

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 118/KB/2021

(Financial Creditor) and the Learned Senior Counsel, Mr. Joy Saha, along with the Learned Counsel, Mr. Danyal Ahmed, appearing on behalf of the Brahm Alloys Private Limited (Corporate Debtor) were heard at length.

3. This Application is preferred under Section 7 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by **Punjab National Bank**, hereinafter referred to as "Applicant"/ "Financial Creditor"/ "PNB" against **Brahm Alloys Private Limited**, hereinafter referred to as "Respondent"/ "Corporate Debtor" seeking for a direction to commence the Corporate Insolvency Resolution Process, for brevity "CIRP" in respect of the Corporate Debtor.
4. The total amount claimed to be in default is **Rs. 65,06,31,483/-** as on 31.12.2019 as per the following particulars:

SN	Particulars	Amount (Rs.)
I.	1. Defaulted amount on account of Working Capital Cash Credit Account	62,34,89,903.68/-
	2. Less: payments received	
	3. Interest from 01-09-2019 to 31-12-2019.	2,61,54,120.32/-
	4. Other Charges /Expenses	
	5. Penal Interest	
	Total Cash Credit	64,96,44,024.00/-
II.	1. Defaulted amount on account for Car Loan	9,58,933.00/-

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	2. Less: payments received	
	3. Interest from 01-09-2019 to 31-12-2019.	28526.00/-
	4. Other charges/Expenses	
	5. Penal Interest	
	Total Car Loan	987459.00/-
	Total Outstanding	65,06,31,483.00/-

5. The Date of default is claimed as on **16.09.20219**.

Factual conspectus:

6. The Financial Creditor herein, Punjab National Bank granted a Cash Credit of Rs. 5 Crore on 15.09.2007 which was enhanced up to Rs. 60 Crore, from the period of 15.09.2007 to 03.07.2017. Further a Card Loan of an amount of Rs. 12 Lakh was disbursed on 23.08.2017. All the Cash Credit was disbursed to the accounts of the Corporate Debtor maintained with the Financial Creditor Bank at the G.T. Road Branch, Burdwan.
7. The Corporate Debtor availed of such Cash Credit (Hypothecation) Loan however failed to operate the accounts regularly. The Financial Creditor through a letter dated 14.08.2019, annexed at Pages 1158-1159 as Annexure "O" to the application, requested the Corporate Debtor to regularize its accounts by making overdue payments with an intimation regarding the consequence of non-payments.
8. The Corporate Debtor further approached the Karnataka Bank Limited for a credit facility and at its request, the consortium

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(“**PNB Consortium**”) of the Financial Creditor (lead bank) and the Karnataka Bank Limited on 03.07.2017 executed an “Inter Se Agreement” and the Karnataka Bank Limited issued a Letter of Authority in favour of the Financial Creditor being the Lead Bank of PNB Consortium. The Financial Creditor had sanctioned Fund based Limit of Rs. 57,00,00,000/- and a non-Fund based Limit of Rs. 3,00,00,000/- totaling Rs. 60,00,00,000/- in favour of the Corporate Debtor.

- 9.** Further, the Karnataka Bank Limited being the Lender Member Bank of PNB Consortium sanctioned Fund Based Limit of Rs. 17,70,00,000/- and a Non-Fund Based Limit of Rs. 10,00,00,000/- totaling Rs. 27,70,00,000/- in favour of the Corporate Debtor.
- 10.** However, despite several requests, since the Corporate Debtor failed to regularize its accounts maintained with PNB, the Financial Creditor Bank, the applicant classified the accounts of the Corporate Debtor as non-performing assets (NPA) with effect from **16.09.2019**.
- 11.** PNB, the Financial Creditor further issued a notice under Section 13(2) of the SARFEASI Act, 2002 to the Corporate Debtor as well as its Guarantors on 17.09.2013.
- 12.** Due to non-payment of regular car loan instalments, vide a letter 11.11.2019, the Financial Creditor informed the Corporate Debtor regarding the intention to take possession of the Vehicle through the Assets Reconstruction Consultancy Service Agent and vide a

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letter dated 18.11.2019 intimated Corporate Debtor taking possession of such vehicle.

13. The Financial Creditor further on 19.12.2019 preferred an application under Section 19 of the RDDB Act, 1993 as amended being O.A. 11/2020 which is pending before the DRT-2, Kolkata Bench.

