

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court-I)  
KOLKATA**

*IA.(IB)No. 563/KB/2023*

*In*

*C.P (IB) No.325/KB/2022*

*An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016,  
read with Rule 11 of National Company Law Tribunal.*

*In the matter of:*

**J.C. Flowers Assets Reconstruction Private Limited**

*...Applicant*

**Versus**

**Shristi Infrastructure Development Corporation Limited**

*... Respondent*

**Order Pronounced on : 03.05.2024**

**Coram:**

***Mr.Rohit Kapoor, Member (Judicial)***

***Mr.Balraj Joshi, Member (Technical)***

**Counsels appeared through Physically/ Video Conference**

Mr.Ramji Srinivasan,Sr. Adv.] For the Applicant in IA 563/2023

Mr.Pramit Chakraborty, Adv. ]

Mr.Arindam Mrinal Roy,Adv. ]

Mr.Rishav Banerjee, Adv. ] For the Respondent in IA 563/2023

Mr.Rajarshri Banerjee,Adv. ]

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**ORDER**

***Per: Balraj Joshi , Member (Technical)***

1. **IA (IBC)/563/KB/2023**, is an application filed by the Applicant under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rule, 2016 for the following reliefs:-
  - i. Allow substitution of Applicant i.e. J.C.Flowers Asset Reconstitution Private Limited, acting in its capacity as trustee of JCF Yes Trust 2022-23/8, in place of the Original Applicant/ Financial Creditor i.e.Yes Bank Limited in Company petition, being CP(IB) No. 325/KB/2022 filed with this Tribunal.*
  - ii. Allow the applicant to amend the Company Petition being C.P.(IB) No. 325/KB/2022 in red ink in the manner mentioned in Annexure "X" of this Application and an amended memo of parties be taken on record, if required.*
  - iii. Allow the applicant to re-verify, re-affirm the file the duly amended copy of the Company Petition with the Registrar of this Tribunal.*
  - iv. Service of fresh notice upon the Corporate Debtor be waived.*
  - v. Ad interim orders in terms of prayers (a), (b), (c) and (d) above.*
  - vi. Such further and other order(s) be made.*

***Facts of the case :***

2. The instant Company Petition was filed on behalf of Yes Bank Limited, the original Financial Creditor, on or about December 05,2022. Subsequent thereto, the Original Financial Creditor has unconditionally and irrevocably assigned, transferred and released in favour of the Applicant herein, all the financial assistance, granted by the Original Financial Creditor to M/s Sarga Hotel Private Limited (Principal Borrower) together with all its rights, title and interest therein and all collateral and underlying security interest and /or mortgages and /or pledges created to secure and/or guarantees issued in respect of the repayment of the financial assistance and to which the Original Financial Creditor (in its

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capacity as the assignor) is entitled to, in terms of Section 5 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) in accordance with Deed of Assignment, dated December 16,2022. The aforementioned Deed of Assignment has been registered with the office of the Additional Registrar of Kolkata and recorded as Deed No. 190401762/2023, Book No.I, Volume 1904 -2023, pages 112771 to 112839.(Annexure-A).

3. Accordingly, the Applicant has become the full and absolute legal owner, and the only person legally entitled to enforce the guarantee documents executed by the Respondent/Corporate Debtor to secure the financial assistance availed by M/s Sarga Hotel Private Limited (Principal Borrower) from the Original Financial Creditor and has further become entitled to receive all amounts due under the aforementioned corporate guarantee, including the right to continue any pending insolvency and bankruptcy proceedings for resolution of the Respondent/Corporate Debtor and institute such other proceedings and take such other actions as may be required for the purpose of enforcing the corporate guarantee executed by the Respondent/ Corporate Debtor in favour of the original Financial Creditor, in its own name and right.
4. Section 5(7) of the Insolvency and Bankruptcy Code, 2019 defines “Financial Creditor” to include “ any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”. Further, Section 5(4) of the SARFAESI Act lays down as follows:

*“ If, on the date of acquisition of 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 of financial institution, save as provided in the third proviso to sub-section (1) of Section 15 of the Sick Industrial Companies (Special Provisions)Act, 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*

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*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.”*

