

BEFORE THE NATIONAL COMPANY TRIBUNAL, MUMBAI BENCH, MUMBAI

T.C.P. NO.1059/I&BP/NCLT/MB/MAH/2017

CORAM:

SHRI M. K. SHRAWAT
MEMBER (JUDICIAL)

APPLICATION BY CORPORATE APPLICANT TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

M/s Schweitzer Systemtek India Private Limited,
104, Autumn Grove, Lokhandwala Township,
Akurli Road, Kandivli E, Mumbai-400 101.

APPLICANT/DEBTOR

VERSUS

Phoenix ARC Private Limited,
Having its Registered Office, at Dani Corporate
Park, 7th Floor, 158, C.S.T. Road, Kalina,
Santacruz (East), Mumbai.

... **RESPONDENT/CREDITOR**

PRESENT ON BEHALF OF THE PARTIES:

FOR THE PETITIONER

PCS on behalf of Prashant Diwan for Applicant/Debtor present.

FOR THE RESPONDENT

Advocate Charles De Souza along with Advocate Manaswi Agarwal instructed by VERUS for Respondent/Creditor.

ORDER

Heard on : 30.06.2017

Pronounced on: 03.07.2017

1. This Petition is filed on 5th June 2010 invoking the provisions of **Section 10 of Insolvency and Bankruptcy Code, 2016** (hereinafter The Code) by a "Corporate Debtor". This Application is filed by the Debtor to initiate Corporate Insolvency Resolution Process against itself.

2. **FACTS :-** Facts in brief are that the Corporate Debtor raised the total debt from Two Banks namely Dhanlaxmi Bank and Standard Chartered Bank respectively of ₹ 4,54,61,524/- and ₹ 14,48,504/-. Dhanlaxmi Bank had sanctioned the Loan on 19.12.2011 and the Standard Chartered Bank had sanctioned the Loan on 17.04.2012. Thereafter, Dhanlaxmi Bank had assigned and transferred the impugned debt to M/s.

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Phoenix ARC Pvt. Ltd., presently contesting and opposing the impugned Application filed by the Corporate Debtor (Petitioner) under Section 10 The Code. This Application is moved so as to initiate Corporate Insolvency Resolution Process so that under the provisions of **Section 14 of The Code the process of "Moratorium" may commence.**

3. The documents annexed with the impugned Application have demonstrated that an "Assignment Agreement" was executed between Dhanlaxmi Bank Limited (Assignor) and M/s. Phoenix ARC Pvt. Ltd. (Assignee) dated 28.03.2014 through which the "Assignor" had assigned the total outstanding debt to the "Assignee". The Assignee is a Company incorporated under the Companies Act and registered as a Securitization and Asset Reconstruction Company pursuant to Section 3 of SARFAESI Act. Initially the personal properties were mortgaged to Dhanlaxmi Bank Limited and on modification of charge those properties stood mortgaged with "Assignee" detailed as under :-

- (a) *Residential flat admeasuring about 224 sq. ft. carpet area bearing Flat No. 107 on the 1st floor in the building known as Autumn Grove situated at Plot No. H-D5 of Sector III, Lokhandwala Township, Akurli Road, Kandivali (East), Mumbai.*
- (b) *Residential flat admeasuring about 224 sq. ft. carpet area bearing Flat No. 104 on the 1st floor in the building known as Autumn Grove situated at Plot No. H-D5 of Sector III, Lokhandwala Township, Akurli Road, Kandivali (East), Mumbai.*
- (c) *Residential flat admeasuring about 1165 sq. ft. carpet area bearing Flat No. 904, C Wing on the 9th floor in the building known as "Whispering Palms Building No. 3 Cooperative Housing Society Limited" situated at Lokhandwala Complex, Akurli Road, Kandivali (East), Mumbai.*

4. **ARGUMENTS :-** From the side of the Applicant/Debtor Learned Representative has pleaded that vide an Order of the Debt Recovery Tribunal (Securitisation Application No. 2015/2017) on an Application by one Dr. Suresh G. Vijan (I.A. No. 813/2017) Order dated 7th June, 2017 the said Application of the Tenant was rejected . As a result an Order of the Chief Metropolitan Magistrate, Esplanade, Mumbai (Case No. 384/SA/2014) dated 11.04.2007 shall come into operation through which a Court Commissioner is appointed to take over the possession of the secured assets bearing Flat Nos. 104 and 107, 1st Floor Autumn Grove, Kandivali (East), Mumbai. **She has further pleaded that once the Application under section 10 is "Admitted" then till Insolvency Process is completed the "Moratorium" shall commence prohibiting the taking**

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over of the possession. In support of "Admission" of the Application reliance is placed on the following decisions of the NCLT Benches as under :-

- (a) *M/s. Raman Ispat Pvt. Ltd. in C.P. (IB) No.23/Ald/2017 u/s 10 of the Insolvency and Bankruptcy Code, 2016 Read With Rule 7 of the Insolvency And Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Order dated 11.04.2017 of NCLT Allahabad Bench.*
- (b) *Dunn Foods Private Limited, Plot No. 469, Industrial Area, Phase VIII-B, Mohali (Punjab) in CP (IB) No. 16/Chd/Pb/2017/2017, u/s 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and u/s 13 and 14 of the Code, Order dated 02.05.2017 of NCLT Chandigarh Bench.*

5. From the side of the Creditor Learned Counsel appeared and vehemently pleaded that this is an attempt to thwart the action taken so far for recovery of the outstanding debt. According to him the Applicant has moved this forum with malafide intention, although the default of non-payment has already been established. He therefore pleaded that the Application deserves to be dismissed. In support placed reliance on the following decisions of NCLT Benches.

