

**NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
(COURT-II)**

IA No. 660 of 2020

IN

CP (IB) 574 of 2018

(Under the Insolvency & Bankruptcy Code, 2016 read with Rule 11 and Rule 48 of the National Company Law Tribunal Rules, 2016)

In the Matter of:

Raj Radhe Finance Limited

...Applicant

Versus

1. Shree Shrinathji Spintex Private Limited

**...Corporate Debtor/
Respondent-1**

2. Bank of Baroda

**...Original Applicant/
Financial Creditor/
Respondent-2**

And In the Matter of:

Bank of Baroda

...Financial Creditor

Versus

Shrinathji Spintex Pvt. Ltd.

...Corporate Debtor

Order Pronounced on: 10/10/2022

Coram:

**DR. DEEPTI MUKESH,
HON'BLE MEMBER (JUDICIAL)
AJAI DAS MEHROTRA,
HON'BLE MEMBER (TECHNICAL)**

MEMO OF PARTIES

IA No. 660 of 2020

Raj Radhe Finance Limited,

(Assignee of Original Applicant – Bank of Baroda (erstwhile Dena Bank))

having its registered office at:

302, Shaswat Complex, Opp. Gujarat College,

Ellisbridge, Ahmedabad-380 006.

(Through its Authorised Signatory Mr. Meet Shah)

...Applicant

Versus

1. Shree Shrinathji Spintex Private Limited,

Having its registered office at:

Gundala Road, Survey No. 461,

Near Khedut Solvant,

Behind Gujarat Ginning,

Gondal, Rajkot-360311.

...Corporate Debtor/

Respondent-1

2. Bank of Baroda,

(Erstwhile Dena Bank),

Having its Head Office at:

Baroda Bhavan, RC Dutt Road,

Alkapuri, Baroda – 390007.

And one of the Branch Office
known as "Gondal Branch" at:
Bhagwat Bazar, Gondal, Rajkot-360311.

**...Original Applicant/
Financial Creditor/
Respondent-2**

Present:

For the Applicant: Mr. Navin Pahwa, Sr. Adv. a.w. Mr. Raju Kothari, Adv., Ms. Abhineeta Chaturvedi Adv.
For the Respondent: Mr. Arjun Sheth, Adv.

ORDER

1. The instant Application is filed on 28.09.2020 by Raj Radhe Finance Limited, (Assignee of Original Applicant – Bank of Baroda (erstwhile Dena Bank)) (for brevity ‘Applicant’), through authorized signatory Mr. Meet Shah, under the Insolvency & Bankruptcy Code, 2016 read with Rule 11 and Rule 48 of the National Company Law Tribunal Rules, 2016 with following prayers as amended:

- a) To Restore the CP(IB) No. 574 of 2018.
- b) To award cost in favor of the Applicant.
- c) To pass such other and further orders as this Hon’ble Tribunal deems

fit and proper in facts and circumstances of the present case.

2. The applicant Raj Radhe Finance Limited is a company incorporated under the provisions of the Companies Act, 1956, registered as a non-banking finance company (NBFC) and having its registered office at: 302, Shaswat Complex, Opp. Gujarat College, Ellisbridge, Ahmedabad-380 006.

3. Brief facts of the case are as under:

i. The original Financial Creditor/Respondent No-2-Bank of Baroda (erstwhile Dena Bank) filed an application under section 7 of IB Code against the corporate debtor original respondent No.-1- Shrinathji Spintex Private Limited for initiation of CIRP.

ii. During the pendency of the said main IB application, the respondent No.2 Bank of Baroda assigned debt of the Respondent No. 1, along with underlying security, to the applicant vide assignment agreement on 30.09.2019 registered with the Sub-Registrar Gondal on 19.10.2019 at serial No. 7135. As per the assignment agreement the respondent-2(assignor Bank of Baroda) assigned in favour of the assignee all rights, title and interest in the financing documents, all agreements, deeds and documents related thereto and all collateral and underlying security interest and/or pledges created to secure and/or guarantees issued in respect of repayment of the loans which the assignee is entitled to. Copy of the said assignment agreement is annexed with the application.

iii. As recorded in the order dated 03.08.2020, in IA 779 of 2020 that

“The respondent/original petitioner has already assigned his debt, to that effect he has filed a pursis. However, as a last chance, the matter is adjourned.

Meanwhile, the Applicant is directed to inform the respondent along with copy of order of CP(IB) 574/2018.

List the matter on 25.08.2020.”

