

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH

CP (IB) -1785/I&BP/MB/2017

Under Section 7 of the I&B Code,  
2016

In the matter of

Asset Reconstruction Company  
(India) Ltd.

The Ruby, 10<sup>th</sup> Floor, 29,  
Senapati Bapat Marg,  
Dadar (West),  
Mumbai – 400028.

... Petitioner

Vs.

Surya Treasure Island Pvt. Ltd.

B-701, Poonam Residency,  
Holy X Road,  
IC Colony, Borivali (W),  
Mumbai – 400103.

... Respondent

Order delivered on : 15.06.2018

**Coram:**

Hon'ble Mr. Bhaskara Pantula Mohan, Member (J)

Hon'ble Mr. V. Nallasenapathy, Member (T)

For the Petitioner: Mr. Charles Desouza, Adv.  
a/w Manaswi Agrawal, i/b Verus

For the Respondent: Mr. Ashish Pyasi, Adv.  
a/w Umang Thakar, Ashlesha Raut  
i/b Dhir & Dhir Associates.

*Per V. Nallasenapathy, Member (T)*

**ORDER**

1. Asset Reconstruction Company (India) Limited (ARCIL) acting in its capacity as Trustee of Arcil-SBPS-001-XIV Trust, filed this Petition to

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initiate a corporate insolvency resolution process against Surya Treasure Island Pvt. Ltd. on the ground, that the Corporate Debtor committed default on 31.05.2012 in repayment of the financial debt of ₹38,85,56,017/- as on 22.12.2017 along with further interest.

2. The Petition reveals that the State Bank of Indore, Industrial Finance Branch, Indore sanctioned Term Loan facility to the extent of ₹20 crores on 18.6.2010 and UCO Bank Sanctioned Credit facility to the extent of ₹66 crores on 3.9.2010 to the Corporate Debtor under a consortium arrangement wherein the UCO Bank is the lead Bank. The said Term Loan is for the purpose of part financing development of shopping mall, foot court etc. at Dhillai. Accordingly, on 14.9.2010 a Joint Agreement for Term Loan of ₹86 crores was executed by the Corporate Debtor in favour of UCOTL Consortium. The said Agreement provides that if the Borrower fails to repay the term loan or interest or any portion thereon or commit any breach of any covenant, to be observed or performed on his part and fails to remedy the same forthwith etc. the entire amount payable at the foot of the Term Loan Account with the bank together with interest, cost, charges, expenses, shall forthwith become payable at the option of the said bank. It also provides that the Borrower shall bear all expenses such as stamp duty, lawyer's fees and inspection charges etc.

3. The Corporate Debtor had executed Joint Deed of Hypothecation for ₹86 crores on 14.9.2010 in favour of UCOTL Consortium. Further,



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the said loan of ₹86 crores was guaranteed by one Mr. Mani Kalani, personal guarantor, and by Corporate Guarantors M/s. Entertainment World Developers Ltd. and Treasure World Developers Pvt. Ltd. by execution of separate Deed of Guarantee for ₹86 crores each on 14.9.2010. Further, the Corporate Debtor created mortgage by way of deposit of title deeds creating security interest in favour of the Bank over its immovable property situated at Junwani Durg, Chattisgarh. The said mortgage was registered with Registrar of Companies, by filing Form – 8 on 14.9.2010. On 14.09.2010, UCO Bank and State Bank of India (UCO TL Consortium) entered into an INTER SE AGREEMENT wherein UCO Bank is designated as the lead bank of the UCO TL Consortium and both the parties to the agreement mutually agreed on certain issues regarding the administration of the Term Loan Facility.

4. After merger of State Bank of Indore with State Bank of India, State Bank of India on 5.10.2013 issued SARFAESI notice to the Corporate Debtor stating that the credit facilities have become irregular and the debt has been classified as non-performing asset on 31.5.2012 and calling upon the Corporate Debtor to pay a sum of ₹21,04,61,765/- as on 30.9.2013 with further interest, cost, charges etc. as applicable.

5. By an Assignment Agreement dated 16.10.2014, State Bank of India assigned the Loan payable by the Corporate Debtor in favour of ARCIL. The execution of Assignment Agreement was informed to the





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Corporate Debtor and the guarantors on 01.01.2015 by the assignee ARCIL.

