IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"

CP (IB) No.35/Chd/HP/2018

Under Section 7 of IBC, 2016.

In the matter of:

Phoenix Arc Private Limited
Acting in its capacity as Trustee of
Phoenix Trust FY 15-7 having its
registered Office at 5th Floor,
Dani Corporate Park,
158, CST Road, Kalina,
Santacruz (E), Mumbai-400098 …Petitioner-Financial Creditor

Vs.

M/s GPI Textiles Limited,
having its registered office at
Bharatgarh Road, Nalagarh,
District Solan, (H.P.)-174101 …Respondent-Corporate Debtor

Judgement delivered on 06.07.2018.

Coram: Hon'ble Mr.Justice R.P.Nagrath, Member (Judicial)
Hon'ble Mr.Pradeep R.Sethi, Member (Technical

For the Petitioner : 1. Mr. Manish Jain, Advocate
2. Ms. Divya Sharma, Advocate

For the Respondent : 1. Ms. Pooja Mahajan, Advocate.
2. Mr. Gaurav Arora, Advocate.

Per: Pradeep R. Sethi, Member(Technical)

JUDGEMENT

The instant petition has been filed in Form No.1 by M/s Phoenix Arc Pvt. Ltd. (hereinafter referred to as the petitioner) for initiation of the corporate insolvency resolution process (CIRP) in the case of M/s GPI Textiles

Ltd. (hereinafter referred to as the respondent). The petition is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the IBC Rules). It is stated that the respondent was incorporated on 29.09.2000 having been allotted CIN U17117HP2000PLC026391 and its registered office is at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh-174101. Therefore, the matter lies within the territorial jurisdiction of this Bench of the Tribunal.

2. It is stated that the respondent is engaged in the business of manufacturing of cotton yarns, polyester yarn and blended yarn from cotton and polyester fibre and that on the request of the respondent, The Hongkong and Shanghai Banking Corporation Ltd. (hereinafter referred as HSBC) granted working capital and term loan facilities to the respondent vide sanction letter dated 24.03.2009 for an amount of ₹129,02,00,000 for a period of 60 months and the respondent and HSBC entered into a Crporate Rupee Loan Facility Agreement dated 08.04.2009, wherein all the terms of the loan agreement were set in and the respondent also executed deed of hypothecation and memorandum of entry in favour of HSBC to secure the loan, stipulating therein all the conditions regarding the creation of charge on moveable and immoveable properties of the respondent in favour of HSBC. It is submitted that due to defaults committed by the respondent in repayment of the loan amount, the account of the respondent was classified as NPA on 01.03.2012 by HSBC in its books of account. It is stated that subsequently on 21.03.2012, HSBC assigned the debts of the respondent together with the

underlying securities, save and except Stand By Letter of Credit (SBLC) in favour of the petitioner through an assignment deed. It is submitted that since on account of the continuous default of the respondent, and HSBC having already classified the account of the respondent as NPA on 01.03.2012, the petitioner issued a demand notice dated 15.05.2012 under the provisions of Section 13 (2) of the SARFAESI Act, 2002 and that the respondent filed reply to the above notice by its reply dated 06.07.2012. It is stated thereafter, the petitioner issued a notice dated 30.09.2015 under Section 13(4) of the SARFAESI Act to take possession of the secured assets of the respondent and against the said notice, the respondent filed SA 281/2015 which is pending for adjudication before the DRT-1, Chandigarh.

3. It is stated further that the petitioner filed an application for recovery by OA # 919/2016 under Section 19 of the Recovery of Debts due to Banks & Financial Institutions Act, 1993 for recovery of ₹222,07,13,590 alongwith interest till realisation of the entire amount and expenses of ₹73,35,840 and the said application is still pending for adjudication before the DRT-1, Chandigarh. It is submitted that due to the continuous failure of the respondent to pay the loan amount, the petitioner issued recall notice dated 19.01.2016 thereby recalling its all financial facilities. In para 2 of Part IV of Form 1, the amount in default is stated to be ₹268,29,20,033 as on 26.12.2017 and workings and computation of the amount of default and date of default are stated to be attached in the table of date of defaults annexed as Annexure-IV (d) of the petition.

