'B.K. Educational Services Private Limited' Vs. 'Parag Gupta and Associates' in Civil Appeal No. 23988 of 2017 in support of his contention that the Section 7 Application is to be filed within three years of the date of NPA as the debt cannot be given a new lease of life when it is time barred.

- The Union Bank of India failed to communicate on time its inability to sanction further amounts and has stated this only after two years of the Agreement. This act of default on behalf of the Bank led to enhancement of the project cost.
- The revival letter is dated 01.06.2017 and even if this letter is accepted to be an acknowledgement of debt under Section 18 of the Limitation Act, 1963, the date of commencement of communication would be 01.06.2017 which is undisputedly the last signed document. At no point of time, there was a recall notice as the amount involved is a 'Term Loan' and is repayable in instalments and the 'Corporate Debtor' has paid the interest on the loans and to demand the entire balance amount at one go when it is a term loan, is unjustified.
- Action was initiated by the Respondent Bank under SARFAESI Act, 2002 for sale of properties and recovery of money and such a recovery under the IBC Code is against the objectives of Code itself.

- The default in question cannot be attributed to the 'Corporate Debtor' as it is the Financial Creditors who caused enormous delay in granting the sanctioned additional loan resulting in overrun of cost.
- There was constant support and continuous funding and infusion of capital by the promoters of the 'Corporate Debtor' to meet additional funds and serving of interest of the existing loans. The project under implementation is not a proper cause for result of Insolvency by commencing CIRP, as the project has reached the stage where phase-1 could be put into operation.
- The commencement of CIRP would cause grave economic loss to all the stakeholders who had contributed the long term capital need of the project of the 'Corporate Debtor'.

8. **Submissions on behalf of Learned Counsel appearing for the Respondent:**

- Briefly put, the Learned Counsel submitted that the Application is well within the period of limitation as the debt amount is a 'Term Loan' sanctioned for the purpose of construction of a Deluxe Resort, the repayment of which amount, was to begin from September, 2012 till the final repayment by September 2018. The same was never adhered to by the 'Corporate Debtor' and the Respondent Bank agreed to restructure the loan facility with a condition that the repayment would start from 2014 and would be completed by the year 2020. The loan was restructured once again as the 'Corporate Debtor' failed to adhere

to the payment and the repayment date was extended to September 2022.

- On 01.07.2016, at the request of the 'Corporate Debtor', the Bank renewed the limits on certain terms but the same was not accepted by the 'Corporate Debtor' and as per the RBI norms, the account was classified as NPA on 30.09.2015. The date is not a default date but the date from which the Banks are prohibited to charge interest.
- Each unpaid instalments constitute a default whether it is the first instalment or the last as per the payment schedule in the Loan Agreement. The 'Corporate Debtor' continued to service interest upto June 2017 and therefore the Application is not barred by Limitation as the Limitation period of three years as provided under Article 137 of the Limitation Act has not expired as on the date of filing of the Application.
- A One Time Settlement was agreed upon on 05.11.2019 based on certain conditions and the 'Corporate Debtor' was required to pay 17.05 Crores, which payment was once again defaulted by the 'Corporate Debtor'. Hence, the conditional OTS is rendered infructuous thereby reverting the obligations to be ignored by the Loan Agreement to 12.01.2015 which required quarterly instalments to be made till the Financial Year 2022-23. As the last payment was made in June 2017, the ratio of ***'Asset Reconstruction Company (India) Limited' (Supra)*** is applicable to this case.

Submissions on behalf of the Learned Counsel appearing for Respondent No. 4:

9. The fourth Respondent filed his Written Submissions stating that the claim of Union Bank of India against him as a personal guarantor is not maintainable as personal guarantor were brought under the purview of the Code only with effect from 01.12.2019; that there is a pending dispute between Union Bank of India and two other Banks and for the recovery of the amount covered by IBA/01/KOB/2020, the said Banks including Union Bank of India filed OA 417/2018 before the Debt Recovery Tribunal, Kochi and in that litigation, the fourth Respondent has filed IA 1409/2019 seeking a direction to the Banks to produce the originals of the documents relied upon, and the same is still pending.