- (a) *Antrix Diamond Exports Pvt. Ltd. 407, Pancharatna, Opera House, Mumbai-400 004 in CP No. 1104/I&BP/NCLT/MAH/2017, u/s 10 of the Insolvency and Bankruptcy Code, 2016 Order dated 20th June, 2017, by NCLT Mumbai Bench.*
- (b) *Leo Duct Engineers & Consultants Ltd. in CP No. 1103/I&BP/NCLT/MAH/2017, u/s 10 of the Insolvency and Bankruptcy Code, 2016 Order dated 22nd June 2017, by NCLT Mumbai Bench.*
- (c) *Unigreen Global Private Limited in CP No. IB-39(PB)/2017, u/s 10 of the Insolvency and Bankruptcy Code, 2016 Order dated 08.05.2017, by Principal Bench, NCLT New Delhi.*

6. **FINDINGS :-** Heard the rival contentions at some length. At this preliminary stage on the question of "Admission" an exhaustive order is not obligatory, discussing comprehensive details of debt in question, contents of Agreements, Terms and Conditions agreed upon etc. thus needs no elaborate discussion. Prima facie it is required to examine the basic facts only to ascertain whether the Application under consideration deserves "Admission" within the parameters of Section 10 of I&BP Code. For ready reference Section 10 of The Code is reproduced hereinbelow :-

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" 10. Initiation of corporate insolvency resolution process by corporate applicant :

- (1) *Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.*
- (2) *The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.*
- (3) *The corporate applicant shall, along with the application furnish the information relating to –*
 - (a) *its books of account and such other documents relating to such period as may be specified; and*
 - (b) *the resolution professional proposed to be appointed as an interim resolution professional.*
- (4) *The Adjudicating Authority shall, within a period of fourteen days of the receipt of the applicant, by an order –*
 - (a) *admit the application, if it is complete ; or*
 - (b) *reject the application, if it is incomplete :*

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

- (5) *The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section. " (emphasis supplied)*

7. One of the condition as laid down in Section 10 is to furnish requisite information as appearing in the Books of Accounts of the Corporate Debtor. Therefore, The Application contains the Balance Sheet along with Profit/Loss Account drawn as on 31st March, 2017. A question has been raised that under which head of the accounts the impugned debt amount is reflected in the balance sheet for the financial year 2016-17.

On one hand the details of Credit facility availed and the defaulted amount as per the Annexure was as under :-

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Schweitzer System India Pvt. Ltd.

104, Autumn Grove, Lokhandwala Township, Akurli Road, Kandivali (E), Mumbai.

Details of Credit Facilities Availled and Default Amount

Bank Name (Sanctioned) : Dhanlaxmi Bank Limited, Branch Borivali					
Name of ARC who has taken over the default debt : Phoenix ARC Pvt. Ltd., 7 th Floor, Dani Coporate Park, 158, CST Road, Kalina, Santacruz (East), Mumbai-400 098.					
Sr. No.	Particulars	Total Debt Raised Amount in Rs	Date of debt	Amount Defaulted Amount Rs.	Date of debt Default
1.	Cash Credit	3,50,00,000.00	19.12.2011	4,31,63,742.35	31.01.2013
2.	Bank Guarantee	1,50,00,000.00	19.12.2011	22,97,782.00	31.01.2013
	Total :	5,00,00,000.00		4,54,61,524.35	

Bank Name Standard Chartered Bank					
Address : 23/25, M.G. Road, Fort, Mumbai-400 001.					
Sr. No.	Particulars	Total Debt Raised Amount in Rs	Date of debt sanctioned	Amount Defaulted Amount Rs.	Date of debt Default
1	Unsecured Loan	30,00,000.00	17.04.2012	14,48,504.26	06.09.2014
	Total :	30,00,000.00		14,48,504.26	

7.1 But on the other hand towards Liability side of the Balance Sheet as on 31st March, 2017 the heads under which the Loans reflected are as under :-

Liabilities		As on 31-March-2017
Loans (Liabilities)		8,59,20,922.61
BANK OD A/c	4,31,63,742.35	
Unsecured Loans From Directors	40,10,894.00	
Loans from Financial Institution	14,48,504.26	
Bank Guarantee A/c Dhanlaxmi Bank	22,97,782.00	
Imperial Multi Ventures Pvt. Ltd.	3,50,00,000.00	
Current Liabilities		3,76,92,089.73
Duties & Taxes	26,48,547.75	
Provisions	12,69,455.77	
Sundry Creditors	3,37,74,086.21	

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7.2 The query raised from the side of the Bench remained unsatisfied that under which head of Liabilities the impugned liability was reflected by the Debtor Company. The Annexures have demonstrated that there was a Cash Credit Facility along with a Bank Guarantee Facility of Loan from Dhanlaxmi Bank Limited. The other type of liability from Standard Chartered Bank is under the title "Unsecured Loan". The Balance Sheet of the Corporate Debtor do not contain the impugned heads of liability. This fact is yet to be ascertained. For this reason it is appropriate to appoint a Professional to stream line the position of the debt, which can be done only after due examination of the Books of Accounts of the Debtor. This is the **first reason** due to which this Bench is of the opinion that the Application under Section 10 of the I&BP Code deserves "Admission".