6. At the time of hearing the Petition, the Petitioner tendered the Independent Auditor's Report along with the Audited Balance Sheet of the Corporate Debtor as on 31.03.2017, saying that the same was obtained from the Registrar of Companies, wherein in the Annexure A to the Independent Auditor's Report, it was mentioned as below:

*"...In our opinion and according to the information and explanations given to us, the Company has not defaulted in repayment of dues to any Financial Institution except the following:*

| Period of Default             | Principal Default | Interest Default | Total default Amount | Remarks                                     |
|-------------------------------|-------------------|------------------|----------------------|---|
| SBI Loan Since September 2012 | 14,75,80,350      | 19,61,25,137     | 34,37,05,487         | Refer Note 5(c) of the Financial Statements |
| UCO Loan since January 2013   | 68,71,61,248      | 42,24,05,955     | 1,10,95,67,203       |   |

7. The Petitioner further submits that in view of the admission of the debt and the default in the financial report of the Corporate Debtor as stated above, the same is the best proof of debt and default which satisfies the requirement of the section 7 of the Code.

8. Since there are handful of judicial pronouncements, viz (i) *Bajan singh Samra v. Wimpy International Ltd.*, 185(2011) DLT 428, (ii) *Shreeram Durgaprasad v. Sail Soap Stone Factory & Ors.* 1982, MhLJ

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912, (iii) *J.G. Glass Ltd. v. Indian Bank and Anr. 2002 (104(1)) Bom LR 234*, and (iv) *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, AIR 1962 Cal. 115*, to say that the debt shown in the Balance Sheet of the Corporate Debtor is an acknowledgement of liability, this Bench is of the view that the debt shown in the Balance Sheet of the Corporate Debtor is an ample proof of debt. Here in this case, the auditor of the Corporate Debtor has certified the debt and default in the latest available Balance sheet and this Bench does not require any more proof for the debt and default which is the basic requirement of Section 7 of the code.

9. The Petitioner further submits that the Corporate Debtor was making payments of approximately ₹5,87,097/- per month, such payment would not save the Corporate debtor from Corporate Insolvency Resolution process, as on 31.03.2018 the amount due had grown to ₹40,31,17,778/- and considering the meagre payment of ₹5,87,097/- per month which is grossly insufficient to even service the accruing interest on the outstanding dues, the situation warrants that the Company petition ought to be admitted.

10. The counsel for the Corporate debtor vehemently raised the following objections which are dealt with:

- (a) The Counsel for the Corporate Debtor submits that the report of the Independent Auditor cannot be relied upon, since it has been produced at the time of hearing without any affidavit and the due process of law was not followed in tendering the same. However, this Bench is not in a position to consider the contention of the Corporate Debtor in view of the fact that the Independent Auditor's Report and the Balance Sheets are public documents and the production of the same without an



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affidavit is a hyper technical objection which has to be brushed aside. Further, the Corporate Debtor is not a stranger to the document and the existence of the document is not denied by the Corporate Debtor. Hence, there is every reason to rely upon the said Document by this Bench.

- (b) The Counsel for the Corporate Debtor submits that due to non-production of copies of entries in a Bankers Book in accordance with Bankers Book Evidence Act, 1891, the application is incomplete and has to be rejected. However, the Petitioner submits that the certificate annexed at page no. 525 of the petition which is inadvertently titled as "Certificate under the Information Technology Act, 2000" is really a certificate as per the requirements of section 2(a) of the Bankers Book Evidence Act, 1891. The Petitioner further submits that it is a settled law that the content of a document and not the title of the same which is relevant to determine the nature of the document. The Petitioner further submitted that it is an Asset Reconstruction Company and they are not bound by the Bankers Book Evidence Act, 1891 but however they have enclosed the certificate dated 07.10.2013 issued by the State Bank of India, at the time of assignment, in accordance with Bankers Book Evidence Act, 1891. This Bench is of the view that the Certificate issued by the State Bank of India satisfies the requirements of Form 5 and the objection of the Corporate Debtor that the Petition is incomplete is not sustainable. In view of this the Judgement relied on by the Corporate Debtor in the case of "*Phoenix Arc Private Limited V. Sarbat Cotfab Private Limited*" passed by the Chandigarh Bench of NCLT may not be helpful to it.
- (c) The Counsel for the Corporate Debtor states that the Petitioner has not mentioned the date of disbursement in Para 1 of Part