5. The Hon’ble National Company Law Appellate Tribunal vide Order dated 13/12/2022 in Siti Networks Ltd. Vs Assets Care and Reconstruction Enterprises Ltd. & Anr. (Comp. App. (AT) (Ins.) No. 1449/2022), rightly observed as follows:-

*“ 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. By virtue of assignment, Respondent No.1 become the Financial Creditor and having stepped in the shoes of ‘Housing Development Finance Corporation Limited’, it has every right to continue the proceeding which was initiated by Respondent No.2”.*

6. In view of the aforementioned assignment of outstanding debts of the Principal Borrower by the Original Financial Creditor in favour of the Applicant and the provisions of the SARFAESI Act, 2002, the Code and the aforementioned order of the Hon’ble Appellate Tribunal, all rights and claims of the Original Financial Creditor in terms of this instant Company Petition against the Respondent stand transferred, assigned and vested in favour of the Applicant and the Applicant has stepped into the shoes of the Original Financial Creditor.
7. In the facts and circumstances and for the reasons set out hereinabove, the Applicant is required to be substituted in place and instead of the Original Financial Creditor i.e. Yes Bank Limited, to enable it to proceed with the present Applicant filed under section 7 of the Code for initiating Corporate Insolvency Resolution Process of the Corporate Debtor.

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8. For the reasons mentioned in paragraph IV(2) to IV(6) of the application, it has now become necessary to amend the Company Petition and to bring on record several new documents in the manner indicated in red ink in the copy of the Company Petition (without annexures) and its supporting affidavits, which are annexed as Annexure-X.
9. Ld. Counsel appearing for the Respondent i.e. Shristi Infrastructure Development Corporation Limited has filed its reply affidavit in response to the application filed by the Applicant, the main contentions raised therein are as under:-
- i. The instant application is not maintainable and without going into the merits of the main petition filed under section 7 of IBC.
  - ii. The main petition filed under section 7 IBC by the Applicant is not maintainable since the alleged Loan Recall cum Guarantee invocation Notice sent by the Applicant [Annexure I-3 (Colly) at page 174 & 175 of the Main petition] was sent on 9<sup>th</sup> June, 2020 and the Corporate Debtor has been called upon to pay the amount in June, 2020 which falls squarely within the excluded period as mentioned under Section 10A of the Insolvency and Bankruptcy Code, 2016. Section 10A clearly stipulates that:-  
  
**“ 10A. Suspension of initiation of corporate insolvency resolution process.**  
  
*Notwithstanding anything contained in sections 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25<sup>th</sup> March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.*  
  
**Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.**  
  
*[Emphasis supplied]*
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- iii. This Adjudicating Authority has not yet issued notice to the answering Respondent on the main petition filed under section 7 of the Code being C.P. No. 325/2022. That in absence of any notice on the main petition, the Applicant has no valid basis to request for an alleged substitution. The Original Creditor should ideally withdraw the present petition and a fresh petition should be preferred by the Applicant herein. That however, only in order to evade the process of law and to circumvent due procedure, the Applicant has belatedly filed the present application seeking substitution at such a preliminary stage.
- iv. Rule 4(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandates the assignor in cases of assignment to produce all relevant documents pertaining to the assignment or transfer. Relevant extract of the aforesaid provision is reproduced hereinunder:-
- “ 4. Application by financial creditor :-***
- (1) ...*
- ...
- (2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer. ”*
- v. The applicant has in order to demonstrate the alleged assignment, has merely placed on record the purported Assignment Agreement, contents of which are denied and the same is neither a valid or binding document. However, upon a bare perusal of the purported Assignment Agreement and the present application, the assignment has been made in favour of the JCF Yes Trust while the Application under reply has been filed by the JC Flowers Asset Reconstruction Private Limited purportedly acting in the capacity of a trustee of JCF Yes Trust 2022-23/8, while no Trust Deed has not been placed on record before this Adjudicating Authority to substantiate

the same.

