

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

CP(IBC)/51/KOB/2022

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016)

In the matter of:

Phoenix ARC Private Limited (Trustee of Phoenix Trust FY 17-8), 5th Floor,
Dani Corporate Park 158, CST Road, Kalina, Santacruz (E), Mumbai- 400 098.

Represented by its Authorised Signatory, Mr. Suresh Mangattu Variyam;

... Financial Creditor

-Versus-

M/s. Cherupushpam Films Private Limited, 4th Floor, Cherupushpam Building,
Shanmugham Road, Ernakulam- 682 031.

... Corporate Debtor

Coram:

Shri. P. Mohan Raj : Member (Judicial)

Shri. Satya Ranjan Prasad : Member (Technical)

Parties / Counsel present (through video conference):

For Financial Creditor : M/s. A.V. Thomas Associates,
Advocates.

For Corporate Debtor : M/s. C.S. Ajith Prakash and
Associates, Advocates.

Order reserved on: 21.12.2022
Order pronounced on: 15.02.2023

ORDER

1. This Application has been filed by Phoenix ARC Private Limited (Trustee of Phoenix Trust FY 17-8), 5th Floor, Dani Corporate Park 158, CST Road, Kalina, Santacruz (E), Mumbai- 400 098. (hereinafter called as '**Financial Creditor**') on 10.10.2022 by invoking the provisions of Section 7 of the Insolvency and

Bankruptcy Code (hereinafter called as **Code**) against M/s. Cherupushpam Films Private Limited, 4th Floor, Cherupushpam Building, Shanmugham Road, Ernakulam- 682 031 (hereinafter called as '**Corporate Debtor**') in order to initiate Corporate Insolvency Resolution Process against the Corporate Debtor for the default amount of Rs 14,50,78,158/- (Rupees Fourteen Crores Fifty Lakhs Seventy-Eight Thousand One Hundred Fifty-Eight Only) as on 05.10.2022 together with interest and additional interest at the applicable rate from 05.10.2022 till the date of realization of dues.

2. The facts as narrated in the application and explained by the Financial Creditor are summarized hereunder:

- i. The Financial Creditor had granted various credit facilities to M/s. Kerala Chamber of Commerce and Industry for the construction of a commercial building called 'Kerala Trade Centre' on the land belonging to the Corporate Debtor. The Corporate Debtor is the guarantor for the credit facilities. The construction project was a joint venture between the Principal Borrower and the Corporate Debtor. The Corporate Debtor has executed necessary documents for each credit facility. M/s. Kerala Chamber of Commerce and Industry (Principal Borrower) had availed other credit facilities with the bank, prior to sanctioning these facilities and the same were closed and a declaration to that effect has been filed along with this application.
- ii. A Fully Secured Loan (FSL) of Rs. 1.10 Crores was sanctioned on 15.09.2010. A Credit Facility Agreement was executed on 16.09.2010 by the Principal Borrower. To secure payment, the Corporate Debtor had executed a guarantee agreement on 16.09.2010. As collateral for the facility, the Corporate Debtor created extension of mortgage in respect of 43.95 cents of land with building thereon in Survey No.843 in Ernakulam Village, Kannayannur Taluk, Ernakulam District as evidenced by letter of deposit of title deeds dated 17.09.2010. Again, a Fully Secured Loan (FSL) of Rs. 5 Crores was sanctioned on 30.12.2010.

A Credit Facility Agreement was executed on 30.12.2010 by the Principal Borrower. To this also the Corporate Debtor executed a guarantee agreement on 30.12.2010. As collateral for the facility, the Corporate Debtor created extension of mortgage in respect of the same land mortgaged earlier as evidenced by letter of deposit of title deeds dated 31.12.2010. Another Fully Secured Loan (FSL) of Rs. 2.5 Crores was sanctioned on 01.01.2013. A Credit Facility Agreement was executed on 01.01.2013 by the Principal Borrower. To this also the Corporate Debtor had executed a guarantee agreement on 01.01.2013. As collateral for the facility, the Corporate Debtor created extension of mortgage in respect of the same land mortgaged earlier as evidenced by letter of deposit of title deeds dated 02.01.2013. The Amounts were thus granted to the Principal Borrower and the Corporate Debtor stood liable as a guarantor. The loans were regular in the initial stages, the principal borrower has defaulted on the repayments. The accounts were declared as NPA on 30.09.2013.