Assessment:

10. At the outset, we address ourselves to the issue whether the Application filed under Section 7 of the Code is barred by Limitation. A plea of limitation is a mixed question of law and fact. It cannot be decided as an abstract principle of law devoid from facts as in every case, the starting point of limitation is entirely a question of fact. The following facts with respect to terms of payment of Loan Agreement is not in dispute:-

a) the first Loan Agreement is dated 02.07.2010 for the term loan of ₹ 25 Crores with a repayment schedule of 70 monthly instalments of ₹ 35.71 Lakhs each.

b) another Agreement dated 21.09.2011 was entered into according to which the last four instalments were to be paid by 2019-20.

c) the repayment schedule was once again revised by an Agreement dated 24.02.2014, according to which the last two quarterly instalments were to be paid by the year end 2021.

d) the last Agreement entered into between the parties is dated 12.01.2015, whereby the last four instalments were to be paid by the year end 2022-23.

11. A perusal of the Minutes of the JLF Meeting held on 27.09.2017 attended by the 'Corporate Debtor' evidences that the Bankers brought to the notice of the 'Corporate Debtor' regarding the recorded Minutes in the Consortium Meeting held on 27.07.2015 and on 04.09.2015, wherein the promoters have assured the completion of the project by 30.09.2015. It is an admitted fact that the project was not complete and there was a cost overrun of ₹ 88.22/- Crores. It is seen from the Minutes of 27.09.2017, that the 'Corporate Debtor' was aware that the account had slipped to NPA in the books of UBI and SBI as on 30.06.2017 and 24.07.2017 respectively.

12. Notice dated 29.12.2017 was issued to the 'Corporate Debtor' under Section 13(2) of the SARFAESI Act, 2002 specifying the outstanding liability due and owing to all the three Banks is the sum of ₹ 96,04,97,895/-, failing which the Banks can exercise their rights under Section 13(4) of the SARFAESI Act, 2002. The Admission by the 'Corporate Debtor' in their Reply filed before the Adjudicating Authority establishes that the 'Corporate Debtor' was servicing interest upto 2017 and has paid ₹ 61.40 Crores towards interest and principal. It is not in dispute that a JLF Meeting was conducted on 22.08.2019 and Annexure R-20 details the Minutes of the same. It is the case of the Appellants that the OTS was rejected on the

ground that there was no upfront payment made. It is the case of the 'Corporate Debtor' that the same was not communicated to them. Be that as it may, vide letter dated 29.08.2019, SBI has agreed for One Time Settlement and the same was settled for the sum of ₹ 38,14,49,303/-.

13. It is also not in dispute that the Respondent, Union Bank of India has given an offer letter dated 10.10.2019 (Annexure R-24) and on 05.11.2019 a settlement amount was negotiated to ₹ 17,05,00,000/-. It is also the case of the Appellant that Dhanlaxmi Bank filed IBA/41/KOB/2019 before the Adjudicating Authority and the 'Corporate Debtor' paid ₹ 3.195 Crores as part payment of the settlement amount and as such Dhanlaxmi Bank filed a withdrawal Application. It is submitted that the 'Corporate Debtor' is also ready to settle this dispute if given some time.

14. It is submitted that the Minutes of the Meeting of the JLF held on 27.09.2017 cannot be construed as acknowledgment under Section 18 of the Limitation Act. The Hon'ble Supreme Court in its recent Judgement in ***'Asset Reconstruction Company (India) Limited' (Supra)*** has discussed elaborately Section 18 of the Limitation Act in reference with the Code. Section 18 of the Limitation Act reads thus:-

> *"**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 of its contents shall not be received.

Explanation.—For the purposes 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."