7.3 On examination of the Balance Sheet it is further noticed that there are Sundry Creditors amounting to ₹ 3,37,74,086/-. The fate of these Sundry Creditors is not known at present. There is no evidence on record to indicate that how the interest of the Sundry Creditors has been safe guarded. This aspect can be examined by the Professional to be appointed on "Admission" of this Application. This is the **Second reason** to allow "Admission of this Application".

7.4 On examination of the Balance Sheet a huge contrast is apparent. On left hand side of the Balance Sheet the liability is stated to be approximately ₹ 5,30,00,000/-, but on the right hand side the Fixed Assets, FDRs, Bank Guarantee are significantly insufficient. The Insolvency Professional thus can iron out all these creases. The details of Reserves and Surplus need due examination. The possibility of recovery from Sundry Debtor is also to be explored. Both these figures, i.e. Reserves as also Sundry Debtor, are substantial in nature which require due consideration hence this is the **third reason** to allow "Admission" of this Application.

7.5 A Profit and Loss Account as on 31st March, 2017 has also been annexed reflecting total Sales of the **Financial Year 2016-17 was to the tune of ₹ 7,68,66,346/-**. Although a 'Loss' has been reflected in P & L A/c but it is very natural to examine the correctness of the loss so claimed. The Professional, if allowed to proceed, shall look into the profitability of the Company so that if possible the Company may come out of the clutches of Insolvency, so that the interest of the Stake Holders can also be protected. This is the **fourth reason** to allow "Admission".

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8. **The "Admission" as discussed hereinabove is subject to a rider or a qualification imposed hereinbelow.** This Code of 2016 has prescribed certain limitations which are inbuilt and must not be overlooked. The 'Moratorium' indeed is an effective tool, sometimes being used by the Corporate Debtor to thwart or frustrate the Recovery Proceedings, as happened in this Case. The Learned Chief Metropolitan Magistrate vide Order (supra) dated 11.04.2017 has appointed a Court Commissioner to take over the possession of the flats. **The admitted position is that the Flats in question are not under the Ownership of the Corporate Debtor.** A question in this regard was raised during the hearing however not disputed by the either side. Even in the balance sheet of the Corporate Debtor these flats are not reflected. It is further evidenced that the documents annexed have clearly demonstrated that the **personal properties of the Promoters have been given as a "Security" to the Banks.** Now the question is that whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium ?. To examine this aspect it is useful to reproduce verbatim the provisions of **Section 14 of The Code** as under :-

Section 14. Moratorium

(1) *Subject to provisions of sub-sections (2) and (3) , on the insolvency commencement date, the Adjudicating Authority shall by order **declare moratorium for prohibiting** all of the following namely :-*

(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 (54 of 2002) ;*

(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.

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8.1 On careful reading I have noticed that the term **"its"** is significant. The plain language of the Section is that on the commencement of the Insolvency process the 'Moratorium' shall be declared for **prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of "its" property.** Relevant section which needs in-depth examination is Section 14 (1) (c) of The Code.

There are recognised canons of interpretation. Language of the Statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. **Rather in this Section the language is so simple that there is no scope even to supply 'casus omissus'. I hasten to add that the doctrine of 'Noscitur a Sociis' is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted .** As a result, "its" denotes the property owned by the Corporate Debtor. **The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium.** Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that Section 10(3) has specified that the Corporate Applicant shall furnish "its" Books of Accounts. This Bench has no legislative authority to expand the meaning of the term "its" even under the umbrella of '**Ejusdem generis**'.

8.2 The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding debt, which is not the subject matter of this Bench. **Before I part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.**

9. To conclude the Application under Section 10 of The Code is hereby "Admitted" subject to the exception as carved out supra. The consequential directions shall be that

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the provisions of Section 14 of The Code i.e. "Moratorium" shall come into operation. Next, the proposed name of Interim Resolution Professional i.e. (Page 4 name) is hereby approved. The IRP shall take appropriate action such as Public Announcement etc. so that the Insolvency Resolution Process shall be initiated expeditiously. He is directed to submit a Progress Report within one month's time from the commencement of Insolvency Resolution Process.

10. Having "Admitted" the Application, hereby pronounce the commencement of the Corporate Insolvency Resolution Process effective from the date of this Order.

Date : 03.07.2017

Sd/-
M.K. SHRAWAT
Member (Judicial)