Applicant's submissions:

14. The Learned Counsel appearing on behalf of the PNB would submit that in terms of sanction of cash credit by the applicant on 15.09.2007 and the Resolution of the Board of Directors of the Corporate Debtor dated 14.09.2007, the Respondent executed several security documents including guarantees for securing the liability of its and the payment of Financial Creditor.
15. Further, that at the request of the Corporate Debtor, the Financial Creditor and Karnataka Bank Limited formed PNB Consortium and approved a cash credit facility. Brahm India Private Limited and Brahm Nirman Private Limited's immovable property is mortgaged under pari passu charge with Karnataka Bank Limited, and the Corporate Debtor has a Rs. 12,00,000 car loan from the Financial Creditor.
16. The Learned Counsel for the applicant would further submit that the Corporate Debtor also availed a term loan up to a limit of Rs. 5 Crore from the West Bengal Financial Corporation (WBFC) and to secure the said term loan, the Respondent executed Deed of Hypothecation in favour of the WBFC creating First Charge over

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all movable assets of the Financial Creditor save and except Stocks of Raw Materials, Finished Goods, Work-in-progress and other consumables and receivables and in addition to that also created Mortgaged of its all-immovable properties (Factory Land and Buildings and Plant and Machinery) in favour of the WBFC.

- 17.** It is submitted that since the Corporate Debtor availed of Cash Credit (Hypothecation) as well as its Ad-hoc limits from the Applicant, the Respondent agreed to execute a Tripartite Agreement with the Financial Creditor and the WBFC on 16.09.2007. The Corporate Debtor further agreed to create Second Charge on all immovable properties and movable Fixed Assets and also agreed to create First Charge on all the movable Current Stocks belongs to the Corporate Debtor situated in Durgapur, District Burdwan in favour of the WBFC to collaterally secure the working capital loan granted to the Corporate Debtor and also movable assets, machineries, spares, tools and accessories, both present and future to secure the working capital loan granted to the Corporate Debtor by the Financial Creditor and accordingly from time to time on 12.12.2007, 21.08.2008, 15.02.2010, 12.01.2011 made four several tripartite agreement was entered in among the Corporate Debtor, WBFC and Financial Creditor.
- 18.** Further, that the Financial Creditor, being the Lead Bank of PNB Consortium sanctioned Rs. 60 Crore and the Karnataka Bank limited, being the Lender Member Bank of the PNB Consortium sanctioned Rs. 27.70 Crore in favour of Corporate Debtor. The Corporate Debtor executed the following joint documents in favour of the PNB Consortium:

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- i.** Joint Deed of Hypothecation for Rs.87,70,00,000/-.
- ii.** Consortium Agreement for Rs.87,70,00,000/-.
- iii.** Omnibus Counter Guarantee for 87,70,00,000/-.

19. Further, it is contended that the Corporate Debtor from time to time while availing and/or enjoying credit facilities and enhancement thereof from the Financial Creditor from time to time on 28th April, 2011, 29th September, 2012, 27th September, 2015 and lastly on 25th September, 2018 duly acknowledged its liability to the Financial Creditor in respect of Credit (Hypothecation) account. Due Cash to the irregular operation of the accounts, the Financial Creditor though demanded its claim through letters but ultimately accounts maintained in the name of the Corporate Debtor were classified and declared as NPA with effect from 16th September, 2019 and the Financial Creditor raised its demand.

Submissions made by the Respondent, per contra:

20. The Learned Senior Counsel, Mr. Joy Saha, appearing on behalf of the Corporate Debtor would vehemently oppose the claim of the applicant and raised questions on maintainability of the instant application which are set out in seriatim:

- a)** It is argued that the present company petition is not maintainable as the proceedings initiated by the West Bengal Financial Corporation (WBFC) under the provisions under Sections 29 and 30 of the State Financial Corporation Act, 1955 are pending consideration and WBFC has put up the immovable properties of the Corporate Debtor for sale due to

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which no resolution of the Corporate Debtor possible and if the said assets are sold by the WBFC, there will be absolutely no possibility of any resolution of the Corporate Debtor under the I&B Code. Thus, it was contended that the present company petition should not be proceeded until such time that proceedings initiated by the WBFC are decided.