- vi. It is submitted that in the absence of any trust deed being placed on record and a resolution of the beneficiaries of the trust authorizing the Applicant herein to file the present Application makes it without authorization.
- vii. It is submitted that the Ld. NCLT Bench at Kochi has vide judgement dated 15.02.2023 in **Phoenix ARC Private Limited (Trustee of Phoenix Trust FY 17-18 ) vs. M/s Cherupushpam Films Private Limited** categorically held that in the absence of the Trust Deed, the Petition was incomplete. Relevant extract of the aforesaid Judgement is reproduced hereunder:-

*“ 15. 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.”*

- viii. In terms of Rule 4(2) as reproduced above, the Applicant was obligated to produce the fundamental document before this Adjudicating Authority and hence the Application under response is deficient.
- ix. That in addition to the foregoing, the Assignment Agreement is bereft of any proper statement of accounts or details regarding a clear and proper bifurcation of the loan amount and outstanding dues and hence the document cannot be considered as a legal and valid contract. It is submitted that Schedule I of the Assignment Agreement merely states that outstanding amount of the Term Loan availed by Sarga Hotel Private Limited is Rs. 399,82,52,011.48/- without however giving any bifurcation. The Assignor

has further failed to disclose whether there have been any defaults to the Loan of Sarga Hotel Private Limited. That in the absence of necessary details striking at the very root of the assignment, the said Assignment Agreement cannot be considered as a valid assignment. The present application basis the Assignment Agreement is therefore not maintainable since the Agreement lacks legal validity and binding effect.

- x. It is further stated that the Assignment Agreement, which the present application relies upon, is fundamentally flawed and lacks legal validity due to non compliance with stamp duty requirements as per the Bengal Stamp Act, 1922. The Agreement in question has not been appropriately stamped, and the stamp duty paid is insufficient, rendering it legally deficient. It is pertinent to note that adherence to stamp duty laws is a fundamental aspect of ensuring the enforceability and legality of agreements. However, in this instance, the Assignment Agreement fails to meet the necessary stamp duty obligations, thereby making it ineffective and unenforceable. The Applicant's reliance on such an inadequately stamped and invalid Agreement for the purpose of implement is untenable and should be dismissed by this Adjudicating Authority.
- xi. It is submitted that an amount of Rs. 300 Crore was to be disbursed by the Original Financial Creditor namely YES Bank Limited in accordance with the sanction letter dated 16<sup>th</sup> March, 2016. The Principal Borrower namely Sarga Hotel Private Limited for which the Corporate Debtor is stated to be the Guarantor, had paid total processing fee amounting to Rs. 11.56 Crore till 6<sup>th</sup> March, 2017. However, as against the total disbursed amount of Rs. 300 Crore, only a sum of Rs.2,75,50,73,858/- had been disbursed against the said sanction letter. Therefore, Excessive Processing Fee/Facility Fees paid by Sarga Hotel Private Limited had to be adjusted which finds no mention in the Assignment Agreement.
- xii. That in view of the facts and circumstances as stated above, it becomes evident that the alleged Assignment Agreement is a mere facade

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orchestrated by Yes Bank Limited and does not hold legal validity. The agreement lacks the essential elements required to constitute a legally binding contract. Upon careful examination, it becomes apparent that the Assignment Agreement is designed to conceal the true nature of Yes Bank Limited's involvement and is intended to serve as a shield to avoid legal obligations. The agreement fails to meet the necessary legal requirements, such as proper execution, clarity of terms, and the presence of essential contractual elements.

xiii. In the light of the above, this Adjudicating Authority may kindly be pleased to dismiss the Application bearing IA(IB) No. 563/KB/2023 in CP No. 325/2022 with cost.

10. In regard to the reply affidavit filed by the Respondent, Ld.Counsel for the Applicant has filed its **rejoinder**, the contents of which are under:-

i. It is submitted that the Company Petition filed under section 7 of the Code is lawful, bonafide and maintainable contrary to all assertions raised by the Respondent in Paragraph 6, it is submitted by the applicant that the Applicant's prayers for substitution of the Original Financial Creditor i.e., Yes Bank Limited with the Applicant is a formal application which neither changes the nature and character of the instant proceeding nor constitutes any new and/or different and /or cause of action. The Hon'ble NCLAT, while adjudicating an appeal filed in **Siti Networks Ltd. v Assets Care and Reconstruction Enterprises Ltd. & Anr. [Comp.App. (AT) (Ins.) 1449/2022]** has filed that there is no prohibition in the Code or any of the regulations from continuing the proceeding by an assignee. Similarly in **Surender Singh versus Yes Bank Ltd.& Anr.** (Company Appeal (AT) (Insolvency) No. 179 of 2023, the National Company Law Appellate Tribunal, by relying on the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, and the Supreme Court judgement in **Sharadamma versus Mohammed Pyrejan &Anr.** (Civil Appeal No. 7889/2015) observed that the application filed by the assignor