4. In Part III of the petition, the name of Shri Jalesh Kumar Grover IBBI Regd. No.IBBI/IPA-01/IP-P00200/2017-18/10390 has been proposed to

act as an Interim Resolution Professional and Form 2 has been annexed as Annexure-III of the petition. In the Form 2, Shri Jalesh Kumar Grover has certified that there are no disciplinary proceedings pending against him with the Board or ICSI Insolvency Professional Agency. The petition is accompanied with a copy of the assignment deed dated 21.03.2012 (Annexure-IV (c) of the petition). The contents of the petition are supported by affidavit of the authorised representative of the petitioner, namely; Gurleen Chhabra, one of the authorised person as per Board resolution dated 20.09.2017 of the petitioner (Annexure-I (c) of the petition). A copy of the petition is also stated to be sent to the respondent by speed post on 01.02.2018.

5. Notice of this petition was issued to the respondent. The respondent contested the petition by filing a written reply. It is stated that the petition is an exercise in fraud practised upon the respondent by the petitioner and its alleged assignor, HSBC and that the assignment purported to be undertaken by HSBC in favour of the petitioner was not only against the agreements between the respondent and HSBC but also against the guidelines of the Reserve Bank of India (RBI) and as such the purported assignment was illegal, malafide, fraudulent and undertaken by HSBC with ulterior motives in connivance with the petitioner and there is no debt owed to the petitioner which can sustain the present application. It is averred that the respondent was incorporated in September, 2000 and gained good reputation in the textile industry and to support its business it availed loans from IDBI Bank Ltd., IFCI Ltd. and ICICI Bank Ltd. In the year 2007, in order to streamline its accounts and settle the outstanding debts with the

above original lenders, the respondent entered into an arrangement with GL Asia Mauritius-II Ltd. (GLAM), a non-resident investor for investment and infusion of funds into the respondent company and for arranging refinancing/one time settlement of the loans of the original lenders and in pursuance thereof, GLAM arranged ₹129 Crores from ICICI Bank Ltd. against a Stand By Letter of Credit (SBLC) issued by Citi Bank N.A., Hongkong Branch to ICICI Bank Ltd. which was fully cash collateralized by GLAM.

6. It is further alleged that on or about 08.04.2009 the ICICI Bank Ltd. loan was swapped with a loan from HSBC and a corporate loan facility agreement dated 08.04.2009 was entered into between HSBC and the respondent (sanction letter is stated to be dated 24.03.2009). Further, HSBC, the respondent and GLAM also entered into tripartite facility rights agreement dated 08.04.2009 (Annexure R-1 of the reply). It is submitted that as per the HSBC sanction letter, the HSBC facility agreement and facility rights agreement, the entire principal outstanding of terms loan of ₹129.02 crores was to be repaid by the respondent to HSBC by way of a bullet repayment at the end of 60 months from the drawn down i.e. with effect from 20.04.2014 and further monthly interest of 11% per annum basis was payable on 20th of each month and the HSBC loan was required to be backed by a SBLC denominated in USD from HSBC Mauritius. It is submitted that as per sanction on 25.03.2009 by HSBC Mauritius of banking facility to GLAM, the HSBC SBLC was fully cash collateralised by way of a term deposit given by Glam to HSBC Mauritius for the full amount of SBLC. It is submitted that the primary security for all amounts due to HSBC from the respondent under the HSBC facility agreement was the HSBC SBLC and that whenever the respondent

did not pay the interest/processing fee to HSBC on the date (20th of the month), HSBC used to draw down on the SBLC for the said amount and as and when such draw down was made, the funding of interest and processing fee was acknowledged by the respondent as interest free unsecured loan of GLAM in the books of the respondent in terms of Board resolutions dated 30.06.2009, 16.12.2009, 23.11.2011 and 23.03.2012 (Annexure R-4) (colly) of the reply).