15. The Hon'ble Supreme Court in ***'Asset Reconstruction Company (India) Limited' (Supra)*** has observed as follows:-

"37. 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 of the Code. 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) acknowledgements, 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 acknowledgement in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. 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 acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgement must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code."

11. *Given the aforesaid, it is not possible to accede to the arguments made by Shri Sinha that Section 18 of the Limitation Act cannot be made applicable by reason of the arguments put forth by him. As has been held in Ambika Prasad Mishra v. State of U.P., (1980) 3 SCC 719, every argumentative novelty does not undo a settled position of law. Krishna Iyer, J., speaking for a Bench of five learned Judges, stated thus:*

*"**5.** … But, after listening to the Marathon erudition from eminent counsel, a 13-Judge Bench of this Court upheld the vires of Article 31-A in unequivocal terms. That decision binds, on the simple score of stare decisis and the constitutional ground of Article 141. Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high pressure advocacy, cannot persuade us to reopen what was laid down for the guidance of the nation as a solemn proposition by the epic Fundamental Rights case [(1973) 4 SCC 225 : 1973 Supp SCR 1]. From Kameshwar Singh [AIR 1952 SC 252 : 1952 SCR 889 : 1952 SCJ 354] (1952) and Golak Nath [I.C. Golak Nath v. State*

of Punjab, AIR 1967 SC 1643 : (1967) 2 SCR 762 : (1967) 2 SCJ 486] (1967) through Kesavananda [(1973) 4 SCC 225 : 1973 Supp SCR 1] (1973) and Kanan Devan [Kanan Devan Hills Produce Co. Ltd. v. State of Kerala, (1973) 1 SCR 356 : (1972) 2 SCC 218 : AIR 1972 SC 2301] (1972) to Gwalior Rayons [State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg). Co. Ltd. (1973) 2 SCC 713 : (1974) 1 SCR 671] (1976) and after Article 31-A has stood judicial scrutiny although, as stated earlier, we do not base the conclusion on Article 31-A. Even so, it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow up. This, if permitted, may well be a kind of judicial destabilisation of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake-up. It is surely wrong to prove Justice Roberts of the United States Supreme Court right when he said : [Smith v. Allwright, 321 US 649 (1944), 669, 670]

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket good for this day and train only.... It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."

(emphasis supplied)

***12.** Section 18 of the Limitation Act .....*

***13.** In an illuminating discussion on the reach of Section 18 of the Limitation Act, including the reach of the Explanation to the said Section, this Court, in Khan Bahadur Shapoor Fredoom Mazda v. Durga*

*Prasad, (1962) 1 SCR 140 ["**Shapoor Fredoom Mazda**"], after referring to Section 19 of the Limitation Act, 1908, which corresponds to Section 18 of the 1963 Act, held:*

"It is thus clear that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. 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 even by implication. The statement on which a plea of acknowledgement 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 acknowledgement 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. In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. 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. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter."

16. The Counsel for the Respondent Bank in the instant case is relying on the last Promissory Note dated 01.07.2016 signed by the 'Corporate Debtor' for an amount of ₹ 25 Crores, interest rate reset with monthly rest.

17. To reiterate the date of NPA as stated in Part-IV of the Application is 30.09.2015, the last Promissory Note as stated in Part-V of the Application is dated 01.07.2016; the revised letter of approval of a One Time Settlement is dated 27.11.2019. The other dates which are relevant to this case are the dates of payment as specified in the One Time Settlement for ₹ 17,05,00,000/-. Admittedly, this was extended as a last opportunity till three months from 27.11.2019 with a stipulation that 5% of the OTS amount ₹ 86 Lakhs was to be deposited immediately, 20% of the amount ₹ 3.14 Crores was to be deposited within 30 days from 27.11.2019 and the balance amount ₹ 12.78 Crores was to be deposited three months from 27.11.2019. The 'Corporate Debtor' has not adhered to these terms of payment and the Section 7 Application was filed on 21.12.2019. The Hon'ble Supreme Court in ***'Asset Reconstruction Company (India) Limited' (Supra)*** has observed that the *'words used in the acknowledgement must, however, indicate the existence of the jural relationship between the parties such as that of Debtor and Creditor and it must appear that the statement is made with the intention admit as jural relationship. Such intention can be inferred by implication from the nature of the Admission, and need not expressed in words'.* In the instant case, the term loan was serviced till June 2017. The Application was filed on 21.12.2019. Further, an OTS Agreement was entered into by the parties and the promise to pay the amount within the time frame can safely be construed as the existence of a jural