- iii. The Financial Creditor stated that the present petition has been filed within the period of limitation. To buttress this submission, they have referred to the Hon'ble Supreme Court decision in Misc. Appln No. 21 of 2022 in Suo Moto Writ Petition No. 3 of 2022 wherein, it has been directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for purposes of limitation and that the balance period of limitation available from 03.10.2021 becomes available with effect from 01.03.2022. The Applicant has 8 months and 18 days remaining with effect from 03.10.2021 and by computing the remaining period from 01.03.2022, the present petition has been filed within the period of limitation.
- iv. It is stated that after the date of default the Principal Borrower has admitted and acknowledged the liability vide the following Annual Financial Statements:

- a) Annual Financial Statements as of 31.03.2015 signed by Directors on 14.01.2016;
 - b) Annual Financial Statements as of 31.03.2017 duly signed by Directors on 19.10.2017;
 - c) Annual Financial Statements as of 31.03.2018 duly signed by Directors on 21.06.2019.
- v. The Financial Creditor further stated that the acknowledgment of the debt by the Principal Borrower is binding on the Corporate Debtor as per Clause 6 of the Guarantee Agreements. The Corporate Debtor has also mentioned the debt in their Annual Financial Statements and treated the same as a contingent liability. The Corporate Debtor is liable for the default of the Principal Borrower as per the guarantee agreements.
3. On 23.11.2022, the Corporate Debtor filed its reply statement and stated that as per Section 7(3)(b) of the Code the Financial Creditor seeking to initiate CIRP proceedings against a Corporate Debtor shall mandatorily name an Insolvency Professional to be appointed as Interim Resolution Professional and also produce other information as may be specified by the Board. The absence of mandatory documents, as required under Section 7 of the Code as well as the Rules itself, is a ground for the rejection of this Company Petition.
4. It is also stated that as per Rule 4(2) of the AA Rules, in case of assignment of the debt, the assignee shall produce all relevant documents pertaining to the assignment or transfer. However, the Assignment Agreement produced is truncated and incomplete as well as the Financial Creditor who is acting as a trustee has failed to bring into the record the relevant trust deed. The absence of production of the trust deed and a resolution of the beneficiaries of the trust authorizing the applicant to file the present petition lead to a concluding finding that the Applicant and the signatory for the applicant have no authority to file the present proceedings. The Applicant and the signatory to the applicant had failed to prove their capacity/authority, therefore, on this ground also the application is liable to be dismissed.

5. It is stated that the Assignment Agreement dated 17.03.2017, produced by the Applicant, seems to be a document executed by South Indian Bank in favour of Phoenix ARC Pvt Ltd ("Phoenix ARC") acting in its capacity as a trustee of Phoenix Trust FY 17-18 for the benefit of holders of the security receipt issued by the trustee. There is no trust deed produced as part of the pleadings when the Rules specifically mandate that every document relevant should be filed by the Financial Creditor to establish the credibility of the default by reason of which such creditor seeks to initiate CIRP against a corporate person. From the recital A of Assignment Agreement, the Applicant herein/assignee is an Asset Reconstruction Company registered pursuant to Section 3 of the SARFAESI Act acting in the capacity of a trustee of Phoenix Trust FY 17-18 pursuant to a trust deed dated 06.02.2017. Therefore, the trust deed is the master document and rights under the said trust deed belong to the security receipt holder. There is a mandatory obligation placed on the Financial Creditor or to the party claiming to be the Financial Creditor to produce the fundamental document before the Applicant seeks to initiate CIR proceedings against the Corporate Debtor. A trust cannot claim to be a Financial Creditor by virtue of the Assignment Agreement alone. The Assignment Agreement defines 'financing documents' which means all documents executed in favour of the assignor setting out the terms on which the assignor has agreed to provide financial assistance to the borrower who is listed in Schedule 1 thereto. However, the document produced as the Assignment Agreement by the Petitioner does not contain any Schedule 1. Thus, the details of the financing documents are conspicuously absent in this document and that brings out the fact that the document which is relied on by the Applicant is not the relevant document or that the Applicant has produced before this Tribunal a truncated set of documents for initiating insolvency proceedings against the Corporate Debtor. It is further stated that the purchase consideration of Rs. 79 Crore is an obnoxious sum especially when the Assignment Agreement does not provide any details as to whether there were any other borrowers' debt has been assigned under the said agreement since the Applicant has produced a truncated document before this Tribunal.