- b)** This Adjudicating Authority should exercise the discretion vested in it in terms of the judgement rendered by the Hon'ble Apex Court in the matter of ***Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*** reported at **(2022) 8 SCC 352** to keep in abeyance or to stay the present company petition till the proceedings initiated by the WBFC are disposed of.
- c)** There is no default in payment by the Corporate Debtor having regard to the fact that:
- i.** There was a concluded settlement (OTS) between the parties as on **03.07.2021** for a sum of Rs. 36 Crore, annexed at Page 27 to the Reply Affidavit.
 - ii.** The said settlement was accepted by the bank and signed by all the parties and the bank requested the corporate debtor to provide the post-dated cheques in terms of the OTS, annexed at Page 27 to the Reply Affidavit.
 - iii.** The Corporate Debtor duly made over the said Post-dated cheques for the sum of Rs. 3.6 Crore, annexed at

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pages 28-29 to the Reply Affidavit as 10% of the OTS amount.

- iv.** However, the said post-dated cheques were not encashed by the PNB.
- v.** The Corporate Debtor was always and continues to be ready and willing to make payment of the said sum of Rs. 36 Crore and consequently there can be no default of the part of the Corporate Debtor.
- vi.** It is contended that the concluded settlement between the Punjab National Bank and the Corporate Debtor will inter alia appear from and/or are embodied in the following correspondence and minutes of the meeting between the parties: -

3rd July 2021	<p>Minutes of the meeting between Brahm (Alloys) Ltd. and PNB, whereby the parties agreed to settle the claim of PNB for a sum of Rs. 36,00,00,000/- (Rupees Thirty-Six Crores) in the manner following: -</p> <ul style="list-style-type: none"><u>i. 10% of the OTS amount equal to 3.60 Crores, upon sanction of the OTS by PNB.</u>ii. Balance sum of Rs. 32,40,00,000/- (Rupees Thirty-Two Crores and Forty Lakhs) in 12 equal monthly instalments of Rs. 2.70 Crore each.
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	<p>In terms of the said Settlement the AGM of the Punjab National Bank, Sri Kalyan Karjee advised the Corporate Debtor to provide a letter from its investor and to submit post-dated cheques in respect of the upfront amount. A copy of the minutes of the said meeting dated 3rd July 2021 is annexed at page 27 to the Reply affidavit.</p>
6th July 2021	<p>Letter by Brahm (Alloys) Ltd. duly furnishing PNB with a letter from Jaishree Steel Pvt. Ltd. undertaking to pay the upfront 10% of the OTS proposal made by Brahm (Alloys) Ltd. and furnishing undated postdated cheques drawn on the bank account of Jaishree Steel Pvt. Ltd.</p>
17th July 2021	<p>PNB however requested post-dated cheques to be issued from the account of Brahm (Alloys) Ltd. instead of Jaishree Steel Pvt. Ltd. It is stated that this request by PNB is contrary to the agreement as evinced from the minutes of the meeting of 3rd July 2021.</p>
6th July 2021	<p>Letter by Brahm (Alloys) Ltd. to PNB stating that as the account of Brahm (Alloys) Ltd. had already been declared NPA with effect from 16th September 2019 the operation of the said account had been stopped. Consequently, Brahm (Alloys) Ltd. had no option but to rely on its investor Jaishree Steel Pvt. Ltd. to tender the amount of Rs. 3.60 Crores constituting 10% of the accepted OTS amount.</p>

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17th July 2021	Letter by PNB evincing its acceptance of the OTS proposal made by Brahm (Alloys) Ltd., by calling upon Brahm (Alloys) Ltd. to furnish the bank with a copy of the agreement executed between Brahm (Alloys) Ltd. and Jaishree Steel Pvt. Ltd. with regard to the OTS.
<u>10th August 2021</u>	<u>PNB called upon Brahm (Alloys) Ltd. to deposit a sum of Rs. 3.60 Crore constituting 10% of the accepted OTS proposal in the form of post-dated cheques.</u>
14th August 2021	Brahm (Alloys) Ltd. duly furnished undated cheques drawn on the account of Jaishree Steel Pvt. Ltd. for the amount of Rs. 3.60 Crores to be encashed upon sanction of the OTS proposal by the PNB. Brahm (Alloys) Ltd. also duly furnished a letter from Jaishree Steel Pvt. Ltd. undertaking to tender 10% of the OTS proposal at the behest of Brahm (Alloys) Ltd. A copy of the said letter dated 14th August 2021 together with the letter of Jaishree Steel Pvt. Ltd. is annexed at page 28 to the Reply Affidavit.
24th September 2021	<u>PNB alleged that the cheques furnished by Brahm (Alloys) Ltd. through Jaishree Steel Pvt. Ltd. were not acceptable and called upon Brahm (Alloys) Pvt. Ltd. to deposit a sum of Rs. 3.6 Crores. Moreover, by the said letter PNB for the first time stated as follows:</u>

