

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

IA(IBC)/254/KOB/2023

IN

CP(IBC)/33/KOB/2021

*(Under Section 60(5) of the IBC, 2016 read with Rule
11 and Rule 32 of NCLT Rules, 2016)*

In the matter of:

M/s. Kerala Chamber of Commerce and
Industries.

Memo of Parties:

Kerala Trade Centre Owners Association,
Kerala Trade Centre Building, Marine Drive,
Kochi- 682 031 ... **Applicant.**

-Versus-

1. Jossy Stephen Kattur, Resolution
Professional of Kerala Chamber of Commerce
and Industries Having his address at Skyline
Imperial Gardens, Next to IMA House, Kaloor,
Kochi.

2. Phoenix Arc Private Limited, 5th Floor, Dani
Corporate Park, 158, C.S.T. Road, Kalina,
Santacruz (E), Mumbai ... **Respondents.**

Order delivered on: 22.12.2023

Coram:

Hon'ble Member (Technical)

Shyam Babu Gautam

Hon'ble Member (Judicial)

TMT. Justice (Retd.) T. Krishna Valli

Appearances:

For the Applicant : Mr. P.B. Krishnan, Adv.,
Mr. Terry V. James, Adv.
For the Respondent No. 1 : Mr. Akhil Suresh, Adv.
For the Respondent No. 2 : Mr. Suresh Dutt Dhobal, Adv.

ORDER

Per: Coram

1. The present application is filed by the Applicant, who is the authorized representative of home buyers under Section 60(5) of the IBC, 2016 read with Rules 11 and 32 of NCLT Rules, 2016 for the following reliefs: -
 - i. To set aside the claim verified in favour of Respondent No. 2 by the erstwhile RP as invalid as the same is on the strength of an instrument which is insufficiently stamped.
 - ii. Reconstitute the Committee of Creditors without Respondent No. 2.
 - iii. To restrain the 2nd Respondent from exercising his voting rights henceforth pending disposal of this petition.
 - iv. To restrain the 2nd Respondent from attending CoC meetings henceforth pending disposal of this petition.

2. The Brief facts of the case are as follows: -

3. This application arises from CP(IB)/33/KOB/2021 which was admitted on 21.02.2022 and CIRP initiated. The Applicant stated that the larger objective of the Kerala Chamber of Commerce and Industries (KCCI for short) is to contribute towards various causes of merchants in the state and to act as a merchant forum for promoting various activities inter alia education discussions, support, of merchants, conduct various group adopt and implement policy decisions to promote interest of merchant, act as an industry and advocacy forum etc.

4. The Respondent No. 2 is an Asset Reconstruction Company (ARC) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI") inherited their rights based on the Assignment Agreement dated 17.03.2017 executed in their favour at Ernakulam by South Indian Bank based on which they initiated corporate insolvency resolution process against the Kerala Chamber of Commerce and Industries under Section 7 of Insolvency and Bankruptcy Code, 2016 ("Code") and the same was admitted by this Tribunal vide order dated 21.02.2022 and Mr. K. Parameswaran Nair was

appointed as IRP. Thereafter, during the 1st Meeting of the CoC held on 23.02.2022, he was confirmed as the Resolution Professional.

5. The present application is against the Assignment Agreement dated 17.03.2017 executed between the South Indian Bank in favour of Phoenix ARC for filing a Section 7 application before this Tribunal. The contention is that the aforesaid deed is a void and unenforceable financial contract because of the following reasons:

- a) The deed is for a true sale of Non-Performing Assets ("NPA") for a purchase consideration of Rs. 79,25,00,000/- with underlying securities. As per provisions of the Transfer of Property Act, 1882 ("Act 1882") read with Registration Act, 1908 (Act 1908") any transfer of an interest in an immovable property shall be by way of the registered deed. The deed produced in CP(IB)/33/KOB/2021 is not seen to be registered and therefore that document is void.

- b) The deed is unenforceable because the deed is insufficiently stamped. The Stamp duty paid was only Rs. 500/- while it ought to have been paid at 8% of the consideration value of Rs. 79,25,00,000/-.

- c) The Assignment Agreement is a truncated document in as much as the definition of Financing Documents Clause 1.10 of the Agreement references to Schedule 1 annexed to the Agreement but the same has not been annexed to the Agreement in whole.
6. It is stated that the erstwhile RP had admitted the claims of Respondent No. 2 for an amount of Rs. 13,26,77,441/-. It is further stated that the erstwhile RP should not have verified the claim of Respondent No. 2, because they have not filed valid financial contracts, as is evident from the CP(IB)/33/KOB/2021 application.
7. Regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 clearly defined that the financial contracts have to be verified. While verifying financial contracts, the apparent defect should have been considered to analyse whether Respondent No. 2 has the capacity or authority to file a claim. It is stated that there is no capacity or authority by which Respondent No. 2 can establish his claim unless a registered and duly stamped agreement is produced. This being not produced before this Tribunal in the Section 7 proceedings stage makes it impossible to prove capacity/authority to file his claims. The Resolution Professional has to request any claimant

to produce documents that prove their capacity/ capability/ authority.

