

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

C.P (IB) No. 1536/KB/2019

A Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Phoenix ARC Private Limited

...Financial Creditor

Versus

Arambagh Hatcheries Limited [CIN U01222WB1973PLC029137]

...Corporate Debtor

Date of Hearing: 20.04.2022

Date of pronouncing the order: 13.05.2022

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Harish Chander Suri

: Member (Technical)

Appearances (through Video Conferencing/Physical)

For Financial Creditor

*: Mr. Amit Singh Chadha, Sr. Adv.
: Mr. Suresh Dobhal, Adv.
: Mr. Nirmal Goenka, Adv.
: Ms. Rupal Swati, Adv.
: Mr. Shaunak Ghosh, Adv.
: Mr. Saptarshi Saha, Adv.
: Mr. Arindam Mrinal Pal, Adv.*

For Corporate Debtor

*: Mr. Ajay Gaggar, Adv.
: Mr. Uttiyo Mallick, Adv.*

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Phoenix Arc Private Limited (*'Financial Creditor'*), by Mr.Sandeepan Mandal, Manager, duly authorised *vide* board resolution dated 23 April, 2019 for initiation of Corporate Insolvency Resolution Process ("CIRP") against Arambagh Hatcheries Private Limited (*'Corporate Debtor'*).
3. The Financial Creditor is an Asset Reconstruction Company and is the assignee of all the debts due and payable by the Corporate Debtor to the Central Bank of India (*'Assignor Bank'*). The outstanding dues as on **31 July, 2019** is Rs.51,67,89,482/-
4. ***Submissions by the Ld. Sr. Counsel appearing on behalf of the Financial Creditor***
 - 4.1 The Corporate Debtor approached the Assignor Bank to avail financial assistance. Subsequently, the Assignor Bank *vide* sanction letter dated 23 September, 2003 sanctioned a cash credit facilities aggregating to the tune of Rs.11.95 Crores to the Corporate Debtor. On the request of the Corporate Debtor the credit facilities were renewed from time to time and were last renewed on 30 June, 2009¹.
 - 4.2 However, the Corporate Debtor failed to maintain the Account with the Assignor Bank, the account of the Corporate Debtor was slipped into the category of non-Performing Assets (*'NPA'*) on 07 May, 2011.² The Assignor Bank issued a Recall Notice dated 18 September, 2013 to the Corporate Debtor, recalling to pay amount of Rs.22,12,64,505.94/- as on 30 September, 2013.

¹ Annexure – P of the Petition.

- 4.3 The Assignor Bank had also initiated against the Corporate Debtor before the Ld. Debt Recovery Tribunal. Further, Assignor Bank *vide* Deed of Assignment dated 28 March, 2014 assigned the NPA to the Financial Creditor. However, no dues were cleared by the Corporate Debtor. The Corporate Debtor on 28 November, 2014 had sent an One-Time Settlement letter to the Financial Creditor.
- 4.4 Subsequently, on 08 October, 2019 the Financial Creditor and the Corporate Debtor enters into a Letter of Acceptance. In the said letter of Acceptance at Clause 3, the Corporate Debtor has admitted the liability of Rs.48,02,42,189/- and agrees to settle the matter for a sum of Rs.25 Crore.
- 4.5 However, after paying some amount the Corporate Debtor failed to adhere to the Letter of Acceptance. In pursuance of such failure to repay the debt, the Financial Creditor revoked the settlement as per clause 9 of the Letter of Acceptance.
- 4.6 An Application being IA No. 785/KB/2021 was filed by the Financial Creditor for making amendment to section 7 Petition. The same was allowed by this Adjudicating Authority. The Financial Creditor made a two line table amendment thereby mentioning the correct date of default based on the Letter of Acceptance and the letter of Revocation dated 08 10 July, 2019.
- 4.7 On 03 February, 2022, the Financial creditor filed a supplementary affidavit along with Balance Sheet of the Corporate Debtor. It is also pertinent to mention that the Balance Sheet of the Corporate Debtor for the Financial Years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019 clearly acknowledge the debt.
- 4.8 Reliance has been placed on *Dena Bank v. C. Shivakumar Reddy and Another*³ (Para 116), *Innoventive Industries Limited v. ICICI Bank*⁴ (Para 30) and *ARCIL v. Bishal Jaiswal and Anr*⁵ (Paras 10 to 48) by the Financial Creditor.