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should be allowed to be continued and would not prejudicially be affected by reason of acquisition of the financial asset. Section 5(7) of the Code which defines 'Financial Creditor' also includes a person to whom such debt has been legally assigned or transferred to. Thus, by virtue of an assignment, an assignee becomes the financial creditor and it has every right to continue the proceeding which was initiated by the original Financial Creditor/Assignor. Accordingly, the Respondent's submissions are premature, ill-conceived and should not be entertained at the instant stage when the incidence of subsisting the Original Financial Creditor i.e., Yes Bank Limited with the Applicant is still pending before the Adjudicating Authority. Accordingly, without allowing the substitution of the Applicant in place and instead of Original Financial Creditor i.e., Yes Bank Limited, the frivolous and irrelevant submissions made by the Respondent with respect to maintainability of the Company Petition under Section 7 of the Code should be outright rejected in entirety since their instant Reply affidavit only pertains to the Application.

- ii. Additionally, sub-section (4) of Section 5 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) clearly contemplates continuation and prosecution of any proceeding by an assignee who acquires financial asset. Sub-section (4) of Section 5 of the SARFAESI Act, 2002 is as follows:-

*"5. Acquisition of rights or interest in financial assets.....(4) If, on the date of acquisition of 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*

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*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”.* (**emphasis supplied**).

In this connection, the observations of the Hon’ble Supreme Court in **Sharadamma v. Mohammed Pyrejan & Anr.** are relevant and applicable.

- iii. It is submitted by the applicant that the provision of Section 10A of the Code is not attracted or applicable to the present case at all. That the Respondent (in its capacity as the Corporate Guarantor) is said to have defaulted in its repayment obligations to the Original Financial Creditor i.e, Yes Bank for the first time on November 30,2019 (hereinafter referred to as “First Date of SIDCL Default”) when M/s Sarga Hotel Private Limited ( in its capacity as the Principal Borrower ) initially failed in making due payments to the Original Financial Creditor i.e. Yes Bank in accordance with the agreed repayment schedule. That the defaulting nature of the Respondent (in its capacity as the Corporate Guarantor) continued and was exposed every time M/s Sarga Hotel Private Limited ( in its capacity as the Principal Borrower) defaulted in its repayment obligations to the Original Financial Creditor, ultimately resulting in the loan account of M/s Sarga Hotel Private Limited being classified as Non –Performing Asset on 29/02/2020 (which was much before inclusion of Section 10A). It is submitted that each of the aforementioned incidence of defaults by the Respondent ( in its capacity as the Corporate Guarantor) in the present case is in the nature of ‘Continuing Default’ which commenced much prior to the period contained under Section 10A of the Code. Additionally, as per NESL report (Exhibit G) of the Company Petition), the date of default in the matter of M/s Sarga Hotel Private Limited is November 30, 2019, which is out of 10A period.
- iv. That the liability of the Respondent (as Corporate Guarantor) is co-terminus

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and co-extensive with that of M/s Sarga Hotel Private Limited (in its capacity as the Principal Borrower) in accordance with the settled legal position ratified by the Hon'ble Supreme Court of India in *Laxmi Pat Surana v Union of India (Civil Appeal No. 2734 of 2020)*. That the Supreme Court of India again reaffirmed the legal position propounded in the foregoing case in a recent judgment of *K Paramasivam Vs. The Karur Vysya Bank Ltd. and Anr. (Civil Appeal No. 9286 of 2019)*. As a result, it is presumed that the Respondent has also committed default on 29<sup>th</sup> February, 2020 which is explicit from the provisions of Section 128 of the Indian Contract Act, 1972.