7. It is then submitted that the last payment of interest (before the purported illegal assignment to the petitioner on 21.03.2012) was made to HSBC by way of draw down from the HSBC SBLC on 15.02.2012 which was against the interest over dues for the month of November, 2011 to January, 2012. It is submitted that all of a sudden, without warning, without notice and without any hint of proposed action, the respondent received a letter dated 23.03.2012 from HSBC through e-mail on 26.03.2012, stating that HSBC had assigned the HSBC loan to the petitioner and that through e-mail on 27.03.2012, it was informed by HSBC that by way of a deed of assignment dated 21.03.2012, executed between HSBC and the petitioner, the HSBC loan, "alongwith the underlying financial documents and the security interest (other than the SBLC and the rights arising thereunder)" has been assigned to the petitioner. It is stated that details of specific transaction dated 22.03.2012 in the "demand deposit transaction history" of the respondent showed a receipt of ₹81,25,08,408 as "(PROCEEDS UNDER GTY FROM HSBC MAR)" (transaction dated 22.03.2012), was asked from HSBC by the respondent but no response was received. It is stated that when State Bank of India, a secured creditor of the respondent, was informed of the impugned assignment, SBI specifically asked HSBC the reasons for assignment of the

debt to the petitioner when the recourse was available to HSBC to invoke the HBSC SBLC and also asked to HSBC to confirm that the assignment met "all required RBI/BIFR guidelines", but no response was given by HSBC to SBI. With reference to Notice under Section 13(2) of SARFAESI Act issued by the petitioner, the respondent raised objections as to how it had been classified as NPA by HSBC when interest had been recovered and the principal only became due on 20.04.2014; no notice of default was given to the respondent after 2009; HSBC appeared to have received approximately ₹81 crores by way of transfer from HSBC and on the other hand transferred the entire HSBC loan to the petitioner.

8. According to the respondent several legal proceedings were pending between the promoters of respondent-company and GLAM before and around the time of the impugned assignment. Further on 16.06.2012, the promoters of respondent company filed Title Suit No.38 of 2012 before the Civil Judge (Senior Division), 1st Court, Alipore alongwith an application under order 39 Rule 1 & 2 read with Section 151 of Civil Procedure Code, 1908 inter alia assailing the validity of the assignment deed and the impugned assignment. It is stated that vide order dated 21.04.2014, the ex-parte ad interim order dated 17.07.2012 was made absolute till final disposal of the promoter's suit. The ex-parte ad interim order is stated to restrain the petitioner and others from enforcing any rights under the impugned assignment. It is submitted that against the interim injunction order, Revision Application bearing C.O. 2089 of 2014 was filed by the petitioner before the Hon'ble Calcutta High Court which was dismissed as not maintainable by order dated 28.07.2014 and the petitioner thereafter moved the Hon'ble Supreme

Court of India by way of SLP No.28146/2014. It is submitted that the respondent understands that in the meanwhile, on 27.08.2015, the promoter's suit got dismissed in default (for non-appearance), as a result of which the Hon'ble Supreme Court on 28.09.2015 dismissed SLP No.28146/2014 as infructuous and that the respondent further understands that in January, 2016, the promoters of the respondent company filed a restoration application against the dismissal of the promoter's suit alongwith an application for condonation of delay and that the delay in filing restoration application has been condoned and the restoration application was listed for 07.04.2018.

9. As regards notice under section 13 (2) of the SARFAESI Act, appeal is stated to be filed before the DRT objecting to the classification of the respondent's account as NPA and assailing the validity of the assignment deed. As regards recall notice of the petitioner issued on 19.01.2016, it is stated that this was duly responded to by the respondent on 17.02.2016 reiterating its objections to the impugned assignment and similar objections were also taken with reference to O.A. under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 filed by the petitioner on 07.06.2016. It is further stated that meanwhile, in 2015 the GLAM sold its 44.44% shares to one ADAL Media Pvt. Ltd. in 2015. It has been submitted that HSBC was in a great hurry to somehow classify the respondent's account as NPA and then surreptitiously assigned the same to the petitioner without the primary security of the HSBC SBLC. It is stated that in any case, as there is an encashment under the HSBC SLBC which was after about one day of the impugned assignment, the said encashment led to full and complete satisfaction of the outstanding of the respondent alleged being in default. It is

