THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI

Company Petition No. (IB)- 802 (PB) /2019

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Phoenix Arc Private Limited
Applicant/Financial Creditor

Vs

General Garments Delhi Private Limited
Respondent / Corporate Debtor

Judgment delivered on: 08.11.2019

CORAM:

MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Petitioner:	Mr. Gulshan Kumar Sachdev, Ms. Charu Sachdev, Advocates.
For Respondent:	Mr. Sumant Batra, Mr. Akshit Kapoor, with Ms. Kiran Sharma, CS

ORDER

S. K. Mohapatra, Member

1. M/s Phoenix Arc Private Limited, claiming as the financial creditor, has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. General Garments Delhi Private Limited, referred to as the corporate debtor.

2. The Respondent Company M/s. General Garments Delhi Private Limited (CIN No. U74899 DL1993 PTC 056533) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 20.12.1993 and presently has its registered office at B-II/19, Mohan Co-operative Industrial Estate, Badarpur, New Delhi – 110044. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is appropriate to mention that Ms. Priyanka Narang authorized signatory of the applicant company duly authorized by Board Resolution dated 11.02.2019 has preferred the present application on behalf of the applicant, M/s. Phoenix Arc Private Limited, for initiation of Corporate Insolvency Resolution Process against the respondent corporate debtor in terms of the provisions of the Code. A copy of the relevant Board Resolution of the applicant company held on 11.02.2019 has been placed on record.

4. It is the case of the applicant that M/s Religare Finvest Limited having its registered office at 2nd Floor, Rajlok Building, 24, Nehru Place, New Delhi-110019 (hereinafter referred to as "Assignor") had sanctioned loan facility to the respondent company M/s General

Garments Delhi Private Limited for an amount of Rs. 8,82,00,000/- (Eight Crore Eighty-Two Lacs Only) vide Loan facility agreement dated 28.02.2014 having loan account no. XMORPNG00051834.

5. It is stated that the respondent corporate debtor accepted the terms and conditions of the loan agreement and signed the said facility agreement. The Corporate debtor also agreed to create charge with ROC in favour of Religare Finvest Limited (Assignor) over the immovable property of plot of land situated at the Industrial Plot no. 19, admeasuring 1996.06 sq. yds., Block no. B-II, in the layout plan of Mohan Co-operative Industrial Estate Ltd. Delhi- 110044.

6. It is alleged that the Corporate Debtor made default in repayment of said loan facility. Due to non-payment of the debt as per schedule of payment, Religare Finvest Limited (Assignor) initiated various legal proceedings against the Corporate Debtor.

7. An arbitration proceeding was also initiated by the Assignor against the respondent Corporate Debtor. The

Ld. Arbitrator passed an arbitration award dated 29.03.2017 in favour of the Assignor i.e. Religare Finvest Limited.

8. Subsequently vide Deed of Assignment dated 10th May 2018, Phoenix Arc Limited (acting as trustee of Phoenix Trust FY 18-1 Scheme G) Assignee/ Financial Creditor) acquired the debt from Religare Finvest Limited (Assignor) along with all rights, titles and interests in said loan account.

9. As a consequence of assignment of debt, the relevant charge was also modified in favour of applicant financial creditor by the Religare Finvest Limited (Assignor) over the secured mortgaged property in the records of statutory body.

10. Subsequent to the assignment, the applicant Financial Creditor issued various notices to the corporate debtor and demanded the overdue amount, however Corporate Debtor failed to repay the said amount. The financial Creditor also issued notice dated 31.01.2019 to the Corporate Debtor demanding thereby amount of Rs. 11,97,05,242/- outstanding as on 31.01.2019.

11. It has been claimed in the application that the Corporate Debtor owes an amount of INR. 12,08,94,118/- as on 07.03.2019 as per the arbitral award dated 29.03.2017 passed in favour of the Financial Creditor.

12. In support of its claim, applicant has placed on record copy of loan agreement dated 28.02.2014, copy of Statement of Account as maintained by Religare Finvest Limited (Assignor), notice of default issued by applicant on 31.01.2019 and copy of the award including details of computation of amount in default.

13. Applicant has prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application as the respondent corporate debtor has failed and defaulted to pay the amount as awarded under Arbitration and Conciliation Act, 1996.

14. The respondent corporate debtor has filed its reply on 20.05.2019. Rejoinder to the reply was filed by applicant on 31.05.2019.

15. We have heard the learned counsels for the parties and have perused the case records.

16. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

a) Financial creditor
b) Operational creditor, and
c) Corporate debtor itself.

17. The procedure in relation to the initiation of Corporate Insolvency Resolution Process by the "Financial Creditor" is delineated under Section 7 of the Code, wherein only "Financial Creditor" / "Financial Creditors" can file an application. As per Section 7(1) of the Code, an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

18. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code and precisely "Financial debt" is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

19. In the present case the disbursed loan amount is recoverable with applicable interest as envisages in the loan agreement dated 28.02.2018 executed by the parties. The corporate debtor had undertaken the liability to repay the loan along with the agreed interest. The loan/financial facility was clearly disbursed against the consideration for time value of money with a clear commercial effect of borrowing. Moreover, the debt claimed in the present application based on the arbitral award which includes both the component of outstanding principal and interest.