4. As per the order dated 25.08.2020, CP(IB) 574 of 2018 was dismissed by this adjudicating authority for non-prosecution, as a consequence the pending IAs also got dismissed. The applicant being an assignee of the debt has filed this application for restoration of the main CP(IB) 574 of 2018, filed by the Bank of Baroda u/s 7 of the Code.
5. Respondent No. 1 filed its reply and raised the objection and submitted as follows:
 - a. The present application seeking restoration has not been filed by the Bank of Baroda, but has been filed by a third party and hence it has no locus in filing this application seeking restoration of the main CP(IB) no. 574 of 2018.
 - b. That the present application is not maintainable, on the ground that this Adjudicating Authority does not have the power to recall its order.
 - c. That from the purported assignment agreement dated 30.09.2019, it can be seen that the account of the corporate debtor with Bank of Baroda(‘BOB’) has not been assigned to the applicant and the same becomes clear while perusing the list of the borrowers in the

schedule 1 of the said assignment agreement wherein the name of the corporate debtor is not included. It is further submitted that Adjudicating Authority had given multiple opportunities to the applicant even after the debt was assigned to it by the original financial creditor (BOB)/respondent-2 to prosecute the application. Vide order dated 03.08.2020, Registry was directed to issue notice to the original applicant (Bank of Baroda) and observed that in the event of non-appearance or no representation from Bank of Baroda, an appropriate order shall be passed, and vide order dated 25.08.2020, Adjudicating authority dismissed the application due to non-prosecution by the Bank of Baroda.

6. Respondent No. 1 further submitted that the applicant is entitled to file a fresh IB application, and need not seek restoration of the old IB application.
7. Respondent No.1 also relied upon the judgment passed by the Hon'ble Supreme Court in J. Samuel and others Vs. Gattu Mahesh and others (Civil Appeal No. 561 of 2012) decided on January 16, 2012, wherein the following observation is made

“21. In the given facts, there is a clear lack of "due diligence" and the mistake committed certainly does not come within the preview of a typographical error. The term "typographical error" is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to

perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.”

8. The applicant has filed an affidavit in rejoinder to deal with reply filed by respondent No.1 and followed the direction of Adjudicating Authority vide order dated 27.04.2022 and submitted that the Bank of Baroda has granted Cash Credit Facility and Term Loan to the corporate debtor. Against the said loan, raw materials, goods-in-process, finished goods, plant and machineries, tools, and accessories, etc. were hypothecated vide the Hypothecation Agreement dated 03-06-2011 by the Corporate Debtor. The Corporate Debtor has mortgaged the immovable property to the Applicant, the details of which is mentioned in the proceedings of C.P. (IB) No. 574 of 2018.

9. The Applicant had produced the documents relating to the aforesaid facilities:
 - (a) Resolution dated 02-05-2011.
 - (b) Demand Promissory Note dated 03-06-2011.
 - (c) Letter of Continuity dated 03-06-2011.
 - (d) Hypothecation Agreement dated 03-06-2011.
 - (e) Letter of General Lien and Set-off dated 03-06 2011.
 - (f) Foreign Bill Form dated 03-06-201.
 - (g) General Undertaking dated 03-06-2011.
 - (h) Registered Instrument relating to Deposit of Title Deeds dated 06-06-2011.

- (i) Registered Deed of Rectification dated 14-06 2011.
- (j) Registered Instrument relating to Deposit of Title Deeds dated 28-03-2013.
- (k) Letter of Acknowledgement dated 26-03-2013.
- (l) Sanction Letter dated 15-10-2014.

10. The applicant submits that Bank of Baroda (erstwhile Dena Bank), the assignor, as the original Financial Creditor, had assigned entire debt of the Corporate Debtor along with underlying securities and the name of the corporate debtor reflected as the borrower to the financial debt covered by the Deed of assignment. Further stated that deed of assignment read with schedules shows that Bank of Baroda was a financial creditor for the present corporate debtor/respondent no. 1. A correction is made to the assignment deed by document dated 30.03.2021, wherein, the name of the corporate debtor reflects as the borrower of the financial debt covered under the deed of assignment. The copy of the corrected deed of assignment is also annexed. The corporate debtor is fully aware of the assignment of debt made by the Bank of Baroda in favor of the applicant. On these grounds, the application is maintainable.

11. The liberty was granted to both parties to file written submissions within a week. The applicant filed the written submission on 27.09.2022 and reiterated those contentions which are raised in the application. Corporate debtor/respondent no. 1 filed its written submission on 04.10.2022 reiterated same objections as raised in the reply.

12. Heard submissions and perused the documents placed on record. It is seen that till date respondent no. 2 (Bank of Baroda) has not filed a reply. It is seen from the records that during the pendency of main application CP(IB) 574/2018, through the registered assignment agreement dated 30.09.2019, respondent no. 2 had assigned certain debts to the applicant herein. The issues to be decided herein are:

1. *Whether the debt due to respondent no. 2 from respondent no. 1 corporate debtor had also been assigned to the applicant vide assignment dated 30.09.2019?*
2. *Whether the name of the applicant was substituted in the main CP(IB) 574 of 2018 during its pendency?*
3. *Whether this application is maintainable under rule 48 of the National Company Law Tribunal Rules, 2016?*

Issue No. 1- Whether the debt due to respondent no. 2 from respondent no. 1 corporate debtor had also been assigned to the applicant vide assignment dated 30.09.2019?