6. The Corporate Debtor further stated that the date of default in the present case is 30.09.2013. The acknowledgment of debt in the balance sheet of the Corporate Debtor is a valid acknowledgment for the purposes of Section 18 of the Limitation Act, 1963. However, the acknowledgment of debt dues is only in favour of SIB and not in favour of the Applicant.
7. It is stated that the petition is filed in violation of the very object of the Code. The object of the Code is to promote entrepreneurship and not to initiate CIRP for all related companies as a chain reaction without any proper or valid existence of debt or documents to substantiate such debts in this case there are provisional attachments made by Enforcement Directorate ("ED") and it is in the process of adjudicating this matter and has not attained finality. In the intervening period, while the ED investigation is going on, resolution of neither the Principal Borrower nor the Corporate Debtor herein will be possible. The very object of insolvency resolution is to make the prospects of a company viable and not initiate any resolution proceedings on the whims of an asset reconstruction company or RP of the Principal Borrower, who is acting in collusion with the asset reconstruction company, as there cannot be any maximization of value if there is no logical conclusion to attachment of ED. In the proceedings before the ED, 32,000 sq. ft. property of the Corporate Debtor has been attached, therefore, without its conclusion value maximization is not possible which is a fundamental tenet of the Code.

FINDINGS: -

8. We have heard learned senior counsel Mr. Joseph Kodianthara for the Financial Creditor and Mr. Pradeep Joy for the Corporate Debtor and perused the whole case records including documents appended with the case records. On perusal of the documents and arguments advanced by both the sides, this Bench finds it necessary to deal with each issue separately.
9. On the Respondent side primarily argued and questioned the validity and enforceability assignment deed dated 17.03.2017, upon on which the petitioner

built this petition. On the Petitioner side said the question relating to insufficient stamp duty paid on assignment deed is not raised in the reply hence opposed. The question pertaining to payment of stamp duty on assignment deed is concern this is purely question of law, such a plea can be raised even without pleading.

The points for consideration are:

1. Whether the deed of assignment dated 17.03.2017 is enforceable instrument?
2. Whether the petitioner has proved its authority to institute this petition?

Point No.1

10. The deed of assignment dated 17.03.2017 is produced by the petitioner as Annexure 3, it was executed by the South India Bank Limited, original lender infavour of the petitioner at Ernakulam assigning INR 79,25,00,000/- value of loans to the petitioner on Rs.500/- value non-judicial stamp paper. On the respondent side questioned the validity and enforceability of assignment deed because of instrument is engrossed on insufficient Stamp paper.
11. The assignment deed was executed at Ernakulam, hence the Kerala Stamp Act 1959 alone will applicable to this case. In the Kerala Stamp Act there is no provision available similar to section 8F of Indian Stamp Act 1899. Section 8F Indian Stamp Act 1899 exempt the duty payable under the Indian Stamp Act 1899 and not exempted the payment of stamp duty payable under the Kerala Stamp Act 1959, this is evident from last line of section 8F of Indian Stamp Act 1899. It runs as follows;

[8F. Agreement or document for transfer or assignment of rights or interest in financial assets not liable to stamp-duty.--- Notwithstanding anything contained in this Act or any other law for the time being in force, any agreement or other document for transfer or assignment of rights or interest in financial assets of banks or financial institutions under section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), in favour of any asset

reconstruction company, as defined in clause (ba) of sub-section (1) of section 2 of that Act, shall not be liable to duty under this Act.]

12. The Kerala Stamp Act 1959 repeal the applicability of Indian Stamp Act 1899 to the State of Kerala. Further section 25 of the Kerala stamp Act 1959 explains how the debt can be transferred for consideration. The stamp duty payable for assignment of debt is as conveyance mentioned in Article 22 of schedule of the Act. Accordingly, the stamp duty payable on assignment of debt is 8% on total consideration. As per Kerala Stamp Act 1959, the assignment deed annexure A3 ought to have been executed on the stamp paper value of (79,25,00,000 X 8%) = Rs.6,34,00,000/- as per Article 22 of Kerala Stamp Act 1959. Here the assignment deed is engrossed on Rs.500/- it shows that the debt assignment instrument was executed on insufficient stamp papers. The effect and consequences of insufficiently stamped instrument is explained in section 34 of the Kerala Stamp Act 1959. As per the said section the insufficiently stamped instrument cannot be used for any purpose. For validating the insufficiently stamped assignment deed the petitioner has to pay deficit stamp duty of (Rs.6,34,00,000-500) = Rs. 6,33,99,500/- and ten times penalty. Further section 34 of Kerala Stamp Act 1959 clearly says that the insufficiently stamped instrument cannot be used for any purpose unless the stamp duty and penalty is paid.