8. The Applicant further stated that one of the members of KCCI had filed a Right to Information (RTI) application dated 10.01.2023 before the State Public Information Officer, Sub-Registrar Office, Ernakulam. To that the Sub-Registrar gave a reply to the queries on 23.01.2023 stated that 8% stamp duty is payable as per Article 21 and 22 of Schedule 1 to Kerala Stamp Act, 1959.
9. It is stated that the transfer of interest in the mortgage of underlying security under the Assignment Agreement comes within the definition of operation of transfer under Section 8 of the Transfer of Property Act, 1882. It is further stated that Section 17 of the Registration Act, 1908 requires that the documents which purport or operate to create, declare, assign, limit or extinguish any right, title, or interest, whether vested or contingent to be registered.
10. The Applicant stated that by virtue of admission of the claim by the erstwhile RP they will be deprioritized to the status of an unsecured creditor and will get left over value after payment to the Resolution Professional.

11. On 07.08.2023, the 2nd Respondent filed a reply statement and stated that the existence of debt due to the Financial Creditor duly stands proved by various documents and information submitted by the 2nd Respondent before the Resolution Professional. After analysing the said documents, the Resolution Professional had admitted the claim of Phoenix ARC in full on 14.04.2022.

12. It is stated that Applicant by way of the application now wants to create a situation where the admitted and proved debt due by Corporate Debtor remains unrepresented in CIRP of Corporate Debtor. It is further stated that the order dated 21.02.2022 has attained finality long back. Further, the full claim of Phoenix ARC was also admitted by Resolution Professional on 14.04.2022, itself. It is much more than a year after the admission of the claim of Phoenix ARC as well as after the commencement of CIRP of Corporate Debtor that the Applicant has belatedly chosen to file the application is liable to be dismissed.

13. It is stated that the assignment of a Non-Performing Asset neither creates a new liability nor does it extinguishes or alters the existing liability of the Corporate Debtor. The liability of the Corporate Debtor remains the same and it is only the Assignee

(in the present case Phoenix ARC) who steps into the shoes of the Assignor.

14.It is stated that vide execution of the Assignment Agreement dated 17.03.2017 (between South Indian Bank/Assignor & Phoenix ARC), there was no transfer of any movable or immovable property. The Assignor (South Indian Bank) was only mortgagee and was never owner of the mortgaged properties. The borrower/mortgagor had created mortgage in order to provide security for the due repayment of outstanding dues in respect of financial facilities/loans availed from the Assignor (South Indian Bank). The borrower/mortgager who was owner of mortgaged properties at the time of creation of mortgage and even before execution of the Assignment Agreement, continued to retain title and remained owner of the mortgaged properties/secured assets. The only consequence of assignment is that the Assignee (Phoenix ARC) becomes entitled to enforce the rights of recovery from the Corporate Debtor in place of the Assignor.

15.It is further stated that a bare perusal of Article 21, 22 of Kerala Stamp Act, 1959, would reveal that the stamp duty as stated in the said Articles is on Conveyance (as defined under section 2(d) of Kerala Stamp Act, 1959) and not on Assignment Agreements.

It is further, aggrieved by the inaction of the State of Kerala in registering the Assignment Agreements (on account of alleged deficiency in payment of stamp duty), Phoenix ARC filed Writ Petition bearing WP. (C) No. 19371 of 2017, titled “Phoenix ARC Private Limited vs State of Kerala & Ors”, before the Hon’ble High Court of Kerala, inter alia, praying for a direction to the State of Kerala to register the Assignment Agreements without insisting on payment of alleged stamp duty more particularly given the exemption contemplated in Section 8F of Indian Stamp Act, 1899. The said Writ Petition is pending adjudication. It is the settled position of law that a Non-Performing Asset in the hands of the Assignor is nothing but an account receivable. Such account receivable is the asset of the Assignor bank. The Assignment does not affect the right or title of the Borrower on the mortgaged properties.

FINDINGS: -

16. We have heard the arguments of the learned counsel for the both parties at length and perused the entire case records/documents. We have also gone through the evidence on record. In order to arrive at a decision in the matter, we have gone through the decision rendered by the Hon’ble Supreme Court in *M/S. N.N. Global Mercantile Private Limited Vs. M/S.*

Indo unique Flame Ltd. & Ors. (Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020) wherein the Apex Court held that: -

“224. The conclusions reached in this judgment are summarised below:

a. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;

b. Non-stamping or inadequate stamping is a curable defect;”.

17. In the light of the order passed by the Hon’ble Apex Court we are of the considered opinion that the unstamped or inadequately stamped agreements were enforceable before the law and in this matter, the other issue to be resolved in this application is whether at this belated stage, the prayers with the present application can be altered by this Tribunal. It is seen that CP(IB)/33/KOB/2021 filed by Phoenix ARC Private Limited against the Kerala Chamber of Commerce and Industries has been admitted by this Tribunal on 21.02.2022 and CIRP was initiated. Since the CIRP is initiated and the IRP appointed, the IRP has to consider the claim of the Petitioner therein M/s. Phoenix ARC Private Limited, who had filed the Petition and proceed with. The contention of the Applicant herein should have been taken by them at that point by representation and not

after the lapse of more than one year. Moreover, the Applicant was aggrieved with that order they should have taken a recourse of Section 61 of IBC, 2016 and filed an appeal against the said order. This has not been done. At this belated point, this Tribunal cannot accept this application and order to set aside the claim of the 2nd Respondent as invalid. The application is bereft of merit and **is dismissed**. No costs.

18.The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.

19.Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

20.File be consigned to records.

SHYAM BABU GAUTAM Digitally signed by
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Date: 2023.12.22
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SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T.KRISHNAVALLI Digitally signed by
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T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this the 22nd day of December, 2023.