relationship between the parties constituting an 'acknowledgement of debt'. Hence, we hold that the Section 7 Application was not barred by Limitation as the facts substantiate that the period of limitation of three years as provided under Article 137 of the Limitation Act, 1963 is satisfied.

18. Now we address ourselves to the merits of the matter. The Hon'ble Supreme Court in ***'Innoventive Industries Ltd.' Vs. 'ICICI Bank & Ors.', (2018) 1 SCC 407*** observed as follows:-

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-Section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicants to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied*

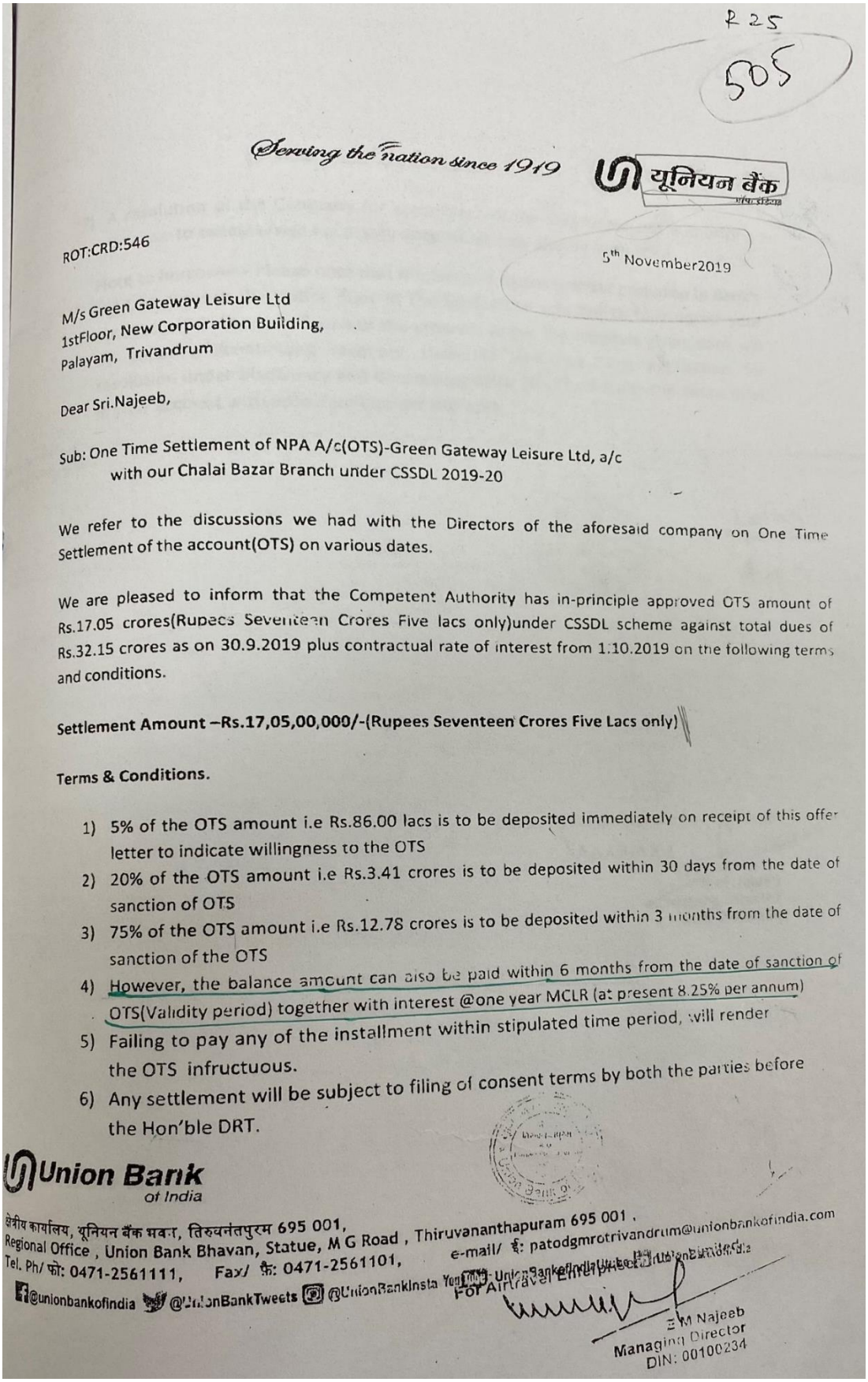
that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-Section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

