

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT V**

I.A. 4428 OF 2023

IN

C.P. No. (IB) 1234 OF 2022

Application under Section 60(5) of the
Insolvency and Bankruptcy Code, 2016
And Rule 11 of NCLT Rules, 2016

Filed by

**CFM Asset Reconstruction
Private Limited**

...Applicant

In the matter of:

State Bank of India

**...Petitioner/Financial
Creditor**

vs.

Vidarbha Industries Power Limited

...Corporate Debtor

Order Dated: 07.03.2024

Coram:

Hon'ble Ms. Reeta Kohli, Member (Judicial)

Hon'ble Ms. Madhu Sinha, Member (Technical)

Appearance (Physical):

For the Applicant: Adv. Bhavika Deora (PH)

For the Respondent: Sr. Counsel Prateek Seksaria a/w Raghavi
Sharma (VC)

ORDER

Per: Reeta Kohli, Member (Judicial)

1. The above application I.A. No. 4428 OF 2023 is filed by CFM Asset Reconstruction Private Limited (hereinafter referred to as the “**Applicant**”) seeking direction against Vidarbha Industries Power Limited (hereinafter referred to as the “**Respondent**”) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 And Rule 11 of NCLT Rules, 2016 (hereinafter called as “**the Code**”), praying for following reliefs:

- a. *To allow the present Application and consequently permit the substitution of State Bank of India as the Financial Creditor in the captioned Company Petition, with the Applicant herein i.e. CFM Asset Reconstruction Private Limited;*
- b. *That this Hon’ble Tribunal may be pleased to take on record the amended Memo of Parties (annexed herewith as Exhibit B) and allow the consequential amendment of the cause title of the Captioned Company Petition;*
- c. *May pass any such other or further order as this Hon’ble Tribunal may deem fit and proper in favour of the Applicant, in the facts and circumstances of the case.*

Brief facts

2. The Present Applicant bearing no. I.A. 4428 of 2023 is filed by CFM Asset Reconstruction Private Limited seeking substitution of the Applicant (CFM Asset Reconstruction Private Limited) as the

Financial Creditor in the captioned Company Petition being Company Petition (IB) No. 1234 of 2022 in place of State Bank of India, the original Financial Creditor in the Company Petition.

3. It is submitted that the original Financial Creditor i.e State Bank of India being a part of the consortium of lenders ("**Consortium**") had extended certain credit facilities ("**Facilities**") to the Corporate Debtor for financing the Project. However, the Corporate Debtor defaulted in its payment obligations under the financing documents entered between the Corporate Debtor and the Financial Creditor on 31 March 2019 and therefore the original Financial Creditor declared the account of the Corporate Debtor as a Non-Performing Asset ("**NPA**") on 29 June 2019.
4. Therefore, in November 2022, the original Financial Creditor filed the Company Petition under Section 7 of the Code for initiating Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor claiming a sum of Rs. 2,043.98/- crores to be the amount in default as on 31st October 2022.
5. It is further submitted that during the pendency of the captioned Company Petition, the original Financial Creditor, along with other lenders of the Consortium, vide assignment Agreement dated 17 August 2023 ("Assignment Agreement") has assigned all its rights in respect of the amounts due from the Corporate Debtor under various financing documents to the Applicant.
6. Pursuant to the above, it is submitted that the default as set out in the Company Petition are stand assigned to the Applicant, therefore the Applicant is entitled to continue the captioned Company Petition against the Corporate Debtor. Hence this Application.

Reply of the Respondent

7. The Corporate Debtor in its reply had denied each and every averment contained in the Application.
8. The Corporate Debtor submitted that the Applicant has not annexed the copy of the Assignment agreement dated 17.08.2023 on the basis of which the Applicant is seeking substitution of the Applicant with the State Bank of India (Financial Creditor). Therefore, the Application is defective, incomplete and deserves to be dismissed.
9. It is further submitted that the Corporate Debtor had filed a writ Petition being WP No. 2395 of 2023 ("**WP/Writ Petition**") for *inter alia* including to restrain the consortium of lenders acting through lead lender i.e. Axis Bank Ltd. from accepting any bids from any bidders for takeover of the Corporate Debtor's loans / assets without affording an opportunity to the Corporate Debtor to match the bid of any bidder by way of OTS Proposal. The said Writ Petition is currently sub-judice before Hon'ble Bombay High Court. The Hon'ble Court by its order dated 05.07.2023 expressly clarified that the result of any process being run by Axis Bank is subject to further orders and the outcome of the writ petition and that no equities can be claimed by the Axis Bank on the basis of this order or on the basis that it carried out certain actions.
10. However, the Corporate Debtor through media reports learn that the sale of debt of Corporate Debtor was concluded on 17.08.2023 in favour of CFM-ARC for Rs. 1265 crores, i.e. just 5 crore more than the last OTS proposal of the Corporate Debtor, without giving