- v. It is submitted that subsequent to 29<sup>th</sup> February, 2020, the default has continued thereafter and after providing ample time to the Respondent, Yes bank Limited has issued a notice calling upon the Respondent to clear the outstanding dues that is due and payable as corporate guarantor. That the Applicant had issued the Loan Recall – cum- Guarantee Invocation Notice, dated June 09, 2020 formally recalling the credit facility (availed by the M/s Sarga Hotel Private Limited) from M/s Sarga Hotel Private Limited (in its capacity as the Principal Borrower) and the Respondent (in its capacity as the Corporate Guarantor). **That the aforementioned notice is erroneously being construed by the Respondent to fall within the Covid restriction period under Section 10A of the Code as a desperate attempt to wriggle out the repayment obligations legitimately owed to the Applicant.** The said notice does not suggest that the liability of the Respondent accrued only in June 2020 when Section 10A of the Code was introduced and came into force. On the contrary the liability of the Corporate Debtor arose much before on November 30, 2019 when the principal borrower being Sarga Hotels Private Limited committed default.
- vi. That in terms of Paragraph 9 of the Reply, the Respondent has argued that since the Adjudicating Authority has not issued notice to the Corporate Debtor, being the answering respondent in the Company Petition, the

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Applicant has no basis to request for an alleged substitution and should ideally withdraw the present petition and file a fresh petition. That at the cost of sounding respective, it is reiterated the contents of Paragraph 2 of the Application which referred to the original Section 7 Company Petition being filed by Yes Bank Limited (“**Original Financial Creditor**”) on or about December 05, 2022. Thereafter, vide a registered Assignment Agreement, dated December 16, 2022, Yes Bank Limited (in its capacity as the Original Financial Creditor), unconditionally and irrevocably assigned, transferred and released in favour of the Applicant, all the financial assistance, granted by it to M/s Sarga Hotel Private Limited (“**Principal Borrower**”) together with all its rights, title and interest therein and all collateral and underlying security interest and/or mortgages and/or pledges created to secure and/or guarantees issued in respect of the repayment of the financial assistance to which the Original Financial Creditor (in its capacity as the assignor) is entitled to, in terms of Section 5 of the SARFAESI Act. The aforementioned Assignment Agreement was registered with the Office of Additional Registrar of Assurances-IV, Kolkata and recorded as Deed No. 190401762/2023, Book No. 1, Volume 1904-2023, Pages 112771 to 112839 (hereinafter referred to as the “**Assignment Agreement**”).

- vii. That thereafter, when the Section 7 Company Petition came up for hearing for the first time on December 28, 2022, the loan account of M/s Sarga Hotel Private Limited (in its capacity as the Principal Borrower) was already assigned by the Original Financial Creditor in favour of the Applicant. The present Applicant had already stepped into the shoes of the Original Financial Creditor as a proper and necessary party. This Refutes the baseless assertion/ allegation of the Respondent that the Applicant has belatedly filed the present Application seeking substitution at such a preliminary stage, in terms of Paragraph 9 of the Reply.
- viii. That in terms of Paragraph 10 of the Reply, the Respondent has cited Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjoining Authority)

Rules, 2016 which mandates all assignees/ transferees (in relation to any financial contracts) to produce and submit copies of all assignment or transfer agreement with relevant documentation to demonstrate the assignment or transfer in the event they need/ decide to pursue cases before the Adjudicating Authority. The Applicant states that it has complied with the cited Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Further, the assignment of all rights, title and interests in the financial assistance pertaining to M/s Sarga Hotel Private Limited along with security created thereof, were duly intimated to M/s Sarga Hotel Private Limited (in its capacity as the Principal Borrower) and the Respondent (in its capacity as the Corporate Guarantor) *vide* letters dated December 30, 2022 and January 03, 2023 issued by the Original Financial Creditor and the Applicant respectively.

- ix. In Paragraph 11 of the Reply, the Respondent has contended that while the Assignment Agreement has been produced (by way of a relevant annexure/ exhibit), the underlying Trust Deed has not been brought on record. It is denied that a Trust Deed is required to be divulged/ brought on record before the Adjudicating Authority, since the Corporate Debtor/ Respondent has no reason to be interested in a particular transaction specially when such Corporate Debtor/ Respondent is not even a party to the Trust Deed. Based on the principles of privity of contract, the Applicant is not bound to disclose the terms and conditions of Trust Deed to the Respondent, who is not even a party to such Trust Deed. The Applicant vehemently opposes and denies the averments made by the Respondent in terms of Paragraphs 11 and 12 of the Reply wherein it has referred a certain order of the NCLT Kochi Bench in support of their claims. The Applicant affirms that the instant NCLT Order is under challenge before the Ld. National Company Law Appellate Tribunal, Delhi as on current date and the same cannot be stated to be in furtherance of a correct position of law vis-a-vis filing of application under Section 7 of the Code and/or the Application on the basis

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of Assignment Agreement. That by no stretch of imagination, the Applicant is required to annex the Trust Deed with the present Application as a relevant annexure or exhibit. The applicant, therefore, also denies the averments made by the Respondent in terms of Paragraph 13 of the Reply which states that the Applicant was obligated to produce the fundamental document i.e. the Trust Deed before the Tribunal.