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	<p>“Further the OTS offer of Rs. 36,00,00,000/- submitted by you is at very low side. You are requested to improve the offer considerably and inform immediately so that matter be percolated to our highest authority for consideration or otherwise offer of proposal of Brahm (Alloys) Ltd. on merits.”</p> <p>A copy of the said mail dated 24th September, 2021 is annexed at Pages 30-31 to the Reply Affidavit.</p>
12th January 2022	<p>Letter by Brahm (Alloys) Pvt. Ltd. once again explaining why it was compelled and constrained to depend on investment by Jaishree Steel Pvt. Ltd. for tendering the sum of Rs. 3.60 Crores constituting 10% of the accepted OTS proposal. A copy of the letter dated 12th January 2022 is annexed at page 32 to the reply affidavit.</p>
16th February 2022	<p>In the interest of giving a quietus to the disputes between the parties, <u>Brahm (Alloys) Ltd., agreed to the demand of PNB to enhance its OTS proposal from Rs. 36 Crores and offered a sum of Rs. 37.00 Crores as OTS</u> in full and final satisfaction of the dues allegedly owing to the PNB, in the manner following:</p> <p>“Rs. 2.00 Crore within 7 days from your in principal acceptance of the OTS proposal.</p>

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	<p>i. Rs.1.7 Crore on acceptance of your OTS sanction.</p> <p>ii. Balance Rs. 33.3 Crores will be paid in twelve monthly equal instalments of Rs. 2,77,50,000.00 each starting from the subsequent month of the sanctioned letter. Monthly payment will be paid in parts throughout the month/ as bullet on the last day of the month."</p> <p>Brahm (Alloys) Ltd. however, categorically stated that it depended on or investments of Jaishree Steel Pvt. Ltd. A copy of the said letter dated 16th February 2022 is annexed at page 34 to the reply affidavit.</p>
4th March 2022	<p>By an email, the PNB acknowledged the enhancement proposal of the OTS offer of Brahm (Alloys) Ltd. for Rs. 37.00 Crores in the following manner:</p> <p>“Rs.1.7 Crore within 2 days of acceptance of the letter.</p> <p>i. Rs. 2.00 Crores on acceptance of OTS sanction.</p> <p>ii. Balance Rs. 33.30 Crores will be paid by them in 12 monthly instalments of Rs. 2.775 Crores starting from subsequent months of the sanction.”</p>

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	<p>ONB, the Financial Creditor accepted the proposal and asked the Corporate Debtor to deposit upfront amount by 08.03.2022.</p> <p>A copy of the email dated 4th March 2022 is annexed at Page 35 to the reply affidavit.</p>
23rd March 2022	<p>Letter of PNB from PNB purporting to reject the OTS proposal. A copy of the said letter dated 23rd March 2022 is annexed at page 37 to the reply affidavit.</p>
24th March 2022	<p>Email from PNB calling upon Brahm (Alloys) Ltd. to collect the undated cheques that had been tendered to PNB through Jaishree Steel Pvt. Ltd.</p> <p>A copy of the said email dated 24th March 2022 is annexed at page 38 to the reply affidavit.</p>

- d) On maintainability of the Company Petition,** Learned Senior Counsel, Mr. Saha has submitted that the company petition is signed by one Mr. Rajnandan Kumar as Assistant General Manager of the PNB, attention drawn to Page 26 to the Company Petition. It is claimed that the said Mr. Rajnandan Kumar has affirmed the petition and describes himself to be the “Power of Attorney Holder” of the PNB, attention drawn to Pages 28-29 of the company petition. It is asserted that the said power of attorney is dated April 13, 1991, no authority could have been granted to the said Mr. Rajnandan Kumar to file the present company petition in the year 2021, i.e., 30 years later. Reliance is placed on the

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decision of the Hon'ble NCLAT in ***Palogix Infrastructure (P) Ltd. v. ICICI Bank Ltd.***, reported in **2017 SCC OnLine NCLAT 266** at Para 36 – 38.