20. It is also pertinent to note that vide Deed of Assignment dated 10th May 2018, Phoenix Arc Limited (acting as trustee of Phoenix Trust FY 18-1 Scheme G) Assignee/ Financial Creditor) acquired the debt from

Religare Finvest Limited (Assignor/original lender) along with all rights, titles and interests in said loan account.

21. The assignment, is the transfer of one's right to recover the debt of another person as a contractual right. 'Assignor' assigns its debt in favour of the assignee and 'assignee' steps in the shoes of the 'assignor'.

22. Religare Finvest Limited original Lender and the applicant entered into an Assignment Agreement on 10th May 2018 where by the Loan rights of the original lender so far as relates to the corporate debtor were assigned in favour of the applicant. Thereby the applicant M/s Phoenix Arc Limited became the assignee and came within the meaning of 'financial creditor' under Section 5(7) read with 5(8) of the Code.

23. It is thus seen that not only the present claim comes within the purview of '*Financial Debt*' but also the applicant can clearly be termed as '*Financial Creditor*' of the respondent corporate debtor so as to prefer the present application under Section 7 of the Code.

24. The present application filed by the applicant financial creditor has to be admitted under sub-section 5 (a) of Section 7 of the code, on satisfaction that:

I. Default has occurred.

II. Application is complete, and

III. No disciplinary proceeding is pending against the proposed IRP.

25. An application under Section 7 of the Code is acceptable so long as the financial debt is proved to be due and there has been occurrence of existence of default. What is material is that the default is at least Rs. 1 lakh. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

26. In the present case the claim of the applicant is based on the award dated 29.03.2017 passed under Arbitration and Conciliation Act, 1996 against the respondent corporate debtor jointly and severally, which reads as follows: -

"a. The respondents shall jointly and severally pay to the claimant company an amount of Rs. 9,50,58,009.07/- with future interest at the rate 12% p.a. form the date of initiation of arbitration proceeding i.e. 31.11.2016 till realization. It is clarified that the amount already paid by the respondents to the claimants against sanctioned loan during the pendency of the proceedings, if any, shall be deducted from the awarded amount.

b. The respondent shall jointly and severally pay to the claimant a sum of Rs. 22000/- as costs of these proceeding and shall also pay such costs and expenses that may be born and incurred by the claimant for recovery awarded amount plus value of non-judicial stamp which is of value of 0.1.% of the total awarded amount."

27. It is reiterated that M/s Religare Finvest Limited in whose favour the award was passed has assigned its right over the debt/award in favour of the assignee i.e. applicant Financial Creditor. The Loan rights of the original lender so far as it relates to the corporate debtor have been assigned in favour of the applicant.

28. It is further seen that the award being unchallenged has since attained finality. The present claim of the financial debt based on the award is clearly due and payable in law. Besides the claimed financial debt in the light of the award exceeds Rupees 12 Crores much above the thresh hold limit of one lakh and the respondent has failed to place on record any evidence to prove that it has paid the awarded amount to the applicant. There has been clear occurrence of default in payment of the financial debt.

29. In connection with the 2nd requirement of sub-section 5 (a) of Section 7 of the code, it is seen that the present application is complete and has been filed by the petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with the required information, documents and records as prescribed under the Rules.

30. The applicant *inert-alia* has annexed to the application detail particulars of 'financial debt' including documents, records and relevant arbitral award as evidence of default as required under subsection 3 (a) of Section 7 of the Code. It is reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of the Rules, shows that the Form is complete in all respect and there is no infirmity in the same.

31. Sub-section (3) (b) of Section 7 of the Code further mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Ms. Ritu Rastogi, for appointment as Interim Resolution Professional having registration number IBBI / IPA - 001 / IP-P00204 / 2017-18 / 10393 resident of D-1B, 9A, Janak Puri, New Delhi - 110058 with email-id ritu_rastogi1@yahoo.com.

Ms. Ritu Rastogi has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 07.03.2019 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by her that no disciplinary proceedings are pending against her in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Ms. Ritu Rastogi as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has also been satisfied.

32. It is thus seen that the requirement of sub-section 5 (a) of Section 7 of the code stands satisfied as default has occurred; the present application filed under Section 7 is complete and as no disciplinary proceeding against the proposed IRP is pending.

33. Once there is a debt and default and the application under the Code is complete the Adjudicating Authority is bound to admit the application.

34. Before parting with the matter, various objections raised by the respondent corporate debtor are discussed below.

35. The main contention of the respondent is that the loan was given to three co-borrowers i.e. R. K. Industries, a proprietorship, Shri Rakesh Dua (now deceased) and Smt. Renu Dua. It is contended that the loan was availed and utilized by R. K. Industries for its business needs and was thus passed on by the respondent to R. K. Industries.