- x. That in terms of Paragraph 11 of the Reply, the Respondent has also enquired about the subsistence of resolution passed by the beneficiaries of the Trust authorizing the Applicant to file the Application and that any application without such resolution is to be treated as without authorization for all practical purposes. That the Applicant categorically denies such reiterations of the Respondent as baseless and made without legal basis and intended to derail the proceedings for substitution of the Applicant in place of Original Applicant i.e. Yes Bank Limited.
- xi. That a careful reading of the Assignment Agreement makes it amply clear the instant assignment in terms of the Assignment Agreement has been made by Yes Bank Limited (“Original Financial Creditor”) (as Assignor) in favour of J.C. Flowers Asset Reconstruction Private Limited (acting in its capacity as Trustee of JCF Yes Trust 2022-23/8) (“Applicant”) (as assignee). That a perusal of Clause 2.1.1 of the Assignment Agreement (currently appearing in Page 32 of the Application). reveals as follows: *“The parties hereto acknowledge that the conditions precedent set forth in Section 3 (conditions Precedent) of this Agreement have been fulfilled or waived by the parties, as the case may be, and in consideration of the Assignee paying the Purchase Consideration of the Assignor, and upon the terms and conditions set forth herein and in the relevant Transaction Documents, the Assignor, as the true, legal and beneficial owner of the Loans, in the ordinary course of its business, hereby unconditionally and irrevocably sells, assigns, transfers and releases to and unto the Assignee all the Loans, forever, To Hold the same absolutely IN TRUST for the*

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*benefit of the holders of Security Receipts issued by the Assignee pursuant to JCF YES Trust 2022-23/8 Trust and the Trust Deed TO THE END AND INTENT THAT the Assignee shall hereafter be deemed to be the full and absolute legal owner, and the only person legally entitled to the Loans or any part thereof, free from any or all encumbrances, and to recover and receive all Amounts Due, including the right to file a suit or institute such other recovery proceedings and take such other action as may be require for the purpose of recovery of the Loans, in its own name and right and as an assignee and not as a representative or agent of the Assignor and to exercise all other rights of the Assignor in relation thereto.”*

- xii. That the Applicant states that the Respondent has deliberately misinterpreted the terms and conditions set out under the Assignment Agreement as per its own convenience by failing to notice that the outstanding debts (together with all its rights title and interest therein and all collateral and underlying security interest and/or mortgages and/or pledges created to secure and/or guarantees issued in respect of the repayment of the financial assistance) owed to Yes Bank Limited (as Original Financial Creditor) stand assigned in favour of the Applicant.
- xiii. The Applicant makes it clear that the Trust Deed is not a prerequisite document and need not be produced with the Assignment Agreement. Similarly, there also exists no requirement to divulge the existence of appropriate resolution of the beneficiaries of the Trust to file the Application since the Assignment has been made in favour of J.C. Flowers Asset Reconstruction Private Limited (acting in its capacity as Trustee of JCF Yes Trust 2022-23/8) . Consequently, the submissions of the Respondent in Paragraph 10,12 and 13 falls flat on its face and are liable to be summarily dismissed
- xiv. That the Applicant denies the Respondent’s assertion in Paragraph 14 wherein it claims that Assignment Agreement has been executed bereft of any proper statement of accounts or details regarding a clear and proper

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bifurcation of the loan amount and outstanding dues and hence the document cannot be considered a legal and valid contract. The Applicant denies that it has failed to disclose details of any defaults in relation to the Loan of Sarga Hotel Private Limited (as primary Borrower) and in the absence of necessary details, striking at the root of the assignment, according to which the said Assignment Agreement cannot be considered as a valid assignment under the eyes of law.