To Counter the Reply by the Corporate Debtor, the Applicant would submit as under:

- 21.** That, vide a letter dated 24.02.2020, the Corporate Debtor made a settlement proposal to the Financial Creditor without any offer. In reply, the Applicant intimated the Respondent, regarding the quantum of recoverable dues amounting to Rs. 65,20,76,593.88/- as of 10.12.2019 and advised to submit a complete OTS proposal.
- 22.** That, further on 16.03.2020, the Corporate Debtor made a settlement proposal to the Financial Creditor for a total sum of Rs. 63 Lakh as OTS against the claim of WBFC, PNB and Karnataka Bank on condition that they would pay 10% of the upfront amount.
- 23.** Further, vide a letter dated 15.06.2021, annexed at Page 50 to the Rejoinder, the Corporate Debtor duly offered a total sum of Rs. 36 Crore against the total outstanding dues of the Financial Creditor upon which 10% of the OTS amount would be paid immediately upon sanction of the OTS proposal.
- 24.** Further, vide a letter dated 19.06.2021, The Applicant requested the Respondent to pay the requisite upfront payment, which is annexed at Page 53 to the Rejoinder.
- 25.** Further, on 03.07.2021, a joint meeting was held between the applicant and respondent, and it was submitted that the OTS

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amount would be paid by the intending investor of the Corporate Debtor and intimated the same to the Financial Creditor vide letter dated 06.07.2021. Board Resolution and letter dated 06.07.2021 is annexed at Page 54-55 to the Rejoinder.

- 26.** Further, vide a letter received on 08.07.2021, annexed at Page 56 to the Rejoinder, one Jaishree Steel Pvt. Ltd., Kolkata 700017, the intending investor of the Corporate Debtor informed the Financial Creditor Bank that they would submit the Post-dated Cheques as and by way of upfront money towards the 10% of the Settlement offer of the Corporate Debtor of Rs. 36 Crore which would be honoured only after the approval of the Financial Creditor.
- 27.** Further, Corporate Debtor again its resolution of the board of directors dated 09.07.2021, on 14.07.2021 again submitted settlement proposal for the amount of Rs. 36 Crore without any upfront payment, annexed at page 56A-62 to the Rejoinder. In reply to the OTS offer dated 06.07.2021, the applicant on 17.07.2021, through letter requested the respondent to copy of agreement of the prospective investor, post-dated cheques of the corporate debtor instead of the proposed investor as and by way of upfront payment. Letter dated 17.07.2021, annexed at page 63 to the Rejoinder.
- 28.** Further, vide letter dated 10.08.2021, the Financial Creditor intimated the Corporate Debtor of non-submission of 10% upfront payment, annexed at Page 64 to the Rejoinder. The Corporate Debtor as well as its investor vide letter dated 14.08.2021, annexed at Page 65 to the Rejoinder, referring to the letter dated

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10.08.2021 made one-time settlement with the Financial Creditor backed by four several undated cheques of Rs. 90 Lakh each with a request the Financial Creditor to encash only upon after acceptance and final approval of their OTS proposal.

29. That, vide a letter dated 23.03.2022, annexed at Page 68 to the Rejoinder, the Financial Creditor rejected the OTS proposal, as the Corporate Debtor failed to submit the upfront payment within the given timeline.

30. That, in reply, the Corporate Debtor on 24.03.2022, annexed at Page 69 to the Rejoinder, begged pardon of non-payment of upfront payment and sought the extension of time up to 30.03.2022 to deposit of Rs. 1.70 Crore.

31. Further, vide letter dated 25.03.2022, the Financial Creditor rejected enhanced OTS proposal of Rs. 37 Crore against the total receivable bank dues of more that RS. 87 Crore.

Analysis and Finding:

32. We have considered the rival contentions of both parties and peruse the records available to us.

33. The discernible facts are the following:

33.1. Under the OTS proposal on 03.07.2021, Jaishree Steel Pvt. Ltd., the investor of the Corporate Debtor had furnished the four post-dated cheques of Rs. 90 Lakh, totaling Rs. 3.6 Crore. It would be evident from the letter dated 03.07.2021, annexed at page 27 to the Reply Affidavit that:

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The minutes of meeting dated 03.07.2021, in NPA account M/s. Brahm Alloys Ltd held a PNB zonal office, Durgapur on 03.07.2021, shows that a meeting was held with the Director of the M/s. Brahm Alloys Ltd. regarding the resolution in the account. The company submitted an OTS offer of Rs. 36 Crore in the account. The Terms of the OTS submitted by them are as under:

“1. 10% of OTS amount i.e., Rs. 3.60 Crore to be paid by them upon sanction/approval.

