

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

CP No. 2285/IBC/NCLT/MB/MAH/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.

Deegee Cotsyn Private Limited.
..... Corporate Debtor

Heard on: 14.02.2019
Pronounced on: 26.02.2019

Coram :

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

For the Petitioner :

Advocate Charles De Souza.

For the Respondent :

Dr. S.K. Jain, Practising Company Secretary.

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 12.06.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Deegee Cotsyn Private Limited' (hereinafter as '**Corporate Debtor**'). The registered address of the Corporate Debtor is stated to be Deegee House, Jaistambh Chowk, Rallies Plot, Amravati, Maharashtra
2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt granted is ₹29,35,79,028/- and the amount claimed to be in default is stated to be ₹28,05,66,577/- as on 31.03.2018. The Corporate Debtor defaulted in repayment of the Financial Facilities on various dates as reflected in the Statement of Accounts , therefore, the loan account of the Corporate Debtor was declared **NPA on 31.12.2014**.

A) Brief History of the case:

3. The Corporate Debtor herein, approached a Consortium of Banks consisting of UCO Bank (Assignor Bank) as the Lead Bank, Union Bank of India, Bank Of India and Canara Bank, requesting for certain financial facilities. The request was acceded to by the Consortium of Banks. Accordingly, UCO Bank Consortium and the Corporate Debtor executed Term Loan Agreement dated 17.11.2007 pursuant to which a Term Loan I (Spinning) of ₹17,00,00,000/- (**Term Loan I**) was advanced to the Respondent. The Term Loan I was renewed vide Sanction Letters dated 15.12.2009, 17.11.2011 and 11.03.2014. The total amount which was disbursed is ₹17,35,79,028/- on different dates in the year 2007 and 2008. Out of the said disbursed amount, the 'Term Loan I' was partly repaid in several instalments between 2007 to 2014. However, an amount of ₹11,71,28,848/- was outstanding as on 31.03.2018.
4. Similarly, 'Term Loan II' and 'Cash Credit' was also granted by the Assignor Bank to the Corporate Debtor. The details of all the loan facilities can be summarised in table given below:

Sr. No.	Loan Facility	Total amount (₹)	Disbursed amount (₹)	Outstanding amount (₹)
1.	Term Loan I (Spinning)	17,00,00,000/-	17,35,79,028/-	11,71,28,848/-
2.	Term Loan II (Power)	10,00,00,000/-	3,50,00,000/-	2,33,90,395/-
3.	Cash Credit (Spinning)	8,50,00,000/-	8,50,00,000/-	14,00,47,334/-
			Total Outstanding Amount	28,05,66,577/-

5. The loan facilities were secured by various security documents viz. personal guarantees, corporate guarantees, hypothecation, mortgage etc. as annexed in the petition. The loan facilities were revised and renewed time and again vide various sanction letters.

B) Submissions by the Financial Creditor

6. The Financial Creditor submits that the Corporate Debtor did not repay the loan as per the terms of sanction. Therefore, the credit limit of the Corporate Debtor was declared as NPA on 31.12.2014. The Financial Creditor issued a **Recall Letter dated**

09.03.2015, whereby, an amount of ₹16,76,35,490/- was called to be paid by the Corporate Debtor in respect of the financial facilities availed from the Financial Creditor.

7. It is further stated that the Statement of Accounts maintained by the UCO Bank (Assignor Bank) have been placed on record to prove that the loan facilities have been sanctioned and duly disbursed as well. There is a default of non-payment on the part of the corporate debtor even after receiving the Recall Letter.
8. Thereafter, the loan was **assigned by the UCO Bank (Assignor Bank) in favour of the Assignee/Financial Creditor (Phoenix ARC Private Limited), vide Assignment Agreement dated 29.06.2015**. The Statement of accounts maintained by the Financial Creditor corroborate with the amount disbursed and are in accordance with the relevant certificates under the Banker's Books Evidence Act, 1891.
9. It is clarified that the Financial Creditor is acting in its capacity as trustee of the Phoenix Trust FY 16-4. Certain guarantees were invoked by the Financial Creditor vide Letter dated 07.03.2017.
10. The Petitioner further submits that the petition is complete in all respects and all the procedural formalities have been complied with. Hence, this Petition/Application may be Admitted for the initiation of the CIRP.

C) Submissions by the Corporate Debtor :

11. The Corporate Debtor has challenged the maintainability of this petition on various grounds. The foremost contention of the Corporate Debtor is that the Financial Creditor is acting in its capacity as Trustee of the Phoenix Trust. However, no documents have been produced on record nor any resolution has been passed to assert or prove the aforesaid fact. Hence, the Financial Creditor is not authorised to file this petition.
12. Various technical objections have been raised by the Corporate Debtor. One of them is that the petition U/s 7 is not supported with an affidavit in Form No. NCLT 6 as per Rule 34 of National Company Law Tribunal Rules, 2016. Also, the Resolution passed at the meeting dated 30.01.2016 is defective, although it mentions the name of the persons who are authorised to represent the Company or trust in any court of law. However, the said resolution does not mention the name of the trust and the signatures of various officials have not been attested in the said resolution. Further, the incorporation documents of the Financial Creditor have not been annexed in the petition.