- xv. The Applicant submits that in Schedule 2 of the Assignment Agreement (currently appearing in Page 63 of the Application) provides ample clarity in relation to the details of Current Account Nos. (Point 3), Total Outstanding Dues (Point 6) and Details of Credit Facility Sanctioned (Point 8) and follows up with more details contained in Annexure 1 of the Assignment Agreement (currently appearing as Page No. 65 of the Application). The Applicant further submits that the Assignment Agreement provides a complete breakup of the Total Outstanding Dues then/ then about owed by M/s Sarga Hotel Private Limited ( in its capacity as the Principal Borrower) by presenting a clear bifurcation of the Loan delineating the Principal of INR 268,61,97,011.55/-, Interest of INR 108,01,00,849.04/- and Penal Interest of INR 23,19,54,150.89/-, totalling to INR 399,82,52,011.48/- has been specified in Annexure 1 (Page 65 of the Application). The Applicant submits that it has already disclosed details of defaults in relation to the Loan of Sarga Hotel Private Limited (Principal Borrower) in terms of records maintained by National E-Governance Services Limited (appearing in Page Nos. 68 to 77 of the Company Petition filed under Section 7 of the Code). Moreover, Point 4 in Schedule 2 (Page 63 of the Application) records the NPA date of Sarga Hotel Private Limited (as Principal Borrower) as 29.02.2020. The Applicant also submits that detailed statement of accounts need not be annexed as part of the Application as the same is not mandated by law.
- xvi. That the Applicant categorically denies the contents of Paragraph 15 of the

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Respondent's Reply. In doing so, the Applicant refutes the Respondent's allegation that there has been non-compliance with stamp duty requirements as per the relevant stamp laws applicable in the State of West Bengal. The Applicant denies that the Assignment Agreement has not been appropriately stamped and that stamp duty paid on the same is insufficient, rendering it legally deficient, ineffective and unenforceable. The Applicant submits that the Assignment Agreement was registered only after necessary stamp duty and registration fees has been paid to the government account of Directorate of Registration and Stamp Revenue, Government of West Bengal under Article 40(b) read with Article A(1) E of the Indian Stamp Act, 1899 (as applicable and adopted by State of West Bengal). Be it noted that the requisite stamp duty and registration fees was paid only after the requisite instrument was assessed and adjudicated by the Office of Additional Registrar of Assurance-IV, Kolkata, West Bengal.

xvii. The Applicant submits that the Respondent has failed to adduce any substantial evidence in order to prove that the Assignment Agreement has been insufficiently stamped under any relevant provisions of law or otherwise. In absence of such cogent evidence, the submissions of the Respondent are not tenable and the Assignment Agreement ought to be presumed to be sufficiently stamped and admissible in evidence in any court of law/ tribunal.

xviii. The Applicant denies the allegations of the Respondent contained in Paragraph 16 that Original Financial Creditor i.e. Yes Bank had charged any Excessive Processing Fee/ Facility Fees from Sarga Hotel Private Limited which needed to have been divulged and dealt with in terms of the details recorded in the Assignment Agreement. Right from the time of disbursement till date, neither the Respondent (as Corporate Guarantor) nor Sarga Hotel Private Limited (as the Principal Borrower) has raised the issue of Excessive Processing/ Facility Fees with Yes Bank Limited, the Original Financial Creditor. Such belated raising of alleged claim is baffling and reeks of

malafide intention/ attempt to delay the substitution of the Applicant in place of Yes Bank Limited, the Original Financial Creditor.

xix. It is submitted that in totality, the Reply is baseless and vitiated by misleading and incorrect statements, and the statements made in the Reply find no basis in law or in fact and do not deserve any indulgence by this Adjudicating Authority. In view of the submissions made hereinabove, it is respectfully submitted that the submissions made in Reply are not legally tenable. Further, the Applicant's prayers for substitution of the Original Financial Creditor i.e., Yes Bank Limited with the Applicant is a formal application which neither changes the nature and character of the instant proceeding nor constitutes any new and/or different case and/or cause of action. Thus, any arguments advanced on the merits of the Company Petition may be continued post substitution of the Applicant in place and stead of the Original Financial Creditor is allowed by this Adjudicating Authority.