2. Balance Rs. 32.40 Crore in 12 equal monthly instalments of Rs. 2.70 Crore.

Members Present:

1. Punjab National Bank – Kalyan Karjee, AGM, Zonal SASTRA Centre Durgapur.

2. Punjab National Bank – Zaki Ahmed, Chief Manager, Zonal SASTRA Centre Durgapur.

3. M/s. Brahm Alloys Ltd – Manish Mittal, Director.

4. M/s. Brahm Alloys Ltd – Manish Mittal, Director.

The matter was discussed at length and the directors informed that due to corona pandemic they are having no ready cash and the OTS amount will be sourced from the intending investor Sh. Sonu Agarwal (M/s Jayshree Group). Sh. Kalyan Karjee, AGM, PNB advised the directors to arrange to provide the letter from the intending investor and provide the post dated cheque payable after one month for the upfront amount along with OTS proposal asap.

The director assured to provide suitable reply immediately along with the cheque.”

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33.2. In response to the letter dated 03.07.2021, the corporate debtor issued a letter on 14.08.2021 annexed at Page 28-29 to the Reply Affidavit. It would be evident that letter dated 10th August 2021 and in compliance with the request contained therein to make over Post-Dated Cheques of Rs. 3.6 Crore towards 10% upfront payment of OTS, PNB was reminded that at a meeting held on 03.07.2021, it was recorded that:

“Sh Kalyan Karjee, AGM Punjab National Bank advised the Director to arrange to provide the letter from the intending investor and provide the Post-dated cheques payable after one month for the upfront amount along with OTS proposal asap.”

33.3. Accordingly, letter dated 06.07.2021 and 14.07.2021, the Corporate Debtor sent an OTS offer. On 08.07.2021, investor Jaishree Steel Private Limited had also written to PNB confirming their willingness to extend necessary help and assistance to resolve the OTS amount. On 17.07.2021, PNB wrote to the Corporate Debtor take various steps to give effect to the said OTS.

33.4. However, the PNB vide letter dated 10.08.2021, has stated that:

“You are requested to either deposit the 10% upfront amount of OTS i.e., Rs. 3.60 Crore in cash or in the shape of post-dated cheque (encashable after 15 days of

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acceptance of approval) immediately but not later than 16.08.2021”.

33.5. In compliance with the request vide letter dated 10.08.2021 four undated cheques were sent to PNB, encashable only upon acceptance and final approval of the said proposal. The undated cheques bearing the following particulars:

Issuing Bank	Cheque No.	Amount (in Lacs)
Indian Bank-Durgapur-City Center	435483	90.00
Indian Bank-Durgapur-City Center	435484	90.00
Indian Bank-Durgapur-City Center	435485	90.00
Indian Bank-Durgapur-City Center	435486	90.00

33.6. Vide a letter dated 24.09.2021, PNB responded and stating that:

“Vide the above letter dated 14.08.2021 undated cheque of Rs.3.60 cr. was provided by you as upfront. The same has not been found as acceptable and accordingly you are requested to deposit 10% upfront amount of OTS i.e., Rs.3.60 core in lieu of the undated cheque of Rs.3.60 cr.

Further the OTS offer of Rs.36.00 crore submitted by you is on a very lower side. You are requested to improve the offer considerably and inform immediately so that matter be

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percolated to our higher authorities for consideration or otherwise of your proposal of compromise on merits.”

33.7. We would note that the reason why the cheques were not found acceptable is not indicated though.

33.8. The Corporate Debtor responded on 12.01.2022 annexed at Page 33 to the Reply affidavit stating that:

“We are totally depended on our Investor Le M/S Jayashree Steel Private Ltd who has committed the amount Rs 36.00 crore solely for PNB. We had plan to visit with you at your office at the end of December 2021 to finalise the OTS amount and mode of advance payment. But due to out break of third phase of COVID-19, we could not move from Kolkata. COVID 19 test conducted on 01.01.20222 of Mr Sonal Mittal, Director is POSITIVE. Hence please bear with us for few more days for finalisation of OTS.”