*34. Instrument not duly stamped inadmissible in evidence, etc. -
No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties' authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:*

Provided that-

(a) any such instrument not being an instrument chargeable with a duty of [twenty paise or less than [twenty paise] shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same chargeable, or in the, required to make up such duty, together with a penalty of five rupees or, when ten

times the amount of the pro per duty or deficient portion thereof exceeds five rupees, of a sum equal in ten times such duty or portion;

13. It is true when the insufficiently or unstamped instrument is produced the same should be impounded and taken further action as per section 33 of Kerala Stamp Act 1959, akin to Section 33 of Indian Stamp Act 1899, but the unstamped or insufficiently stamped original documents alone can be impounded, the photo copies cannot be impounded because section 2(14) defines “Instrument” there photo copy or secondary evidence is not considered as Instrument. In this regard the Apex court held in **Hariom Agarwal vs Prakash Chand Malviya 2008(3) CTC 457** that a photo copy of an instrument which is not duly stamped cannot be validated by impounding and cannot be admitted as secondary evidence, instrument under Section 2(14) means only original and does not include a copy thereof.
14. In this case on the petitioner side only photo copy of the document is presented hence further action could not be taken. In these circumstances it is answered that the assignment deed dated 17.03.2017 is unenforceable, Instrument.

Point No.2

15. The petition is filed by an assignee of loan of corporate debtor Phoenix ARC Private Limited. In the cause title the Phoenix ARC Private Limited, company is referred as Trustee of Phoenix Trust FY17-8. It depicts the petition is filed by trustee Phoenix ARC Private Limited company, for the Phoenix Trust FY17-8. The trust is a non-living juristic person, it can function through living person as Trustees or through non-living juristic person company as trustee. In this case the Phoenix ARC Private Ltd a company filed the petition for Phoenix Trust FY 17-8 as it's Trustee. On the petitioner side Trust deed is not produced, it is vital document to ascertain the existence of Trust and nature of Trust either public or private trust and to ascertain the beneficiaries of Trust etc., In the Trust there must be three elements they are donor or author of trust, Trustees and beneficiaries of trust. The Trustee is only a custodian or manager of Trust, only on production of Trust deed it can be ascertained whether the Phoenix ARC Private Limited,

company is trustee of Phoenix Trust FY17-8 or not. The actual beneficiaries of trust also can be culled out only on production of Trust deed. When the proceeding is filed by the trustee for the Trust, the Trust deed must be filed. In the assignment deed dated 17.03.2017 it is mentioned that the petitioner Phoenix ARC Private Limited is also acting in the capacity as Trustee of Phoenix Trust FY 17-8 pursuant to the trust deed dated 06.02.2017. In this case also petition is filed by a trustee, for the trust but the trust deed is not produced. Without producing the trust deed the proceeding filed by the trustee for Trust is not maintainable. In part I of the petition, details of trustee (phoenix ARC Private Ltd is given but the details of petitioner/Trust is not given. Rule 4(2) of the Adjudicating Authority Rules says in case of assignment of the debt, the assignee shall produce all relevant documents pertaining to the assignment or transfer. Here the particulars of trustee alone are furnished but particulars of Trust is not furnished, the basic document Trust deed also not produced. Even after the plea raised in this regard on the corporate debtor side, the petitioner not inclined to produce the Trust deed, it leads to filing of incomplete petition. In fine it is answered that the petitioner has not proved its authority to institute this petition.

16. In view of answers arrived to the above points, the petition is liable to be dismissed.

In fine the petition is **Dismissed**.

17. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

18. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.02.15 15:44:55 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.02.15 13:35:16 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 15th day of February, 2023.

Supriya-P.s