36. In this regard applicant financial creditor in its rejoinder filed on 31.05.2019 has submitted that *'the loan was applied by Corporate Debtor i.e. General Garments Delhi Private Limited along with M/s. R.K. Industries as guarantor, Mr. Rakesh Dua and Mrs. Renu Dua as Co-applicants. The Corporate Debtor passed a resolution dated 28.02.2014 before the Board of Directors wherein chairman informed to the Board about the loan sanctioned by Religare Finvest Limited to the company and also about the property mortgaged as collateral* *against the loan. Further, corporate debtor by executing declaration dated 28.02.2014 has affirmed the fact regarding availment of loan facility to the tune of Rs. 8,82,00,000/-. Further, amount of loan was duly credited in account of corporate debtor'.*

37. Moreover, it is seen that the award was passed on 29.03.2017 under Arbitration and Conciliation Act, 1996 jointly and severally against the respondent corporate debtor, Shri Rakesh Dua and Smt. Renu Dua. Accordingly, each one of them is jointly and severally liable to pay to the applicant in terms of the award. As each of them are jointly and severally liable, the applicant can elect to move against the corporate debtor alone. Corporate debtor being jointly and severally liable to pay the financial debt, the present application against the respondent alone is clearly maintainable.

38. Respondent has raised another objection that the applicant has already initiated proceedings against the corporate debtor under the provisions of SARFAESI Act.

It is claimed that simultaneous action under the Code therefore is not maintainable.

39. In this regard it is pertinent to note that Section 7 application filed under the Code is an independent proceeding, which has nothing to do with the pendency of proceedings under SARFAESI Act, 2001. Insolvency and Bankruptcy Code, 2016 is a special law having an overriding effect on any other law as mandated under Section 238 of the Code. The statutory rights of the applicant financial creditor satisfying the requirements of Section 7 of the Code to trigger Corporate Insolvency Resolution Process cannot be defeated on the ground of pendency of such proceedings.

40. Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 187 of 2017 decided on 14.11.2017 with regard to pendency of *SARFAESI* proceedings has observed as follows:

> "6. *It was next submitted by the counsel for the appellant that action under 34(4) of the SARFAESI Act,*

2002 had already taken by the bank, but that cannot be a ground to reject an application under Section 7."

41. Similarly, in the case of M/s Innoventive Industries Ltd. V. ICICI Bank and Ors. reported in AIR 2017 SC 4084, Hon'ble Supreme Court has also held at para 56 that:

> *"The non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code".*

42. In view of the above discussion, the objection raised regarding pendency of proceedings in different forums is no bar for initiation of Corporate Insolvency Resolution Process under Section 7 of the Code in view of the overriding effect given to the provisions of Section 238 of the Code.

43. Similarly, Section 7 application filed under the Code cannot be rejected on the ground that the claim has been disputed. Adjudicating Authority is only to ascertain the existence of a default. The Adjudicating Authority is not required to decide as to what is the actual amount of claim and other details. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application.

44. In the facts, the objection cannot sustain as Section 7 application filed under the Code cannot be rejected on the ground that the claim has been disputed. It is no matter that the debt is disputed so long as the debt is due and payable. Adjudicating Authority is only to ascertain the existence of a default. The Adjudicating Authority is not required to decide as to what is the actual amount of claim and who is at fault. Adjudicating Authority do not decide a money claim or suit, which can only be decided by the court of competent jurisdiction.

45. It is reiterated that the Adjudicating Authority is only to ascertain the existence of a default, which has to be more than the threshold limit of one lac.

46. The corporate debtor is entitled to point out to the Adjudicating Authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim is not due i.e. it is not payable in law or in fact. Respondent Corporate Debtor has miserably failed to raise any good defence against the petition and also has failed to substantiate as to how default in terms of the award dated 29.03.2017 has not arisen. There is no proof on record to show the re-payment of the awarded amount to the financial creditor. Needless to say, that the claim is within limitation and is based on an enforceable award passed on 29.03.2017. That apart being unchallenged the award has attained finality and is enforceable in law.

47. In the aforesaid background it is seen that the applicant clearly comes within the definition of Financial Creditor. Respondent has neither denied the availment of various loans granted by the financial creditor, nor denied the execution of Loan Agreements. Besides there is an enforceable award passed in favour of the applicant, which has since attained finality and is clearly enforceable in law. The material placed on record confirms that the respondent corporate debtor committed default in repayment of the financial debt. Besides on a bare perusal of Form – I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed IRP. All the requirements of Section 7 (5) (a) of the Code thus stand fulfilled.

48. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

49. Ms. Ritu Rastogi, having registration number IBBI / IPA - 001 / IP-P00204 / 2017-18 / 10393 resident of D-1B, 9A, Janak Puri, New Delhi - 110058 with email-id ritu_rastogi1@yahoo.com is appointed as an Interim Resolution Professional.

50. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lac with the Interim Resolution

Professional namely Ms. Ritu Rastogi, to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per applicable rules.

51. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

52. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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."*

53. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

54. The Interim Resolution Professional shall perform all her functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by her in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all her functions strictly in accordance with the provisions of the Code, Rules and Regulations.

55. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The

Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (T)

Shammy