

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP No. 1458/IBC/NCLT/MB/MAH/2017
&
MA No. 1013/2018

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 r.w. Rule 4 of the
Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016

In the matter of

Phoenix ARC Private Limited
..... Financial Creditor

V.

Hotel Horizon Private Limited.
..... Corporate Debtor

Heard on: 19.12.2018
Pronounced on: 29.01.2019

Coram :

Hon'ble M.K. Shrawat, Member (J)

For the Petitioner :

Advocate Charles De Souza a/w Advocate Manashi Agrawal.

For the Respondent :

Sr. Counsel Gaurav Joshi a/w Advocate Ashish Kamat i/b Federal & Rashmikant.

Per: M.K. Shrawat, Member (J)

ORDER

1. The Petitioner/Applicant viz. 'Phoenix ARC Private Limited' (hereinafter as **Financial Creditor**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "**Financial Creditor**" on 29.09.2017 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Hotel Horizon Private Limited' (hereinafter as '**Corporate Debtor**'). The registered address of the Corporate Debtor is stated to be 37, Juhu Beach, Mumbai-400049.
2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount claimed to be in default is stated to be ₹93,86,52,393/- as on 25.09.2017. **The date of default as per Form I is mentioned to be 11.03.2015.**

A) Brief History of the case:

3. The Corporate Debtor herein, approached IDFC Limited (IDFC) in **March 2008**, requesting for certain financial facilities which request was acceded to by IDFC.

Accordingly, IDFC and the Corporate Debtor executed various loan documents pursuant to which IDFC advanced a Term Loan of ₹55,00,00,000/- (**Term Loan I**) to the Respondent. In **November 2009**, the Corporate Debtor sought further financial assistance from IDFC and HDFC Limited (HDFC) and a Rupee Term Loan Agreement was entered for an amount of ₹22,00,00,000/- (**Term Loan II**) by the Corporate Debtor and IDFC dated 20.11.2009. This Term loan was to be repaid in 29 structured, quarterly instalments commencing from 15.07.2012 as per the Amortisation Schedule annexed to the Rupee Term Loan Agreement.

4. Thereafter, the Corporate Debtor sought financial assistance from IDFC, HDFC, and Union Bank of India and a Facility Agreement (**Secured Term Loan Agreement**) dated **24.05.2012** was executed between IDFC, HDFC, Union Bank of India and the Corporate Debtor for advancement of a further amount of ₹46,00,00,000/- to the Corporate Debtor (**Term Loan III**). IDFC also executed an Inter-creditor Agreement dated 24.05.2012 as well as a Security Trustee Agreement dated 24.05.2012 in respect of Term Loan III.

B) Submissions by the Financial Creditor

5. As far as Term Loan I is concerned, it was repaid in entirety by the Corporate Debtor to IDFC and the claim of the Petitioner does not constitute any part of Term Loan I. This is an admitted fact. Term Loan II was secured by a Deed of Mortgage and a Further Charge dated 27.11.2009. Term Loan II is repaid partly to the tune of ₹17,10,20,020/- (out of ₹22,00,00,000/-) and the outstanding amount as claimed by the Petitioner is ₹9,35,15,240/-. Nothing is repaid as far as Term Loan III is concerned and the outstanding amount is ₹84,51,37,153/- (₹46,00,00,000/- being the principal amount @ the interest rate of 3.5% as on 25.09.2017). Hence, Term Loan II and Term Loan III were not repaid as per the agreed terms and conditions. Above said facts can be summarised in the table herein below:

S. No.	Loan Amount	Term Loan I	Term Loan II	Term Loan III
1	Sanctioned Amount (₹)	55,00,00,000/-	22,00,00,000/-	46,00,00,000/-
2	Disbursed Amount (₹)	55,00,00,000/-	22,00,00,000/-	46,00,00,000/-
3	Repaid Amount (₹)	55,00,00,000/-	17,10,20,020/-	NIL
4	Outstanding Amount (₹)	NIL	9,35,15,240/-	84,51,37,153/- (@3.5% interest per annum)
	Total	₹93,86,52,393/-		