an opportunity to the Corporate Debtor to match or improve the offer of CFM-ARC. Therefore, the Corporate Debtor was eliminated from the entire process to enable the lenders to unjustly favour CFM-ARC. The lenders have acted with unprecedented haste to complete the sale of VIPL's debt to CFM-ARC so that it could then plead before the court a fait-accompli.

11. It is submitted that the Applicant has also moved an Application IA 197549/2023 in CA 372 /2017 on 25.09.2023 seeking impleadment before Hon'ble Supreme Court along with another IA bearing No. 197525/2023 in CA 372/2017 seeking direction that any amount receivable pursuant to any other of Hon'ble Supreme Court the same shall be deposited in the Trust Retention Account controlled by lenders. CA 372/2017 is fixed for final hearing on 10.01.2024.
12. Hence the present IA ought to be rejected at the threshold or the matter may be kept in abeyance till the Hon'ble Supreme Court and Hon'ble Bombay High Court decides the pending IAs and/or Writ Petition.

Findings:

13. Heard the Ld. counsels for the parties and perused the record with their able assistance.
14. It is an undisputed fact that the account of the Corporate Debtor was declared as a Non-Performing Asset ("**NPA**") on 29.06.2019. Therefore, the original Financial Creditor (State Bank of India) filed the Company Petition under Section 7 of the Code against the

Corporate Debtor claiming a sum of Rs. 2,043.98/- crores on 31st October 2022.

15. Thereafter, the original Financial Creditor during the pendency of the captioned Company Petition, along with other lenders of the Consortium, has assigned all its rights in respect of the amounts due from the Corporate Debtor vide assignment Agreement dated 17.08.2023 ("Assignment Agreement") to the Applicant. However, The Corporate Debtor contended that the Application is defective and incomplete since the Applicant has not annexed the copy of the Assignment agreement dated 17.08.2023 on the basis of which the Applicant is seeking substitution of the Applicant with the State Bank of India (Financial Creditor). Therefore, deserves to be dismissed. In view of the contention raised by the Corporate Debtor, this Bench has observed that the Applicant has annexed the letter dated 06.09.2023, issued by the Axis Bank Limited (the lead bank of the consortium) to the Corporate Debtor herein as 'Exhibit A' intimating the Corporate Debtor that the debts of M/s. Vidharbha Industries Power Ltd. (the Borrower) has been assigned to CFM Asset Reconstruction Pvt. Ltd. along with all underlying rights, titles, interest, charge on receivables, security/additional security provided to secure the obligations of the Borrower, vide Assignment Agreement dated 17.08.2023. Further the Applicant, in its another similar Application No. 4450 of 2023 has annexed Assignment Agreement dated 17.08.2023 as 'Annexure A' in its rejoinder, wherein the Financial Creditor along with the other lenders of the consortium has assigned the 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, to the assignee. In Pursuance of the above the Applicant Substituted the Financial Creditor and has stepped into the shoes of the Original Financial Creditor and thus has become entitled to continue proceedings initiated by or against the Original Financial Creditor.

16. At this juncture it is relevant to refer the definition of Financial Creditor as provided in Clause 5(7) of the Code, 2016. The definition of Financial Creditor is reproduced herein:-

“5. Definitions: -

(7) “financial creditor” means any person to whom a financial debt is owed and include a person to **whom such debt has been legally assigned or transferred to;**

Therefore, Assignment of debt is recognised as a valid mode of transfer of rights under the Code and hence, the assignee of such debt would be a ‘financial creditor’ under Section 5(7) of the Code.