13. The Corporate Debtor argues that the debt is barred by limitation and there has been neither any acknowledgement of debt nor any part-payment after the date of the loan account becoming NPA on 31.12.2014.
14. The Corporate Debtor disputes the amount claimed by the Financial Creditor. The Corporate Debtor contends that amount claimed by the Financial Creditor is neither in consonance with the sanction letters nor in consonance with the amount claimed in its own Recall Letter dated 09.03.2015. On 31.12.2014, when the account of the Corporate Debtor with UCO Bank became NPA, the total outstanding amount is as follows:

Account No.	Amount shown as outstanding in the statement of UCO Bank (₹)
03830610000359	6,80,88,271/-
03830610000366	1,35,97,090/-
03830500006770	8,25,24,313/-
Total	16,42,09,674/-

15. It is vehemently pleaded by the Corporate Debtor during the course of oral arguments that UCO Bank sold the NPA Accounts to the Financial Creditor for ₹13,90,64,675/- on 30.06.2015 as shown in the Assignment Agreement. An amount of ₹2,51,45,000/- was written off. Thus the amount claimed by the Financial Creditor is way higher than the amount for which the loan accounts were assigned to it.
16. Further, the Corporate Debtor argues that the Financial Creditor has failed to provide the Corporate Debtor, the documents by which the Financial Creditor had taken over the debts from the Assignor Bank
17. It is further argued that the Financial Creditor is guilty of Forum Shopping as certain other proceedings are pending before Debt Recovery Tribunal, Nagpur in respect of the same debt. Also, the amounts were not disbursed by the Consortium Banks as agreed due to which, the Corporate Debtor had to suffer losses. Hence, the Corporate Debtor couldn't repay the loan amounts. Otherwise, the Corporate Debtor is a viable and solvent company.

D) Rebuttal by the Financial Creditor:

18. The Financial Creditor rebuts the argument of the Corporate Debtor that there is no document on record to show that the Financial Creditor is acting in its capacity as Trustee of the Phoenix Trust, by drawing the attention of this Bench towards the Assignment Agreement dated 29.06.2015 wherein the description of the Assignee is

given as Phoenix ARC Private Limited (Acting in its capacity as Trustee of the Phoenix Trust –FY 16-4). Hence, the said contention of the Corporate Debtor ought to be rejected.

19. The Financial Creditor contends that the affidavit verifying the petition has been duly annexed with the petition. As regards the contention of the Corporate Debtor that the Board Resolution dated 30.01.2018 is defective, the Financial Creditor argues that it is not required to pass separate Board Resolutions in respect of each trust and is not invalid on the ground that it does not mention the name of the Phoenix Trust – FY 16-4 or otherwise. It is further contended that the petition is complete in all respects and it is not required to produce incorporation documents or the Trust Deed of the Financial Creditor.
20. It is further argued that the debt is not barred by limitation as the liability to the tune of ₹16,42,09,675/- has been acknowledged by the Corporate Debtor in the Balance Sheet for the year ending on 31.03.2017. Reliance has been placed on *Edelweiss Asset Reconstruction Company Limited V. M/s Birla Cotsyn (India) Limited in CP 579/I&BP/NCLT/MAH/2018, order dated 20.11.2018*, wherein it was held that:
“The balance sheets of 2016-17 reflect the debts due. Therefore, it is logical to assume that the debts falling due in 2012 and reflecting in the balance sheets of 2016-17, would have reflected in the intervening balance sheets also. Hence the ground for limitation as argued by the Corporate Debtor does not survive”.
21. As far as the Ambiguity raised by the Corporate Debtor in the amounts claimed by the Financial Creditor, it is argued that the Statement of accounts maintained by the Assignor Bank reflect the transaction in the accounts of the Corporate Debtor till 31.12.2014. The transactions in the accounts of the Corporate Debtor after 31.12.2014 are reflected in the statement of accounts maintained by the Financial Creditor/Assignee. The Financial creditor contends that there is no discrepancy in the rate of interest charged to the account of the Corporate Debtor and the same is in consonance with the sanction letters as well. Moreover, the quantum of the debt is to be decided by the Resolution Professional and it is not required to be exactly decided while disposing off the petition, in view of the Order dated 15.02.2018 by NCLT, Chandigarh Bench in CP (IB) No. 123/Chd/CHD/2017 in the matter of *Phoenix ARC Private Limited V. Sarbat Cotfab Private Limited*. The relevant portion of the aforesaid order has been reproduced below:

“I do not think that this aspect should detain the Adjudicating Authority for an elaborate discussion as the role of Adjudicating Authority is only to ascertain the existence of a default and not the exact amount. In case of admission of the petition and consequent appointment of the

*Insolvency Resolution professional (IRP), the Financial Creditor has necessarily to file the claim which the IRP is to verify and the IRP or RP, as the case may be, shall look into this aspect as to whether interest is being charged contrary to the principles laid down by the Hon'ble Supreme Court in the **Central Bank of India case (Supra)** and to determine the exact amount as per the binding law laid down by the Apex Court."*