stated that under the Code, financial creditor is defined to inter alia include any person to whom the debt has been legally assigned or transferred to and that the impugned assignment is not only fraudulent but also illegal in view of the RBI guidelines dated 23.04.2003 and 01.07.2015 and that the impugned assignment is illegal as the same was made in breach of the agreements between the parties. It is submitted that the impugned assignment is contrary to Section 5(3) of the SARFAESI Act and that it was not open to HSBC to conveniently pick and choose securities which are to be assigned and which are not to be assigned and/or released. It is submitted that in absence of the books of the petitioner and of HSBC, duly certified in accordance with the Bankers Books Evidence Act, 1891, the defaults alleged on part of the respondent cannot be ascertained. It is stated that the assignment deed enclosed with the petition mentions one "Annexure-A" purportedly being "Details of Ledger Extract" but Annexure-A is missing from the assignment deed filed alongwith the petition. It is stated that HSBC was not made a party to the petition, even though it had to answer various critical unanswered questions surrounding the impugned assessment. It is stated that the respondent cannot be considered in default (as the security stood encashed by HSBC) and in fact the respondent stood discharged. It has been prayed that the petition be dismissed with exemplary costs.

10. By order dated 06.04.2018, it was directed that the RBI guidelines referred to by the learned counsel for respondent be filed in spiral bound paper book. The learned counsel for the respondent also sought time to file copies of orders passed in Civil Suit filed by the promoters of the respondent, orders passed by the Hon'ble High Court and Hon'ble Supreme

Court of India and copy of application for restoration in the aforesaid Civil Suit which was dismissed in default. These documents were filed by the respondent by diary No.1186 dated 17.04.2018 and taken on record as per order dated 09.05.2018. When the matter was listed on 09.05.2018 this Tribunal also issued notice of defect regarding non-enclosure of ledger extract Annexure-A to the assignment deed dated 21.03.2012. The compliance was made by diary No.1575 dated 15.05.2018 and order of the BIFR in case No.50/2011-M/s GPI Textiles Ltd. for hearing on 20.04.2012 was also filed. The compliance was noted in this Tribunal's order dated 23.05.2018 and the arguments were heard.

11. During the course of the arguments, learned counsel for the petitioner has contended that as per Section 7(5) (a) of the Code, the Adjudicating Authority is required to satisfy itself regarding default; application under Form 1 is complete; and there are no disciplinary proceedings against the Interim Resolution Professional. It was argued that as per Article V of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 between the respondent and HSBC (Annexure-IV (b) of the petition reference to BIFR would constitute an event of default and that it is also provided that not acting on the event of default will not constitute the same as having been condoned by HSBC, unless specifically communicated by HSBC. It was argued that there is no requirement under any Act to inform the borrower about declaration of his account as NPA and the only obligation in law is that this fact must be declared in the notice under Section 13(2) of the SARFAESI Act, 2002 which has been duly complied with (page 497 of the petition). It is argued that other than trying to hide behind frivolous issues, the respondent has not mentioned

a single word on their liability to make any repayment whereas in their reply it is admitted that there was complete erosion of net worth which led to filing of reference to BIFR raising serious questions about their capability to repay the secured debts. It is argued that as per Section 11.5 of General Conditions to the Corporate Rupee Loan Facility Agreement dated 08.04.2009 (Annexure-IV (b) of the petition, HSBC has a right to assign in part or whole of the Facility and any dispute that the company may have with regard to SBLC can be raised with HSBC. It is submitted that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated 20.04.2012. It is argued that GLAM was the investor of the respondent company since 2007 and therefore, it cannot be contended that there was collusion between the HSBC, petitioner and GLAM. It is stated that the Facility Rights Agreement (Annexure R-1 of the reply) is related to SBLC facility only and thus will not be binding upon the petitioner. It is submitted that till the preliminary arguments on 21.03.2018 in this Tribunal, no case was filed by the petitioner against GLAM or HSBC and the respondent have chosen to challenge the same only in the 4th week of March, 2018 before the Hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition vide order dated 29.03.2018. It is argued that both HSBC and the petitioner have undergone many RBI audits and thus the allegation on behalf of the respondent that there is collusion between the parties or that the default has been manufactured is misconceived and wrong. It is submitted that the respondent has acknowledged its debt vide its letter dated 15.03.2012 towards HSBC on page 839 of the application and also admitted that the said acknowledgement would be binding upon any assignee