³ (2021) 10 SCC 330

⁴ (2018) 1 SCC 407

⁵ (2021) 6 SCC 366

4.9 Thereafter, by a settlement agreement/letter of acceptance dated 8th October, 2018 (kindly refer to Annexure J volume V page 1049) made between the Corporate Debtor and the Financial Creditor the Corporate Debtor agreed to discharge its liability by making payment of an amount of Rs.25 crores in full and final settlement of all its dues. However, the Corporate Debtor failed to make payment in terms of the settlement agreement which prompted the Financial Creditor to file this application under Section 7 of the IBC.

5. *Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor*

5.1 As and when the matter was heard on 09 December, 2020 this Adjudicating Authority raised an issue to the Financial Creditor that since the date of the NPA is on 07 May, 2011 and the petition was filed in 2018, how this petition is maintainable?.

5.2 Thereafter, the matter was further argued on 19th March, 2021 wherein this Adjudicating Authority clearly recorded that the matter is “*Partly heard and to list this for continuation with the arguments on the next date of hearing.*” Even though the instant Section 7 petition was a part heard matter, the Financial Creditor filed an application for amendment of the main application. This application was heard on 1st November, 2021 wherein the Corporate Debtor raised several objections to such application. Eventually, this Adjudicating Authority allowed the amendment with a clear direction that the objection as raised by the Corporate Debtor for allowing the amendment will be considered and decided at the time of hearing.

5.3 Against the Order dated 1st November, 2021 allowing the amendment the Corporate Debtor preferred an appeal before the Hon’ble National Company Law Appellate Tribunal (NCLAT) in Comp. App. (AT) (Ins) No. 146 of 2022. The Hon’ble Appellate Tribunal by an order dated 16th February, 2022 dismissed the application with a remark that the order clearly says that objections shall be decided at the time of hearing. This clearly means that whatever the amendment has been made that does not *ipso facto* means that date of default has been

changed and that same shall be decided by the Court at the time of hearing after hearing both the parties.

- 5.4 Subsequently, the Financial Creditor carried out amendment in Section 7 application with regard to the date of default which now read to be as 10th July, 2019. The matter was finally heard on 20th April, 2022.
- 5.5 The Application filed under Section 7 of the IBC is barred by limitation The Corporate Debtor had initially availed credit facilities from time to time from Central Bank of India. The account of the Corporate Debtor with Central Bank of India became a NPA on 7th May, 2011 (kindly refer to the Page 9 of the first Form-1/petition under Section 7 of the IBC). Thereafter, by an assignment agreement dated 20th March, 2014 (kindly refer to page 1470 in volume VI of the Section 7 petition) Central Bank of India assigned the loan of the Corporate Debtor to the Financial Creditor being an asset reconstruction company. The Corporate Debtor was not a party to the assignment agreement.
- 5.6 The law is now well laid down that Limitation Act is now applicable to the Insolvency & Bankruptcy Code, 2016. Therefore, Article 137 of the Limitation Act gets attracted and the right to sue accrues from the date of default. If the default has occurred over 3 years prior to the date of filing of an application under Section 7 of the IBC, the application would be barred under Article 137 of the Limitation Act.
- 5.7 Reliance has been placed on *B K Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates* (2019 11 SCC 633), *Jignesh Shah v. Union of India* (2019 10 SCC 750), *Babulal Vardhar Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Anr* (2020 SCC OnLine 647), *Invent Assets Securitisation and Reconstructions Private Limited v. Xylon Electro Technic Private Limited* (Company Appeal (AT) (Ins) No. 677 of 2020), *Manmohan Singh Jalan v. State Bank of India* (Company Appeal (AT) (Ins) No. 97 of 2021), *Arrow engineering Limited v. Golden Tobacco Limited* (MANU/NL/0548/2021), *Salem Advocates Bar Association (I) v. Union of India* (2005 (6) SCC 344).