33.9. The Corporate Debtor even revised its offer vide letter dated 16.02.2022 stating that:

“This has reference to our above referred letter, we wish to offer Rs 37.00 crore as OTS amount instead of Rs 35.00 crore proposed in our earlier letter dated 14.07.2021.

We have made several correspondences and meeting with you and your officials regarding our OTS proposal. We are totally depended on our Investor i.e M/S Jayashree Steel Private Ltd who has committed the amount Rs 36.00 crore

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solely for PNB. We shall arrange to pay Rs 1.00 crore form external borrowing from our friends and relatives.

OTS amount of Rs 37.00 crore will be paid as follows:

i) Rs 2.00 crore within 7 days from your in-principal acceptance of the OTS proposal.

ii) Rs 1.7 crore on acceptance of your OTS sanction.

iii) Balance Rs 33.3 crores will pay in twelve monthly equal instalments of Rs 2.77,50,000.00 each starting from subsequent moth of the sanctioned letter. Monthly payment will be paid in parts throughout the month/ at bullet on the last day of the month.

All other terms and condition remain unchanged informed in our letter dated 14- 07-2021.”

33.10. Further, on 04.03.2022, vide a letter annexed at Page 35 to the Reply Affidavit, PNB responded saying that the Financial Creditor were having several communication/meetings in the above matter, but no concrete step has been taken by the Corporate Debtor and the Corporate Debtor was requested to deposit the upfront amount by 08.03.2022 positively so that PNB can process the OTS proposal given by the Corporate Debtor for its approval or otherwise.

33.11. Further, that the Financial Creditor vide letter dated 23.03.2022, annexed at Page 68 to the Rejoinder, rejected the OTS proposal of the Corporate Debtor by stating that:

**“Reg.: Rejection of OTS proposal of M/s Brahm
Alloys Ltd.**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 118/KB/2021

This is in reference to your OTS offer of Rs.37.00, Crore in captioned NPA account of M/s- Brahm Alloys Ltd. We would like to inform that despite several round of meetings and communication from our Higher office you have, failed to submit any upfront amount as you already committed vide your letter dtd: -02.03.2022. Further you also not responded our Zonal SASTRA mail dtd:- 04:03.2022 wherein you have given timeline till 08.03.2022 to deposit upfront amount.

This is also to inform that your OTS offer has been rejected by the competent authority. This is for your information please.”

33.12. Vide an email dated 24.03.2022 at 11:13 AM, annexed at Page 38 to the Reply Affidavit, the Corporate Debtor was directed to collect the undated cheques (as per letter dated 14.08.2022) deposited by the Corporate Debtor from Zonal SASTRA.

Thus, there is no gainsaying that the Corporate Debtor failed to honour the OTS or tender the upfront payment.

33.13. It would be further evident that vide letter dated 25.03.2022, annexed at Page 70 to the Rejoinder, the Financial Creditor rejected the entire OTS proposal of the Corporate Debtor for neglecting the payment of upfront settled amount and stated that:

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“Reg.: Your letter dated 23.03.2022 regarding your OTS offer of Rs.37.00 crore.

This has reference to your letter dated 14.07.2021 submitting therewith your compromise offer of Rs.36.00 crore in your account. The said offer of compromise was latter enhanced by you to Rs.37.00 crore payable in 12 months. This offer of compromise was without any upfront amount from your end.

It is to inform that you the said compromise offer of Rs.37.00 crore has not been found acceptable and has been rejected by our competent authority. The same has already been communicated to you vide letter dated 23.03.2022 by our Circle SASTRA Centre, Bardhman.

We again reiterate that your offer of Rs.37.00 crore against total recoverable bank dues of more than Rs.87.00 crore and without depositing upfront amount of 10% is not justified as per our bank's guidelines, hence your letter dated 23.03.2022 does not attract merit to be considered.

The above is for your information please.

Zonal SASTRA Head”

34. Now, coming to the issue regarding the authorization to file the application under Section 7 of the I&B Code, the Learned Senior Counsel, Mr. Saha would argue that the company petition signed by one Mr. Rajnandan Kumar as Assistant General Manager of the PNB authorized to file this application through a general “Power of Attorney” on April 13, 1991, i.e., thirty years prior to the filing this application is not maintainable. Reliance is placed on the decision of the Hon’ble

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NCLAT in ***Palogix Infrastructure (P) Ltd. v. ICICI Bank Ltd.***, reported in **2017 SCC OnLine NCLAT 266** at Para 36 – 38.