It is necessary to peruse & understand few terms defined under the assignment agreement dated 30.09.2019:

*“1.1.(c) **Borrower** means person(s) to whom a Financial Assistance has been extended by the Assignor under any of the Financing Documents as listed in Schedule 1 and includes any person who has created any security interest and/or pledge to secure, including but not limited to mortgage of immovable properties as collateral securities and/or a guarantee in respect of the repayment of any Financial Assistance granted by the Assignor to a Borrower.*

*1.1(i) **Financing Documents** means all the agreements, deeds and/or documents, executed in favour of the Assignor and / or entered into between the Assignor and any Borrower and/or any third parties, inter alia setting out the terms and conditions on which the Assignor has agreed to provide Financial Assistance to such Borrower, including any writings creating/evidencing a Security Interest, pledge and / or guarantee in favour of the Assignor and any undertakings by any Person, on the basis of which the Assignor disbursed or made available such Financial Assistance, a list of which agreements, deeds and/or documents is more particularly set out in Schedule 1 annexed hereto. The description of the movable/ immovable properties over which Security Interests have been created in favour of the Assignors is also as set out in Schedule 1 annexed hereto.*

*1.1(j) **Loans** means the aggregate of all Amounts Due and all other monies whatsoever stipulated in or payable, under the Financing Documents, by the Borrowers to the Assignor, including but not limited to past overdues, future payments, interest charges for delayed payments, indemnities and damages or other charges and/or all other monies, if any, to be received by the Assignor under the Financing Documents, including the proceeds of any enforcement of the Financing Documents or any Security Interests and/or pledge, created by any Borrower to secure the repayment of the Financial Assistance under the Financing Documents and/or any guarantee issued in relation thereto.*

Provided that it is hereby clarified that Amounts Due and all other monies stipulated in or payable, under the Financing Documents shall not include any undisbursed commitment by the Assignor to any of the Borrowers under the Financing Documents.

Provided further that any amount actually paid by the Borrower prior to the Cut-off date to the Assignor and acknowledged/ accounted by the Assignor shall not be included as part of Loans.”

2.1 “Assignment

2.1.2 The Assignor hereby further assigns in favour of the Assignee, all its rights, title and interest in the Financing Documents, all agreements, deeds and documents related thereto and all collateral and underlying Security Interests and / or pledges created to secure, and/or

guarantees issued in respect of, the repayment of the Loans, which the Assignor is entitled to. The Assignee shall have the right to enforce such Security Interests, pledges and / or guarantees and appropriate the amounts realized therefrom towards the repayment of the Loans and to exercise all other rights of the Assignor in relation to such Security Interests, pledges and/or guarantees. The Assignor shall transfer/deliver or cause to be transferred/delivered or hold for and on behalf of the Assignee, all such original documents, deeds and/or writings, including but not limited to the Financing Documents, and produce the same promptly upon any request by the Assignee.”

The above definitions reflects that the debts of the person to whom financial assistance is extended by the respondent no. 2 under the financing documents listed in Schedule 1 is assigned to the applicant. On perusal of Schedule 1 along with correction of assignment deed dated 30.03.2021 annexed with rejoinder reflects that the debts of corporate debtor were assigned to the applicant. The relevant extract from correction of assignment deed is reproduced below:

“2. In the said registered Assignment Deed on page No.: 16 details of borrower(s) is not mentioned hence the details of borrower should read as "M/s Shreenathji Spintex Pvt. Ltd." in the said assignment agreement.

Thus, it is established that the Applicant has stepped into the shoes of the respondent no. 1 and has same right against the Corporate Debtor as that of the respondent no. 2(Bank of Baroda) which also include the rights exercisable under the Code.

Issue No. 2- Whether the name of the applicant was substituted in the main CP(IB) 574 of 2018 during its pendency?

After perusal of records, it is found that the main CP(IB) 574 of 2018 was not filed by the present applicant, and the name of the present applicant was also never substituted/brought on record during the pendency of the main IB application.

Issue No. 3- Whether this application is maintainable under Rule 48 of the National Company Law Tribunal Rules, 2016?

As a bare reading of Rule 48, of the NCLT Rules, 2016 shows only the applicant can approach or file the application before the Adjudicating Authority for restoration of the petition or application, which was already dismissed on the ground of non-appearance of the applicant. For the reference, Rule 48 of the National Company Law Tribunal Rules, 2016 is reproduced here under:

Consequence of non-appearance of applicant-

- (1) Where on the date fixed for hearing of the petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on merit.*
- (2) Where the petition or application has been dismissed for default and the applicant files an application within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, the Tribunal shall make an order restoring the same:*

Provided that where the case was disposed of on merits the decision shall not be re-opened.

After going through above rule, we found that the applicant in the present application was not the original applicant in main CP(IB) 574 of 2018 nor was party in said proceedings till its dismissal. Therefore, the applicant of this application will not be treated as the original applicant of the main application.

As a sequel, it is clear that the applicant is not eligible to file the application for restoration of the main application. As the present applicant was not a party in main IB application at any point of time. Therefore, we are of the considered view that main CP(IB) 574 of 2018 cannot be restored by the present applicant. Hence, as discussed above IA is rejected and disposed of.

13.Registry is directed to communicate a copy of this order to the parties.

-Sd-
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-Sd-
DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

Abhishek Singh