(Emphasis Supplied)

19. The Hon'ble Supreme Court while observing that the moment the Adjudicating Authority is satisfied that a default has occurred, the Application must be admitted unless incomplete, has also given an opportunity to the 'Corporate Debtor' to point out that the default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due. Though we find some substance in the contention of the Learned Counsel appearing for the Appellant that the 'Corporate Debtor' had a legitimate expectation that the additional loan would be sanctioned and released within the specified time frame specially in the light of the report done by M/s. Dun & Bradstreet and that it is only on account of delay of more than 1-1/2 years in releasing the amounts that the project cost had escalated; it is significant to mention that in para 24 of their Reply before the Adjudicating Authority the 'Corporate Debtor' had offered to settle the matter. We are of the considered view that in the interest of justice, some time be given to the Appellant to settle the matter for the following reasons:-

- The amount of default involved in this case is of a 'Term Loan' 'restructured in 2015 and payable by 2022-23'. Meanwhile, admittedly an OTS Agreement was entered between the Respondent Bank and the 'Corporate Debtor' on 05.11.2019 and finally approved

on 27.11.2019. At this juncture, it is relevant to reproduce the OTS letter dated 05.11.2019:-



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ROT:CRD:546

5th November2019

M/s Green Gateway Leisure Ltd
1stFloor, New Corporation Building,
Palayam, Trivandrum

Dear Sri.Najeeb,

Sub: One Time Settlement of NPA A/c(OTS)-Green Gateway Leisure Ltd, a/c with our Chalai Bazar Branch under CSSDL 2019-20

We refer to the discussions we had with the Directors of the aforesaid company on One Time Settlement of the account(OTS) on various dates.

We are pleased to inform that the Competent Authority has in-principle approved OTS amount of Rs.17.05 crores(Rupees Seventeen Crores Five lacs only)under CSSDL scheme against total dues of Rs.32.15 crores as on 30.9.2019 plus contractual rate of interest from 1.10.2019 on the following terms and conditions.

Settlement Amount –Rs.17,05,00,000/-(Rupees Seventeen Crores Five Lacs only)

Terms & Conditions.

