

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

I.A. 4450 OF 2023

IN

C.P. No. (IB) 264 OF 2020

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:

Axis Bank Limited

**...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. 4450 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 permit the impleadment of CFM Asset Reconstruction Private Limited as Financial Creditor No.2 in the captioned Company Petition (IB) No. 264 of 2020;*
- b. *May pass any such other or further order as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case.*

Brief facts of the application

2. The Present Application bearing no. I.A. 4450 of 2023 is filed by CFM Asset Reconstruction Private Limited seeking impleadment of the Applicant as Co-Petitioner/ Financial Creditor No. 2 in the Company Petition (IB) No. 264 of 2020 along with Axis Bank Limited, Financial Creditor No. 1.

3. It is submitted that the Financial Creditor No. 1 i.e. Axis Bank Limited being a part of the consortium of lenders ("**Consortium**") had extended credit facilities ("**Facilities**") to the Corporate Debtor for financing the Project. However, the Corporate Debtor defaulted in its payment obligations on 31st March 2019 and the Financial Creditor No. 1 declared the account of the Corporate Debtor as a Non-Performing Asset ("**NPA**") on 28th June 2019.
4. Therefore, in January 2020, the Financial Creditor No. 1 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. 553,27,99,322/- to be the amount in default.
5. It is further submitted that during the pendency of the captioned Company Petition, the Financial Creditor No. 1, 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 to the Applicant wherein the External Commercial Borrowings aggregating to USD 15,00,00,000 have not been assigned to the Applicant and the obligations of the Corporate Debtor in respect of the said External Commercial Borrowing Facility continued towards the Financial Creditor No. 1 i.e. Axis Bank Limited.
6. Pursuant to the above, it is submitted that the default taken place are now stand assigned to the Applicant, therefore it is necessary that the Applicant is to be added as a party-Petitioner to the underlying Company Petition. 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 impleadment of the Applicant with the Axis Bank Ltd (Financial Creditor). Therefore, the Application is defective, incomplete and deserves to be dismissed.
9. It is further submitted that the debts due under the 'Rupee Term Loan Facility RTL II', according to the Applicant's own averments have been assigned and therefore, the question of both being the assignor and assignee being party Petitioners/ Financial creditors does not arise within the meaning of IBC.
10. Only a Financial Creditor who is entitled to claim a Financial Debt has locus to file an Application under Section 7 of the IBC and there is no concept of any other party being impleaded as co-applicant.
11. 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.

12. 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.
13. 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 order 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.
14. 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:

15. Heard the Ld. counsels for the parties and perused the record with their able assistance.
16. It is an undisputed fact that the account of the Corporate Debtor was declared as a Non-Performing Asset ("**NPA**") on 28.06.2019. Therefore, the original Financial Creditor (Axis Bank Limited) filed the Company Petition under Section 7 of the Code against the Corporate Debtor claiming a sum of Rs. 553,27,99,322/-.
17. 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 to the Applicant except External Commercial Borrowings aggregating to USD 15,00,00,000 vide assignment Agreement dated 17.08.2023 ("Assignment Agreement"). However, the contention of the Corporate Debtor is 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 impleadment of the Applicant with the Axis Bank Ltd (Financial Creditor) as a party-Petitioner to the underlying Company Petition. Therefore, the present application deserves to be dismissed. In view of the contention raised by the Corporate Debtor, this Bench has observed that the Applicant in its rejoinder has annexed assignment Agreement dated 17.08.2023 as '*Annexure A*', wherein the Financial Creditor along with the other lenders of the

consortium has assigned 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/Applicant.

18. As per Section 5(1)(b) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"), an asset reconstruction company may acquire financial assets of any bank or financial institution by entering into an agreement with such bank or financial institution for transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them. The Assignment Agreement dated 17.08.2023 has been executed between the lenders of Vidarbha Industries Power Limited (**VIPL**) and the Applicant pursuant to the said provision. Consequently, Financial Creditor No. 1, along with other lenders of VIPL, has assigned the debts of VIPL to the Applicant. Therefore, in view of the contention of the Corporate debtor that Application is defective and incomplete does not survive.

19. Further, the definition of Financial Creditor as provided in Clause 5(7) of the Code 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.

20. The other contention of the Corporate debtor is that the debts due under the 'Rupee Term Loan Facility RTL II', have been assigned and therefore, the question of both (the Applicant and the Financial Creditor) being the assignor and assignee being party Petitioners/ Financial creditors is not legally sustainable as both should not be allowed to be permitted to pursue the case against the Corporate debtor.

In the present case, the types of debt provided to the Corporate Debtor is as under –

S. No.	Type of Facility	Amount Sanctioned	Amount due as on 3 January 2020 (In INR)
i.	Rupee Term Loan I	Rs. 384 Crores	5,01,73,890.76
ii.	Rupee Term Loan II	Rs. 200 Crores	216,87,29,713.15
iii.	Working Capital		
	a) Cash Credit	Rs. 150 Crores	108,97,45,261.57
	b) Bank Guarantee	-	13,61,27,365.00
	c) Letter of Credit	-	
iv.	External Commercial Borrowings	USD 15,00,00,000	208,80,23,092.30

Out of the total debts, the Financial Creditor No. 1 (Axis Bank Limited) has assigned 'Rupee term loan I', 'Rupee term loan II' and 'Working capital' to the Applicant/Assignee. However, the External Commercial Borrowings aggregating to USD 15,00,00,000 have not been assigned to the Applicant and the Corporate debtor remain obligated towards the Financial Creditor No. 1 for the External Commercial Borrowing. Therefore, in terms of Section 7 of the Code, the Financial Creditor No. 1 continues to be a lender of the Corporate Debtor.

Section 7 of the IBC deserves to be appreciated –

*“7. (1) A financial creditor either by itself **or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government]***

may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.”

The perusal of the Section itself shows that the joint petition are permitted under the IBC, 2016 and in the present case the Applicant has stepped into the shoes of the Original Financial Creditor only to the extent of the Debt assigned to them. Therefore, the Applicant has prayed for the impleadment to the extent of the debt assigned. Therefore the remaining portion of the debt which not been assigned in that case, the original creditor will continue to pursue its debt.

21. Further the Corporate Debtor has submitted 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 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 interim 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 of the WP No. 2395 of 2023 is no impediment as there is no stay order having been granted by the Hon'ble Bombay High Court restraining the consortium of lenders for assignment of debt to ARC. The Axis Bank Limited 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 having no merit, deserves no consideration.

22. 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 prohibits 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.

23. In view of the above facts, the Interlocutory Application Number 4450 of 2023 is **allowed and the Applicant is allowed to be impleaded as Financial Creditor No. 2.**

SD/-

Madhu Sinha
Member (Technical)
/Abhay/

SD/-

Reeta Kohli
Member (Judicial)