*“36. As per Section 7 of the ‘I&B Code’ an application for initiation of ‘Corporate Insolvency Resolution Process’ requires to be filed by ‘Financial Creditor’ itself. The form and manner in which an application under section 7 of the ‘I&B Code’ is to be filed by a ‘Financial Creditor’ is provided in ‘Form-1’ of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the ‘I&B Code’ and the Adjudicating Authority Rules recognize that a ‘Financial Creditor’ being a juristic person can only act through an “Authorised Representative”. Entry 5 8b 6 (Part I) of Form No. 1 mandates the ‘Financial Creditor’ to submit “name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the ‘Financial Creditor’. **Thus, it is clear that only an “authorised person” as distinct from “Power of Attorney Holder” can make an application under section 7 and required to state his position in relation to “Financial Creditor”.**”*

“37. The ‘I&B Code’ is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.’

“38. Therefore, we hold that a ‘Power of Attorney Holder’ is not competent to file an application on behalf of a ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Corporate Applicant’.”

(Emphasis Added)

35. We would note that the view of ***Palogix (Supra)*** has been approved by the Hon’ble Apex Court in ***Rajendra Narottamdas Sheth v.***

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Chandra Prakash Jain, reported in (2022) 5 SCC 600. Thus, the view has been affirmed.

- 36.** However, the Hon'ble NCLAT in **Palogix (Supra)** has held that ***if the officer was authorised to sanction loans and had done so, the application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment.*** But nothing is brought on record to substantiate that the Power of Attorney holder was authorized to sanction the loans and had done to. Hence, the bar that **Palogix (Supra)** notes, squarely comes into play.
- 37.** Further, during the pendency of the matter and after the filing of the reply, no liberty was sought for by the Applicant, to cure the defect, although, by way of reply, the Corporate Debtor has adequately harped on the issue of maintainability.
- 38.** It is trite, axiomatic and settled law that to admit an application under Section 7 of the I& B Code filed by the Financial Creditor triggering the insolvency proceedings in respect of the Corporate Debtor, the Adjudicating Authority is required to check whether there is any "debt" and "default", whether the application is complete, and whether the amount of default crosses the threshold

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financial limit and the application is not barred by limitation. The records herein suggest that the OTS proposal and its enhancement was acknowledged and the post-dated cheques towards upfront payment that was received from the investor of Corporate Debtor, were not encashed by the Creditor.

- 39.** During the course of argument, the Learned Senior Counsel, Mr. Joy Saha appearing on behalf of the Respondent, would assert that under the terms of OTS proposal dated 03.07.2021, the Corporate Debtor had duly made over and submitted four Post-dated Cheques for a sum of Rs. 3.6 Crore. Learned Senior Counsel would further submit that the Corporate Debtor was always ready and willing to make payment of the sum as proposed under the OTS.
- 40.** It is evident that Jaishree Steel Pvt Ltd., the investor of the Corporate Debtor had tendered four cheques bearing nos. 453483 to 453486 drawn on Indian Bank, on 14.08.2021 towards the upfront payment under the OTS, but the PNB refused to encash the same, yet, despite tendering of upfront payment amount by the investor of the Corporate Debtor and inaction on the part of the bank to encash the same, on 23.03.2022, the Bank communicated its rejection of the OTS proposal on the ground that the Corporate Debtor has failed to submit any upfront amount and vide email 24.03.2022 the Financial Creditor requested the Corporate Debtor to take back its undated cheques deposited from Zonal SASTRA Durgapur. Thus, the reason for rejection of OTS proposal on the ground of failure to submit upfront amount as decided in the OTS dated 03.07.2021 is not substantiated.

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- 41.** In the aforesaid backdrop, we are of the view that no case is made out by the Applicant herein (PNB) and accordingly, the Company Petition being **C.P. (IB) No. 118/KB/2021** is **dismissed**. Liberty is however granted to the Applicant to seek other remedies as may be available to it under any other law.
- 42. Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), to whom the company(ies) are registered with, by all available means.
- 43.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 23rd Day of April, 2024.

Bose, R. K. [LRA]