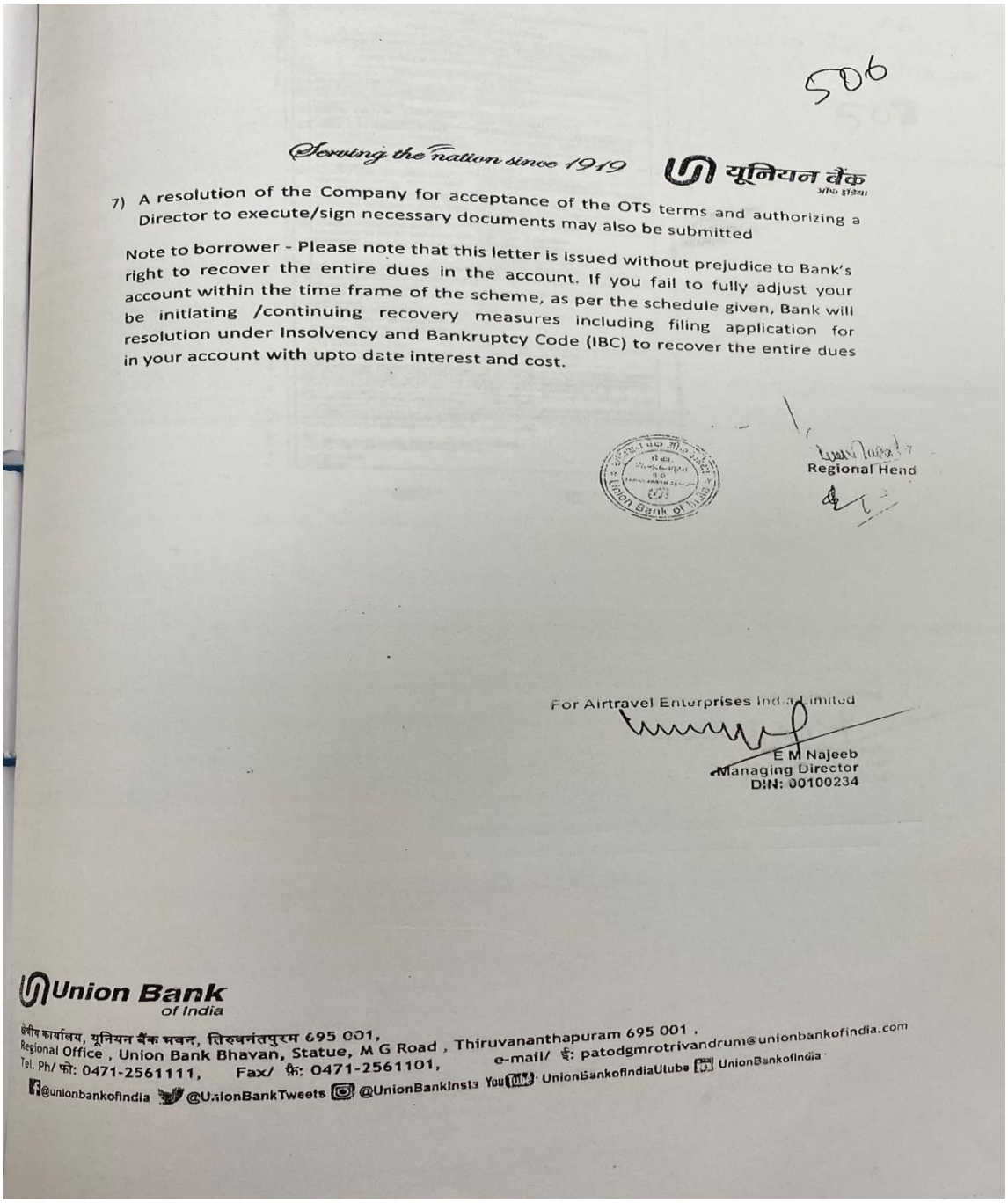
1) 5% of the OTS amount i.e Rs.86.00 lacs is to be deposited immediately on receipt of this offer letter to indicate willingness to the OTS
2) 20% of the OTS amount i.e Rs.3.41 crores is to be deposited within 30 days from the date of sanction of OTS
3) 75% of the OTS amount i.e Rs.12.78 crores is to be deposited within 3 months from the date of sanction of the OTS
4) However, the balance amount can also be paid within 6 months from the date of sanction of OTS(Validity period) together with interest @one year MCLR (at present 8.25% per annum)
5) Failing to pay any of the installment within stipulated time period, will render the OTS infructuous.
6) Any settlement will be subject to filing of consent terms by both the parties before the Hon'ble DRT.