of HSBC. It is submitted that the date of the assignment agreement is 21.03.2012 wherein the cut off date of the principal is mentioned as on 20.03.2012 and the cut off date for the interest due is on 19.03.2012. Therefore, it is pleaded that in respect of entry for transfer of amount of ₹81.25 crores dated 22.03.2012 in the demand deposit transaction history, the borrower cannot take any benefit of any accounting entry subsequent to the cut off date and the posting of such entries is the sole domain of the assignor. As regards the entry of ₹50 crores on 22.03.2012 in the demand deposit transaction history, the same is stated to relate to the consideration which was paid by the petitioner through RTGS to HSBC in lieu of the assignment agreement. As regards the reliance by the respondent on the objections to assignment by SBI, it was pleaded that there was no consortium loan and the assignment of debt does not cause any change qua the status of SBI as another secured creditor and the fact remains that the respondent has not even repaid the debts of SBI which is around ₹100 crores. The learned counsel for the petitioner has relied on the judgement of **ICICI Bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd. (2010) 10 Supreme Court Cases 11 (para No.52)** in which it was stated that NPAs are created on account of the breaches committed by the borrower, he violates his obligations to repay the debts, one fails to appreciate the opportunity he seeks to participate in the “transfer of account receivable” from one bank to the other.

12. In reply, the learned counsel for the respondent has submitted that the petitioner is not a financial creditor under Section 5(7) of the Code, as the debt was not legally assigned by HSBC to the petitioner. It is submitted that as per RBI guidelines dated 23.04.2003 (page No.42 of the reply), a

financial asset (i.e. loan) can be sold to a securitisation company/asset reconstruction company (like the petitioner) by a bank/FI (like HSBC) where the asset is declared as NPA and that NPA declaration is a pre-requisite for assignment of loan and in case of interest payment remaining over-due, banks should classify and account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. It is argued that the principal amount of HSBC loan was due on 20.04.2014 and as regards the monthly interest of 11%, the last payment of interest took place on 15.02.2012 by drawing down SBLC for ₹3.7 crores and hence the account was not over due for more than 90 days from end of quarter as on 01.03.2012. It is stated that the HSBC loan was not accelerated and there is no notice of demand or notice of default or notice of acceleration or notice of cure issued by HSBC to the petitioner. It is submitted that the guidelines issued by RBI on NPAs and loan assignments have a statutory force and must be complied with by referring to APS Star Industries Ltd. (supra) case. It is argued that since the account could have not been NPA on 01.03.2012, the very assignment was fraudulent and illegal in clear breach of RBI guidelines and hence non-est. It is pleaded that the impugned assignment is in violation of Section 5(3) of the SARFAESI Act which provides for assignment of loan with all underlying security and guarantees etc. It is argued that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent and it was a condition precedent to the loan and that various orders passed in Alipore court (26.02.2010) and High Court of Calcutta (24.06.2011), specifically record the relevance of SBLC and its criticality. It is pleaded that it was incumbent on HSBC to take recourse to SBLC and clear

the default and this was also the practice followed by HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment of by the respondent on the due date), without reference and without notice to the respondent. It is pleaded that the sequence of events show that the assignment was pre-meditated and NPA was declared and entire loan was made outstanding on 20.03.2012 only so that HSBC could somehow assign the loan to the petitioner and in addition, the loan was settled by payment of ₹81 crores from SBLC and if at all, it is GLAM which is the creditor of the respondent and Glam is free to file a claim against the respondent for the same. It is submitted that the impugned assignment was challenged by the promoters on 16.06.2012 before the Civil Judge, First Court, Alipore and in addition, the respondent has challenged the assignment before DRT and has also filed a writ petition before the Hon'ble High Court of Himachal Pradesh. It is pleaded that the petitioner has failed to establish default on part of the respondent and failed to explain how more than ₹268 crores is amount in default and as evidence of default, old notices of 2009 have been placed on record, even though the default under such notices were cured in 2009 itself and the only other evidence of default is SARFAESI notice which is itself under challenge. As regards the arguments of the learned counsel for the petitioner, the learned counsel for the respondent reiterated that for an assignee to claim as financial creditor, it must be shown that the debt was legally assigned by HSBC to the petitioner.