6. Thereafter, IDFC assigned all rights, title and interest in the debt owed by the Corporate Debtor to IDFC, in favour of the Petitioner vide an **Assignment Agreement dated 11.09.2014**. Since, the Corporate Debtor failed to repay the outstanding amounts under Term Loan II and Term Loan III, the account of the Corporate Debtor was declared by the Petitioner as a NON – PERFORMING ASSET (NPA) on 11.03.2015.
7. The counsel for the Petitioner submits that a Winding up Notice dated 11.08.2016 was issued by the Petitioner under section 434 of the Companies Act, 1956 seeking certain amounts towards repayment of Term Loan II and Term Loan III. The Corporate Debtor neither raised any dispute whatsoever in response to the Winding up Notice nor repaid the amounts mentioned therein.
8. The petitioner states that Term Loans are secured by various security agreements. A **Demand Promissory Note dated 24.05.2012 for ₹46,00,00,000/-** has also been executed by the Corporate Debtor in favour of IDFC for Term Loan III. Hence, the debt as regards Term Loan III has been duly admitted in view of the above said Promissory Note.
9. The petitioner states that the Petition is well within the limitation period. The date of default in the present case is 11.03.2015 as mentioned in Form I annexed to the petition. Hence the contention of the Respondent that the Debt is time barred, ought to be rejected as the prescribed limitation period in suits for enforcing payment of money secured by a mortgage or otherwise charged upon immovable property is Twelve years from the date when money sued for becomes due as per Article 62 of the Limitation Act, 1963.
10. The Petitioner further submits that the petition is complete in all respects as regards the contention of the Corporate Debtor that the Statement of Accounts annexed to the Petition are false and are not certified under Bankers' Books of Evidence Act. The Petitioner further explains that the statement of accounts for the period prior to the assignment of debt to the Petitioner by IDFC were provided to the Corporate Debtor and the same have been produced at Exhibit 1 to the Affidavit in Reply.
11. As regards the RTGS payment of ₹77,00,00,000/- towards Term Loan I and Term Loan II made by the Corporate Debtor on 09.08.2012, it is submitted that the same has been adjusted towards the full payment of principal, interest, further interest and Liquidated damages due under Term Loan I and PART PAYMENT of principal, interest, further interest and Liquidated damages due under Term Loan II. Hence, the Petitioner contends that the argument of the respondent questioning the assignment of Term Loan II, is wrong in law, ought to be rejected.
12. The Petitioner further contends that despite the account of the Corporate Debtor being declared as an NPA, the constitution of a Joint Lenders' Forum (JLF) by

HDFC and Union Bank of India was bad and invalid in law. There was no agreement as regards the constitution of Joint Lenders' Forum. The petitioner was not bound by any decision taken in Joint Lenders' Meetings in the absence of any such express agreement.

C) Submissions by the Corporate Debtor :

13. The Corporate Debtor has challenged the maintainability of this petition vide Miscellaneous Application No. 1013/2018 and Affidavit in Reply to this petition on the following grounds :

13.1 That the Petition is barred by Limitation: The Counsel for the Corporate Debtor contended during the course of the oral arguments that the Petition is hit by limitation due to the fact that cause of action arose much prior to the filing of this petition and the period of three years as per Article 19 of the Limitation Act, 1963 has expired before the date of filing of this Petition i.e. 29.09.2014. Article 19 of the Limitation Act, 1963 prescribes the limitation period for recovery of money lent to be three years from the date when the loan is given.