### **Analysis and Findings**

11. We have heard the Ld. Sr. Counsel and Counsel appearing for the parties.
12. The Corporate Debtor is a Corporate Guarantor of Sarga Hotel Private Limited, which is already undergoing CIRP. It is settled proposition of law that liability of the Guarantor is co-extensive with that of the Principal Borrower.
13. The IA is for substitution of Yes Bank i.e the original creditor with J.C.Flowers Asset Reconstruction Private Limited, who is the assignee of the said loan.
14. The assignment of debt is specifically allowed by IBC, whereby the assigned debt shall also be considered a Financial debt. The issue for adjudication is whether the assignment of the debt by the Financial Creditor namely Yes Bank to the Assignee viz JC flowers is as per law.
15. In order to adjudicate upon the said issue, it is relevant to refer to section 7 (2) and (2A) of the SARFAESI Act, which are reproduced hereinafter:

**7. Issue of security by raising of receipts or funds by asset reconstruction company.—**

(1) Without prejudice to the provisions contained in the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992), any 2 [asset reconstruction company], may, after acquisition of any financial asset under sub-section (1) of section 5, offer security receipts to qualified institute buyers 3 [or such other category of investors including non-institutional investors as may be specified by the Reserve Bank in consultation with the Board, from time to time,] for subscription in accordance with the provisions of those Acts.

(2) An asset reconstruction company may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

(2A) (a) The scheme for the purpose of offering security receipts under sub-section (1) or raising funds under sub-section (2), may be in the nature of a trust to be managed by the asset reconstruction company, and the asset reconstruction company shall hold the assets so acquired or the funds so raised for acquiring the assets, in trust for the benefit of the 2 [qualified buyers] holding the security receipts or from whom the funds are raised.

(b) The provisions of the Indian Trusts Act, 1882 (2 of 1882) shall, except in so far as they are inconsistent with the provisions of this Act, apply with respect to the trust referred to in clause (a) above.]

16. Under section 7 of the SARFAESI Act, it is clear that the Applicant can file the petition under IBC in the capacity of a trustee. Further, Section 7 does not put on

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- such asset reconstruction company any obligation to disclose its beneficiaries as long as the security receipts are issued to qualified buyers.
17. Further, section 7 of the IBC also does not mandate the Financial Creditor to disclose the name of the beneficiaries of the trust and as such, the same is not relevant for the adjudication of the instant petition.
  18. Furthermore, Rule 4(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandates the assignor in cases of assignment to produce documents relevant to “demonstrate the assignment or transfer”. In the instant matter, the assignment deed has been filed which sufficiently establishes the transfer of the debt to the Applicant. In no way can that be interpreted to include the trust deed. All that is relevant in the instant matter is that the debt became due in favour of the original Creditor i.e Yes Bank Limited which has thereafter been transferred to a third party i.e the Applicant herein.
  19. Moreover, the assignment of a debt and issue of Security receipts by the Trust is premise which has a backing of legal regulations. Effecting the assignment through a trust has many layers of advantages and has a legal backing. Trust structures can provide a layer of protection for both the assignor and the assignee. By transferring the debt through a trust, any liabilities or risks associated with the debt can be better managed and segregated from the assignee's other assets or obligations. As such when an assignment is done through a trust, this should be seen as risk mitigation necessity in line with the RBI Master Directions (Transfer of loan assets) rather than being questioned.
  20. In view of the facts and the circumstances of the matter, **IA. 563/KB/2023** is allowed in terms of prayers (a), (b), (c) and (d) of the application. The applicant is directed to amend the company petition being *C.P.(IB) No. 325/KB/2022* within 10 days of uploading this order on the NCLT Website in the manner mentioned in Annexure “X” of this application and re-verify, re-affirm and file duly amended copy of the Company Petition with the Registry and serve a copy of the amended petition upon the Applicant and Respondent no. 1 accordingly.
  21. With these directions **IA.(IB)No. 563KB/2023** is allowed and disposed of.
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22. The Registry is directed to send e-mail copies of the order forthwith to all the parties for information and for taking necessary steps.
23. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**(Balraj Joshi)**  
**Member (Technical)**

**(Rohit Kapoor)**  
**Member (Judicial)**

*Order signed on this, the 3<sup>rd</sup> day of May 2024.*

PJ/ SM (LRA)