13. As regards the petitioner's arguments regarding event of default in the Corporate Rupee Loan Agreement dated 08.04.2009, it is submitted by the learned counsel for the respondent that the default under the Code is

defined as non-payment of financial debt, and not an "event of default" under some agreement. As regards petitioner's arguments regarding assignment of debt being permitted under Section 11.5 of General Conditions of the Corporate Rupee Loan Facility Agreement, it is pleaded by the learned counsel for the respondent that the facility agreement does not talk of assignment and that however, facility rights agreement talks of assignment and states that assignment can only take place subject to clause 5 and that SBLC and loan go hand in hand.

14. With reference to petitioner's arguments that Facility Rights Agreement is not binding on the petitioner, it is stated that the Facility Rights Agreement was assigned to the petitioner by HSBC vide assignment deed (Serial No.92 of Part II of Assignment Deed at page 255 of the petition). As regards the petitioner's arguments that the respondent admitted/accepted the transfer of HSBC loan in the BIFR hearing on 20.04.2012, it is submitted that the no objection was given on the specific representation made by HSBC during the BIFR hearing that they have transferred and released in favour of the petitioner all the financial assistance granted by it together with all underlying securities and rights, interest and title thereto. With reference to the petitioner's contention that the respondent has never challenged the assignment deed before any authority, it is submitted that various clarifications on the assignment deed were sought from HSBC; the assignment deed was challenged in the reply to the SARFAESI notice as well as to the O.A. application before DRT and that in any event, such admissions and non-challenge cannot make illegal assignment legal and this cannot be construed as a waiver of RBI guidelines. With reference to the petitioner's submissions

with regard to the entry of ₹81.25 crores on 22.03.2012 in the Demand Deposit Transaction History, it is submitted that HSBC stated that the details be obtained from the petitioner and the petitioner stated that the details be obtained from HSBC. With reference to the petitioner's argument that orders in cases filed by promoters are not relevant and further they have been dismissed, it is reiterated by the learned counsel for the respondent that the orders are relevant to the extent they recognise the importance of SBLC to the entire loan structure and that the restoration application filed by the promoters is still pending.

15. In rejoinder, the learned counsel for the petitioner reiterated his submissions and pleaded that in view of the decision of the Hon'ble Supreme Court in **APS Star Industries Ltd. (supra)**, the borrower could not take advantage since he was in default. It was pleaded that the petition be allowed and CIRP proceedings initiated against the respondent.

16. We have carefully considered the submissions of the learned counsel for the parties and have also perused the records.

17. The present petition is filed under Section 7 of the Code. In respect of the plea of the petitioner that the conditions as per Section 7 (5) (a) of the Code are satisfied, the respondent's argument is that even before that, it must be shown that the debt was legally assigned by HSBC to the petitioner. Therefore, the respondent has not raised any objection to the satisfaction of the conditions provided for in Section 7 of the Code and Rule 4 of the IBC Rules. In its reply, the respondent had stated that the assignment deed dated 21.03.2012 (Annexure-IV (c) of the application) mentions one Annexure-A

purportedly being “details of ledger extract” and that the said Annexure-A is missing from the assignment deed filed alongwith the application. Notice of this defect was given to the petitioner and the defect was removed and Annexure-A was filed alongwith compliance affidavit by diary No.1575 dated 15.05.2018.