13.2 That the petitioner has filed false and incomplete statement of accounts: It is argued that the Statement of Accounts annexed in the petition is not in accordance with Section 4 of the Bankers' Book Evidence Act, 1891, Section 128 of the Companies Act, 2013 or the IBC as the same is not duly certified by the Bank Authorities. Also, the statements are not maintained on the basis of a double entry system. Hence, the petition is defective and liable to be rejected. Moreover, the said account statements start from September 2014 whereas the said Loan accounts were opened much prior to September 2014. The claim of the Petitioner is severely inflated including for loan accounts which were admittedly settled before the loans were assigned to the petitioner by IDFC. The Corporate Debtor contends that ₹77,00,00,000/- has already been paid by RTGS for clearing the dues under Term Loan I and Term Loan II on 09.08.2012. Hence, only Term Loan III is left to be repaid and the assignment of Term Loan II to the Petitioner by IDFC is bad in law. So, it is questioned that in a situation when in respect of Term Loan II part payment had already been made, whether IDFC was justified to assign the balance debt to an assignee i.e. Phoenix ARC.

13.3 Pendency of the JLF: The Corporate Debtor contends that the Petitioner has in breach of the RBI Circulars and directives: (i) obstructed the formation of JLF; (ii) not abided by the majority decisions of the JLF; (iii) not abided by the obligations under the Corrective Action Plan (CAP); (iv) not exited the JLF. It is argued that pending any rectification, restructuring and recovery of out-standings by various entities to banks and financial institutions by the JLF, no proceeding for recovery or

coercive action including proceedings under the IBC can be initiated by any entity which is bound by the RBI circulars/ directives.

13.4 Suppression and/or falsehood of several illegal and wrongful charges claimed in the Petition: It is contended that the Petitioner has failed to disclose the facts in relation to failure of IDFC and subsequently the Petitioner to provide additional financing and backtracking on their commitments to the Respondent and other lenders of the consortium. The Corporate Debtor also contends that the declaration of its account as NPA in itself is a wrongful act.

Findings :

14. On perusal of the arguments of both the sides and the documents and evidences placed on record, this Bench finds it necessary to deal with each issue separately. The primary question which has arose in this case regarding the maintainability of this Petition is whether the debt is time barred and hit by limitation. This contention can be further divided into two sub contentions:
- (i) Whether Limitation Act is applicable in this matter as the Petition is filed on 29.09.2017; and
 - (ii) If the Limitation Act is applicable, whether the debt in this case is time barred or not?

As regards the First sub contention, the issue is now well settled in view of *B.K. Educational Services Private Limited v. Parag Gupta & Associates (2018 SCC Online SC 1921)*, that Section 238A of the IBC is applicable from the commencement of the Code i.e. 01.12.2016 irrespective of the fact that this section has been added in the second amendment to the code on 06.06.2018. Hence, if a claim is hit by limitation, the same will not survive in the light of provisions of Limitation Act, 1963 as well as Section 238A of the IBC. The relevant finding of the Hon'ble Supreme Court is given herein:

"It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application".

14.1 Respectfully following the above precedent, this Bench is of the View that the provisions of Limitation Act do apply while implementing the

provisions of Insolvency Code. So, the outcome of this discussion is that if the facts of the case narrates that twelve years is to apply instead of three years, the applicability of those provisions of the limitation act are to be examined in the light of the facts and circumstances of a particular case.

- 14.2 The second issue which arises is that whether the debt is time barred in the present case in hand. The given petition is to enforce the payment of money secured by a mortgage of immovable property. Hence, as per Article 62 of the Limitation Act, 1963, the limitation period is twelve years from the date when the money sued for becomes due. Here, the Date of Default is 11.03.2015 as per Form I annexed to the petition and the petition is filed on 29.09.2017. In the absence of any specific denial or evidence from the side of the Debtor, it is unreasonable and unjustifiable not to believe the date of default as 11.03.2015. Hence, this Bench is of the view that in either case, i.e. three years or twelve years, this petition is well within limitation and the contention of the respondent that the debt is time barred is rejected.
15. As far as the issue of filing of false and incomplete statements of accounts by the Petitioner is concerned, the Petitioner has rightfully placed reliance on *Standard Chartered Bank & DBS Bank Ltd. V. Ruchi Soya Industries Ltd. (CP No. 1371 & 1372/IBP/NCLT/MAH/2017)* and I am also of the similar view that since the Corporate Debtor's case is that these entries in Bankers Book are not in accordance with the Bankers' Book Evidence Act, it is essential to look into Part V of Form I in respect to Entry 7 of this Part V. In Entry 7, two things are requisite, one is, it must be a copy of entry in a Bankers Book, two, that copy shall be attached with Form No. 1. If we see the definition of "Bankers' Books", statement of account being a record used in the ordinary business of the Bank, it will fall within the definition of Bankers' Book. In Entry No. 7, what is asked to attach is the copy of the Bankers' Book, it has not been asked to file a certified copy as certified under Bankers Book Evidence Act. Therefore, it can't be said that unless a certified copy is filed, it should not be looked into.
16. As discussed in the decision of Hon'ble NCLAT in the matter of *Innoventive Industries Ltd. V. ICICI Bank & Anr, Company Appeal (AT) (Insolvency) No. 1&2 of 2017*, it is held that :