17. The another contention raised by the Corporate Debtor is that the Financial Creditor concluded the sale of debt of Corporate Debtor on 17.08.2023 in favour of CFM-ARC for Rs. 1265 crores, i.e. just 5 crore more than the last OTS proposal of the Corporate Debtor to unjustly favour CFM-ARC. And that the Corporate Debtor had filed a writ Petition being WP No. 2395 of 2023 ("**WP/Writ Petition**") before the Hon'ble Bombay High Court for restraining the consortium of lenders acting through lead lender i.e. Axis Bank Ltd. from accepting any bids from any bidders for takeover of the Corporate Debtor's loans / assets without affording an opportunity to the Corporate Debtor to match the bid of any bidder by way of

OTS Proposal. In view of the aforesaid contention, we are of the considered opinion that the Application before the Hon'ble Bombay High Court has been filed for restraining from accepting any bid from any bidder however, the assignment of debt to ARC is purely a prerogative of the Financial Creditor. In view of the above it deserves to be emphatically stated that Firstly the Corporate Debtor has no right or entitlement to equate himself with the ARC. OTS is a proposal of settlement and Assignment of Debt to ARC stands on completely different footing having no comparison between the two. Hence the Applicant cannot raise such frivolous arguments to compare himself with the assignee of the debt which was purely the discretion of the Financial Creditor. Secondly no interim injunction was granted by the Hon'ble Bombay High Court with respect to the assignment of any debt by the creditor to the ARC. And there is no direction from the Hon'ble Bombay High Court to seek the approval from the Corporate Debtor before assigning the Debt to the ARC. Further, the pendency is no impediment as there is no stay order granted by the Hon'ble Bombay High Court restraining the consortium of lenders for assignment of debt to ARC. The State Bank of India being the Financial Creditor is in every right entitled to assign its debt in its commercial wisdom. Section 5 of the SARFAESI Act, is an enabling provision to empower the ARCs to acquire financial assets in the manner provided in Section (5)(1). This Bench further relied on Section 5(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act 2002, which contemplates the continuation and prosecution of any proceeding by an assignee who acquires a financial asset. Section 5(4) of the SARFAESI Act states:

*“5. Acquisition of rights or interest in financial assets:
. . . (4) If, on the date of acquisition of An Assignee is not prohibited under IBC from continuing pending section 7 proceedings LEGAL UPDATE Page No. 8 financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the [asset reconstruction company], as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the [asset reconstruction company], as the case may be.”*

Therefore, the contention of the Corporate Debtor that the assignment of Debt of the Corporate Debtor by the Financial Creditor to the ARC is unjustifiable does not have any merit in it. Hence dismissed.

18. In addition relying upon the judgment passed by the Hon'ble NCLAT in ***Siti Networks Ltd. v. Assets Care and Reconstruction Enterprises Ltd. [Comp. App. (AT) (Ins.) No. 1449 of 2022]***.

“6. Learned Counsel for the Respondent has rightly referred to the provisions of Order XXII Rule 10 of CPC which contemplates continuance of proceeding on the

basis of devolution of rights with the leave of the Court which is applied generally in civil proceeding and suit.'

"7. ... As has been observed rightly by the Adjudicating Authority, there is no prohibition in the IBC or any of the Regulations from continuing the proceeding by an assignee. Section 5(7) of the IBC which defines 'Financial Creditor' also includes a person to whom such debt has been legally assigned or transferred to. ..."

From the perusal of the above it is evident that Hon'ble NCLAT believed that neither the IBC nor any other regulation prohibited the assignee from continuing the proceedings. Section 5(7) of the IBC defines "Financial Creditor" as a person to whom debt has been legally assigned or transferred to. Moreover, the Hon'ble NCLAT believed that, by virtue of the assignment, the assignee had become the financial creditor and thus had every right to continue the proceedings that were initiated by the original financial creditor..

19. In view of the above facts, the Interlocutory Application Number 4428 of 2023 is **allowed and the Applicant is allowed to be substituted as Financial Creditor.**

SD/-
Madhu Sinha
Member (Technical)
/Abhay/

SD/-
Reeta Kohli
Member (Judicial)

NATIONAL COMPANY LAW TRIBUNAL
COURT-V, MUMBAI BENCH

223. IA/933/2023 IA/745/2023 IA/3701/2023 IN C.P. (IB)/1234(MB)2022

IN THE MATTER OF

State Bank of India

V/s

Vidarbha Industries Power Limited

Section 7 of the Insolvency & Bankruptcy Code, 2016

Order Delivered on 07.03.2024

CORAM:

MS. REETA KOHLI
MEMBER (J)

MS. MADHU SINHA
MEMBER (T)

Appearance through VC/Physical/Hybrid Mode:

For the Petitioner:

For the Respondent:

ORDER

Since the Court time is over. Hence the case is adjourned to **01.04.2024**.

Sd/-
MADHU SINHA
Member (Technical)
Shubham

Sd/-
REETA KOHLI
Member (Judicial)