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iv, of the Form 1, whereas the Counsel for the Petitioner argued that those details will be given at the time of filing claim before the IRP. The Counsel for the Corporate Debtor submits that the date of disbursement is a significant part of the Petition and there would not be any further adjudication of the claim of the Petitioner by the Insolvency Resolution Professional. This submission of the Corporate Debtor cannot be accepted since the Insolvency Resolution Professional/ RP is entitled to verify the claim when filed by the Financial Creditor including the Petitioner and arrive at the claim amount to be admitted by him. Further, the Financial creditor has filed a fresh form after duly serving the same to the Corporate Debtor wherein the date of disbursement of the loan was disclosed. Hence, there cannot be any grievance on this aspect from the side of Corporate Debtor.

- (d) The Corporate Debtor contends that in Part VI item 2 of the Form, the Petitioner has annexed the particulars of the claim instead of the computation of the amount in default showing the amount and days of default in the tabular format. However, ongoing through the annexure I-D as stated to be enclosed in the Petition gives the details of principle due, interest, recovery and the balance and hence the contention of the Corporate Debtor does not hold water.
- (e) Another grievance of the Corporate Debtor is that the calculations provided do not tally with the amount claimed as interest from the date of default. It was further submitted that the interest claimed is not supported with any calculation / workings. The above submissions of the corporate debtor are contradictory to one another and further these kind of calculation mistakes or interest claims or any other factor relating to the quantum of debt can be brought to the

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knowledge of Insolvency Resolution Professional/IRP by the Corporate Debtor who is empowered to admit the claim of the financial Creditor. Hence, on this count the Corporate Debtor is not entitled to stop the initiation of Corporate Insolvency Resolution process.

- (f) The Counsel for the Corporate Debtor submits that even though OA No. 109 of 2014 pending in DRT, Jabalpur is mentioned in the Petition, no order or pleading to substantiate the same is annexed with the Petition. This Bench is of the view that this is a separate proceeding and non-enclosure of documents relating to pending proceeding in DRT will not be taken as if the Petition is incomplete. The Hon'ble NCLAT by an order in CA No. 250/2018 dated 28/05/2018 in the case of "*Kanti Commercial Pvt. Ltd. V. Edelweiss Asset Reconstruction Ltd. & Others*" observed that "*The stand taken by the learned counsel for the Appellant that some documents which were not enclosed cannot be the ground to reject the application.*" Hence, this objection of the Corporate Debtor also fails.
- (g) The Counsel for the Corporate Debtor alleged that the Petitioner has suppressed a very important fact that the Corporate Debtor has been religiously paying an amount of ₹26 lac p.m. out of lease rent received by it pursuant to SARFAESI proceedings initiated by UCO Bank (Lead Bank). In view of the fact that the receipt of ₹5,85,097/- by the Petitioner is reflected in the Statement of Account produced by the Petitioner, from and out of the ₹26 lac received by UCO Bank, this contention of the Petitioner does not merit any consideration.
- (h) The Counsel for the Corporate Debtor submits that in view of the Affidavit filed by UCO Bank in the SARFAESI Proceedings



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before the District Magistrate of Durg, accepting a payment of ₹26 lac p.m. from the Corporate Debtor, the Petitioner herein, who is the Member of the UCO Bank TL Consortium, cannot come up with the present petition, since the undertaking given by the said consortium is binding on the Petitioner. This contention of the Corporate Debtor is untenable in view of the Non Obstante clause under the provisions of Section 238 of the Code. Further, the contention of the Corporate Debtor that the Petitioner who is an Assignee of State Bank of India cannot initiate the present proceedings without the consent of Lead Bank is misconceived and the same cannot be accepted on any logic. The Consortium arrangement can never restrict a member to take legal proceedings in accordance with the law of the land and the Consortium arrangement is only a machinery for smooth administration of funding by various institutions. The contention of the Corporate Debtor that the initiation of CIRP process by the Petitioner / Assignor is in contravention of the Inter se agreement between the UCO Bank and State bank of India does not hold water in view of the fact that there is no specific prohibition for initiating any legal proceedings consequent to the failure of the Corporate Debtor in repaying the loan. The very fact that SARFAESI proceedings were initiated by UCO Bank is an ample evidence of default as provided under explanation to Section 7(1) of the Code. The Corporate Debtor conveniently forgets that a sum of ₹20 crores is financed by the Petitioner and further wrongly contends that for taking legal proceedings against the defaults committed, a No Objection Certificate from the other consortium partner is to be produced.