“for initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, 2016, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy –

- (a) Whether a default has occurred;*
- (b) Whether an application is complete; and*
- (c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.*

Once it is satisfied it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application”.

16.1 Therefore, while dealing the admission of Section 7 of IBC petitions, only two points are required adjudication, i.e. whether there is an existence of ascertainable “Debt”, and secondly, whether there is an existence of “Default”.

17. The contention of the Respondent that the petitioner has not complied with the decisions of the JLF is not relevant for deciding a petition u/s 7 of the IBC in view of the Hon’ble NCLAT in the matter of *Innoventive Industries Ltd. V. ICICI Bank & Anr, Company Appeal (AT) (Insolvency) No. 1&2 of 2017*, that :

“the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected”.

17.1 Hence, in the present case, the above mentioned argument of the Corporate Debtor that IDFC or the Petitioner did not agree for the Joint documentation of further loans to be granted to the Corporate debtor by the consortium is all cliché’ for deciding the fate of the present case. A defaulter cannot dictate a term on the creditor to choose its line of action for due security of the debt. The decision of the creditor to form a consortium of lenders or to join a lending forum is a prerogative of the lender which cannot be intervened by the borrower. In this case, it is also important to place on record that at that point of time when this decision was taken by the petitioner/lender, there was no resistance or objection from the side of the Corporate Debtor.

Since as long as there is a 'debt' and a 'default', this Tribunal is inclined to admit the petition

18. Furthermore, it is considered by this Bench that the debt is undisputedly unpaid with regard to Term Loan III in view of the Demand Promissory Note dated 24.05.2012 issued by the Corporate Debtor to the Financial Creditor. The contention of the Corporate Debtor that Term Loan II has been fully repaid is an un-acceptable proposition, thus deserves to be rejected. Moreover, about the assignment of Term Loan III to the Petitioner by IDFC is completely a valid and legal position of facts, hence, the Corporate Debtor is under an obligation to repay the same.
19. On going through the facts and submissions of the petitioner and upon considering the same, it is concluded that the Financial Creditor has established that the loan was duly sanctioned and duly disbursed to the Corporate Debtor but there has been default in payment of Debt on the part of the Corporate Debtor.
20. Considering the above facts, I come to conclusion the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. 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 Debtor.
21. As a consequence, keeping the admitted facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, I am of the conscientious view that this Petition deserves '**Admission**'.
22. Further that, I have also perused the Form – 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
23. Hence, after perusal of the provisions of the Code and facts and circumstances of this case along with the submissions of the petitioner, it is hereby held that this Petition/Application is **Admitted**.
24. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, **Mr. Jayesh Shah**, Juris Corp, 902, Tower 2, India Bulls Finance Centre, Senapati Bapat Marg, Elphinstone Road (West), Mumbai-400013, having registration No. IBBI/IPA-001/IP-P00146/2017-18/10310 is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
25. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of order shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.

However, the supply of essential goods or services to the “Corporate Debtor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

26. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
27. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
28. The Petition is hereby “**Admitted**”. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
29. Ordered Accordingly.

Dated : 29.01.2019

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SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)