Orders

6. We have heard the Ld. Senior Counsel appearing on behalf of the Financial Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor. The issue that arises before us is ***‘whether the Petition under section 7 of the Code is barred by limitation or not?’***
7. Upon perusal of the record it is apparent that transaction between the parties was purely financial in nature and from time to time the terms and conditions were also revised. Further, the letter of Acceptance entered between the parties and setting the amount at 25 Crores is sufficient to construe that there has been existing default.
8. On perusal of records it is also revealed that a Supplementary Affidavit has been filed by the Financial Creditor, wherein, in Para 2 it has been stated by the deponent that the balance sheet of the Corporate Debtor for the Financial Years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019, which are downloaded from the official website of the Ministry of Corporate Affairs, will go on to show that there are admitted dues of the Financial Creditor, which are duly acknowledged by the Corporate Debtor (***Annexure A of the Supplementary Affidavit***).
9. We also noticed that the reply to the Supplementary Affidavit has also been filed by Mr. Prasun Kumar Roy, Managing Director of the Corporate Debtor. The reply appears to be notarized on 08 April, 2022 by the notary public. The deponent has stated in this affidavit that the documents that are being referred in the Supplementary Affidavit of the Financial Creditor cannot be taken on record as they have been filed at a belated stage , when the pleadings were completed for final hearing. It is further contended by the deponent that the documents sought to be place on record by way of Supplementary Affidavit were on public domain and the Financial Creditor failed to place these documents at the time of filing the section 7 of the Code. Therefore, these documents cannot be taken on record at this stage.

10. However, it may be worthwhile to note that the Deponent has not denied the existence or the authenticity of the documents which are part of the Supplementary Affidavit. It remains an admitted position that those Balance Sheets were available in public domain. Thus we are of the view that since the documents were in public domain and are of the Corporate Debtor, therefore, taking on record of such documents should not cause any prejudice to the Corporate Debtor, as such.
11. Therefore, the Adjudicating Authority decides to take these documents on record for considering the plea of limitation raised by the Corporate Debtor. These documents were and have already been placed on record before the matter was Reserved for Orders.
12. It may be reiterated that CD has not disputed or denied the filing of the Balance Sheets with the Ministry of Corporate Affairs, as attached by the Financial Creditor in its Supplementary Affidavit. Therefore, we see no reason to accept the plea of the deponent not to take on record all these documents.
13. In *Laxmi Pat Surana V. Union Bank of India & Anr*, decided on March 21, 2021, the Hon'ble Supreme Court has held that.
- "37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor*

would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of PA but before the expiration of three years there from including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under section 7 of the Code.”

14. In *Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another*⁶, the Hon’ble Supreme Court

“ 23. It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of

⁶ 2021 SCC OnLine SC 843

limitation commences and the application can be entertained, if filed within this extended period.”

15. In light of the above facts and circumstances there has been continuous acknowledgement in the Balance Sheet of the Corporate Debtor for the Financial Years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019, which would extend the limitation period from time to time.
16. The present petition filed by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.
17. Accordingly, it is, hereby ordered as follows:-
 - (a) The application bearing CP (IB) No. 1536/KB/2019 filed by Phoenix Arc Private Limited, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Arambagh Hatcheries Private Limited, the Corporate Debtor, is ***admitted***.
 - (b) There shall be a moratorium under section 14 of the IBC.
 - (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
 - (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
 - (e) ***Mr. Sanjay Kumar Gupta***, registration number ***IBBI/IPA-002/IP-N00545/2017-2018/11736***, email: ***sanjaycs.gupta@gmail.com***, is hereby

appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.5,00,000/- (Rupees Five Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to

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the Registry of this Court within seven days from the date of receipt of a copy of this order.

- 18. CP (IB) No. 1536/KB/2019** to come up on **17 June, 2022** for filing the periodical report
- 19.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

The Order is pronounced on 13th day of May, 2022

SA, LRA