Union Bank of India

क्षेत्रीय कार्यालय, यूनियन बैंक भवन, तिरुवनंतपुरम 695 001,
Regional Office , Union Bank Bhavan, Statue, M G Road , Thiruvananthapuram 695 001 .
Tel. Ph/ फो: 0471-2561111, Fax/ फै: 0471-2561101, e-mail/ ई: patodgmrotrivandrum@unionbankofindia.com
@unionbankofindia @UnionBankTweets @UnionBankInsta

For Airtravel Enterprises (India) Ltd.

E M Najeeb
Managing Director
DIN: 00100234



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7) A resolution of the Company for acceptance of the OTS terms and authorizing a Director to execute/sign necessary documents may also be submitted

Note to borrower - Please note that this letter is issued without prejudice to Bank's right to recover the entire dues in the account. If you fail to fully adjust your account within the time frame of the scheme, as per the schedule given, Bank will be initiating /continuing recovery measures including filing application for resolution under Insolvency and Bankruptcy Code (IBC) to recover the entire dues in your account with upto date interest and cost.

Regional Head

For Airtravel Enterprises India Limited

E M Najeeb
Managing Director
DIN: 00100234

Union Bank of India

क्षेत्रीय कार्यालय, यूनियन बैंक भवन, तिरुवनंतपुरम 695 001,
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@unionbankofindia @UnionBankTweets @UnionBankInsta UnionBankofindiaUtube UnionBankofIndia

(Emphasis Supplied)

- As can be seen from the above terms and conditions, the promise of payment started ticking from 27.11.2019. The initial instalment to be paid as on that date was ₹ 86 Lakhs < ₹ 1 Crore. The Order of Admission is dated 15.10.2020. The second instalment was due after 30 days i.e. on 27.12.2019 and this Application was filed on

27.12.2019. It is the case of the Respondent that the Appellant has not paid the first two instalments of OTS and hence it is the 'Term Loan' amount which has to be paid. However, at this juncture, we note that there has been a conscious effort on behalf of the Appellant to settle the dues of the Banks. The OTS Agreements are detailed as hereunder:-

The State Bank of India settled the matter on 30.09.2019	*₹ 38,14,49,303.00*
Dhanlaxmi Bank settled the matter on 13.12.2019	*₹ 12,50,00,000.00*
Union Bank of India offer of settlement as on 05.11.2019	*₹ 17,05,00,000.00*
Total	*₹ 67,69,49,303.00*

(Emphasis Supplied)

20. Be that as it may, for all the aforenoted reasons and having regard to the Written Submissions that efforts would be made to settle the matter, in the interest of justice and taking into consideration the fact that in this pandemic, the travel dependent sector, which is the core business of the 'Corporate Debtor', has more than suffered the negative impact of the crisis, this opportunity is being given to settle which could help mitigate the blow. We are also conscious of the fact that the 'Corporate Debtor' has settled the matter with Dhanlaxmi Bank, the Applicant of Section 7 Application in IA/06/KOB/2020 & IBA/41/KOB/2019 which was disposed of as withdrawn based on the settlement terms on 06.01.2020, during which period of pendency, this Section 7 Application was filed on 27.12.2019 against the same 'Corporate Debtor'. We reiterate, that the scope and objective of the Code is Insolvency & not recovery. The Admission of Section

7 Application is set aside. Keeping in view the peculiar facts of the attendant case, we dispose of this Appeal with a direction that if the 'Corporate Debtor' fails to settle in 6 months time from the date of this Order, the Respondent Bank is at liberty to take appropriate steps. Any observations made in this Appeal shall not stand in the way of any further proceedings, if initiated. Needless to add, the period spent in pursuing this Appeal shall be excluded for the purpose of limitation.

21. The Registry is directed to upload the Judgement forthwith on the website of this Tribunal.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
09th September, 2021

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