22. The Financial Creditor, in order to rebut the contention of the Corporate Debtor that the Corporate Debtor has not been provided with the relevant documents, contends that the documents by which the debt has been assigned to the Financial Creditor have been made a part of the Original Application No. 198 of 2017 filed on 30.03.2017 before the Debts Recovery Tribunal, Nagpur and a copy of the said application has been duly served upon the Corporate Debtor.
23. Furthermore, it is contended that the Financial Creditor is not guilty of Forum Shopping because of the fact that the pendency of the proceedings before the Debt Recovery Tribunal, Nagpur does not preclude the Financial Creditor from filing the Company Petition in hand. The grievance of the Corporate Debtor that the Financial Creditor failed to disburse the amounts as agreed was never raised earlier at any point of time and is thus unsustainable.

E) Findings:

24. On going through the submissions made by the Learned counsels of both the sides and on perusal of documents placed on record, it is necessary to deal with all the contentions as hereunder. The Corporate Debtor's foremost contention, that the documents to prove that the Financial Creditor is acting in its capacity as a trustee of the Phoenix Trust have not been placed on record, is rejected as the Assignment Agreement itself is evident of this fact and the same has not been challenged by the Corporate Debtor. Hence, no further proof is required to be submitted in this regard. Also, as per section 5(7) of IBC, **Financial Creditor** means any person to whom a financial debt is owed and includes a person to whom such a debt is legally assigned or transferred. The Assignment Agreement dated 29.06.2015 legally assigns the impugned debt to Phoenix ARC Pvt. Ltd. as trustee of Phoenix Trust. Therefore, Phoenix ARC is a Financial Creditor in the meaning of section 5(7) and hence this contention of the Corporate Debtor is unsustainable.
25. As far as the technical objections raised with respect to the petition in hand are concerned, the same have been duly dealt with by the Financial Creditor. Affidavit has been provided in support of the petition and the Board resolution is perfectly legal and valid. Therefore the objections raised are merely cliché' objections in deciding

the fate of the present petition keeping in view the 'debt' and the 'default' which has occurred.

26. The dispute raised by the Corporate Debtor with respect to the debt amount is also not maintainable because the amount claimed corroborates with the Statement of Accounts of the Financial Creditor as on 31.03.2018 and the Statement of Accounts of the Assignor Bank as on 31.12.2014. Otherwise also, after the judgement of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Ors. V. Union of India & Ors.* [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition. Furthermore, placing reliance on the judgement of NCLT Chandigarh in *Phoenix ARC Private Limited V. Sarbat Cotfab Private Limited (supra)*, if any discrepancy has to be raised by the Corporate Debtor with respect to the amount claimed, the same has to be raised before the Resolution Professional (RP) or the Interim Resolution professional (IRP), as the case may be. The Adjudicating authority is not bound to decide the amount of default at the stage of admission. Moreover, the fact that the Financial Creditor did not abide by the terms of Sanction letters in granting the loan or charging of interest, is not relevant in deciding this petition.
27. I am of the view that the Petition is not barred by limitation as 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. Even if the limitation is to be taken three years from the date when the cause of action arose, then also the Corporate Debtor's Balance Sheet as on 31.03.2017 acknowledge the amount payable to the Financial Creditor. Hence, in view of Section 18 of the Limitation act, 1963, the limitation stands extended.
28. The argument of the Corporate Debtor, that the amount claimed by the Financial Creditor is higher than the amount for which the loan accounts were assigned to it, is clearly vague and inadmissible, as the same is a matter of understanding between the Assignor and Assignee. The Financial Creditor's act of taking over the loan at a reduced rate cannot be questioned as there is an element of risk involved in recovering the debt assigned. The Corporate Debtor is not a privy to the Assignment Agreement and therefore has to restrict its contentions to the debt owed by itself to the Financial Creditor.
29. The Financial Creditor is not guilty of Forum Shopping as the pendency of DRT proceedings is no bar to the present proceedings in view of Section 238 of the IBC

which says that the IBC has an overriding effect to the other acts. Hence, this contention of the Corporate Debtor also stands rejected.

30. As discussed in the judgement of the Hon'ble Supreme Court in the matter of *Innoventive Industries Limited V. ICICI Bank & Anr.*[(2018) 1 SCC 407], wherein *inter alia* it was held that the provisions of Section 7 become applicable as soon as a financial debt is established and there is an existence of default. The Hon'ble court has expressed that the moment the Adjudicating Authority is satisfied that a default in repayment of debt had occurred, the process of insolvency is to be triggered, unless the application is incomplete.
31. 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".
32. 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.
33. 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.
34. 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**'.
35. 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.
36. 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**.
37. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, **Mr. Hasti Mal Kachhara**, A-602, Nirman Apartments, Pump House, Vikas Nagar, Andheri East, Mumbai-400093, having registration No. IBBI/IPA-002/IP-N00342/2017-18/10992 is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
38. 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.

39. 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.
40. 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.
41. The Petition is hereby **“Admitted”**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
42. Ordered Accordingly.

Dated : 26.02.2019

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Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)