- (i) The Corporate Debtor further contends that when a payment of approximately ₹5.7 lac p.m. is regularly credited to the

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account of the Petitioner, this petitioner shall keep quiet without making any noise, despite the fact that the due is an enormous amount of about ₹38 crores and a meagre payment of ₹5.7 lac will not be sufficient even to service the interest part of the Loan. The contention of the Corporate Debtor is ridiculous and has to be dismissed in limine without any further consideration.

- (j) The Corporate Debtor further contends that in view of the fact that the Petitioner is receiving the payment of ₹5.7 lac p.m. out of ₹26 lac paid to the consortium and the Petitioner is estopped from taking any legal proceedings and further it cannot be said that there is a default in the repayment of the loan. The mere receipt of a miniscule portion of payment of monies towards the loan after the occurrence of default cannot alter the complexion of the Debt as the default already occurred and the same must disable the Respondent to put forth any defence against the proceedings under Section 7 of the Code. It is not the case of the Corporate Debtor that it had paid the entire default amount to the Financial Creditors. The legal point on the issue of Estoppel is not at all available to the Respondent for the simple reason that the Financial Creditor never had given such an undertaking and even if had been given such an undertaking is not maintainable under law as there cannot be an Estoppel against a person to pursue a legal remedy. This is a case where debt is proved and the default has taken place on the issue of SARFAESI notice. It is to be noted that explanation to Section 7 of the Code provides that a 'default' includes a default in respect of the financial debt owed not only to the Applicant Financial Creditor but to any other creditor of the Corporate Debtor. It is the own admission of the Corporate Debtor that UCO bank has issued SARFAESI notice to the



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Corporate Debtor. Hence, it is a clear admission on the part of the Corporate Debtor that debt and default occurred also in the case of UCO Bank's debt and hence there cannot be any bar for admission of this Petition.

- (k) The contention of the Corporate Debtor that the Petitioner has not even sent a single demand notice does not deserve any consideration in view of the fact that there is no requirement under Section 7 of the Code for sending demand notice to the Corporate Debtor.
- (l) The Corporate Debtor further contends that the loan agreement is not duly stamped in accordance with the provisions of Maharashtra Stamp Act, 1958, therefore the same cannot be acted upon or looked into by this Tribunal, by referring to Section 18 of the Maharashtra Stamp Act, 1958. It is pertinent to note that the Joint Agreement for Term Loan dated 14.09.2010 provides as below "*The Borrower shall bear all expenses such as Solicitors' and Lawyers' Fees, Stamp Duty, Inspection Charges and other incidental Expenses incurred in connection with-----*". In view of the express provision in the agreement, a duty is cast upon the Corporate Debtor to pay the stamp duty and the Corporate Debtor cannot be allowed to take advantage of its own wrong so that it can escape from the clutches of the Code.

11. In view of the above discussion it is clear that the debt is due to State Bank of India initially and now to the Petitioner. Further, the Corporate Debtor has committed default in repaying the debt due.

12. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in repaying the loan availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and



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there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

- I (a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- (II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 15.06.2018 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-



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section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(VI) That this Bench hereby appoints Mr. Ram Ratan Kanoongo, Headway Resolution and Insolvency Services Private Limited, 1006, Raheja Centre, Nariman Point, Mumbai- 400021, Email:- ram@headwayip.com, having Registration No. IBBI/IPA-001/IP-P00070/2017-18/10156 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

10. Accordingly, this Petition is admitted.

11. The Registry is hereby directed to communicate this order to both the parties within seven days from the date order is made available.

Sd/-

V. NALLASENAPATHY  
Member (Technical)

Sd/-

BHASKARA PANTULA MOHAN  
Member (Judicial)