18. The other objection (page 57 of the reply) is that the petitioner has failed to substantiate the amount claimed to be in default as per the requirements of the Code. The respondent’s contention is that the support given of the claimed default amount is not in accordance with the Bankers Books Evidence Act, 1891. We find that in Annexure-V (w) of the application the details of statement of dues showing total dues (including interest and penal interest) of ₹268,29,20,033 is accompanied by a certificate under Section 2A of the Bankers Books Evidence Act. This is also noted in this Tribunal’s order 13.02.2018. Therefore, the contention that the certificate in accordance with Bankers Books Evidence Act 1891 is not filed cannot be accepted. As pointed out by the respondent, we have noted that as per the statement of dues (supra), the outstanding dues with interest as on 20.03.2012 as per assignment agreement is noted as ₹131,35,70,672. This is the amount as stated in the assignment deed dated 21.03.2012 (Annexure-IV (c) of the petition). However, there is a rectification in the outstanding amount made by letter dated 09.05.2012 of HSBC to the petitioner (page 286 of the application) in which the total outstanding is computed at ₹131,21,11,929.50. The difference is on account of interest due (as on 19.03.2012) taken at ₹233,70,672.36 in the assignment deed date 21.03.2012 and interest due as on 19.03.2012 of ₹2,19,11,929.50 taken in the rectification letter date

09.05.2012. It is explained in the letter dated 09.05.2012 that due to some clerical mistake, the particulars of loan as mentioned in Clause 1 Details of Loans of Schedule 1 of the deed of assignment deed dated 21.03.2012 referred different interest due amount as on 20.03.2012 which is being rectified with this letter. It therefore, appears that the notice under Section 13(2) of SARFAESI Act 2002 dated 15.05.2012(Annexure-V (g) of the petition) mentioned the outstanding dues under the facility as aggregating to ₹131,21,11,929.50 as on 20.03.2012. Further, in the statement of dues (Annexure-V (w) of the application, the outstanding dues with interest as on 20.03.2012 are taken i.e. it appears that one day's interest of 20.03.2012 is added and the outstanding dues with interest are thereby shown at ₹131,35,70,672. We therefore, do not find any force in the objection raised by the respondent.

19. The only issue therefore, requiring consideration is whether the petitioner is a financial creditor of the respondent. The respondent has referred to the provisions of Section 5(7) of the Code which reads as follows:-

> *"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to."*

20. The respondent's contention is that the debt should be legally assigned or transferred to make the person to whom the debt is assigned or transferred a financial creditor. The respondent has referred to the Guidelines on sale of financial assets to Securitisation Company (SC)/Reconstruction Company (RC) (created under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) and related

issues dated 23.04.2003 (2003 RBI Guidelines) (page 8 of diary No.1186 dated 17.04.2018 in which the details of financial assets which can be sold is given in para 3 as follows:-

> *"3. A financial asset may be sold to the SC/RC by any bank/FI where the asset is :*
>
> *i) A NPA including a non-performing bond/debenture, and*
> *ii) A Standard Asset where:*
> *a) the asset is under consortium/multiple banking arrangements,*
> *b) at least 75% by value of the asset is classified as non-performing asset in the books of other banks/FIs, and*
> *c) at least 75% (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of the asset to SC/RC."*

21. Further reference is made to para 2.1 of the RBI's Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 01.07.2015 (Prudential Norms 2015) defining an NPA as under (page 43 of the reply):-

> *"2.1.1 An asset including a leased asset, becomes non-performing when it ceases to generate income for the bank.*
>
> *2.1.2 A non-performing asset (NPA) is a loan or an advance where;*
>
> *a) Interest and/or instalment of principal remain over due for a period of more than 90 days in respect of a term loan.*
>
> *XXX*
>
> *2.1.3 In case of interests payments banks should, classify an account as NPA only if the interest due and charged*

during any quarter is not serviced fully within 90 days from the end of the quarter.

22. The respondent's contention is that the principal amount of HSBC loan was due on 20.04.2014 and only monthly interest of 11% was to be paid during the tenure of the HSBC loan and that even the balance confirmation letter dated 15.03.2012 (on which reliance is sought to be placed by the petitioner) mentions outstanding interest of only two months and therefore, the account of the respondent could not be classified as NPA on 01.03.2012 as on the said date no interest has been outstanding for more than 90 days from the end of the quarter in which it was due as per RBI guidelines.

23. Vide diary No.1186 dated 17.04.2018, the respondent has submitted the RBI Prudential Norms circulated by Master Circular dated 02.07.2012 (page 20 of diary No.1186 dated 17.04.2018). The definition of non performing assets (para 2.1.3) is on the same lines as in the 2015 Prudential Norms. The 2012 Prudential Norms refer to RBI Master Circular dated 01.07.2011. This master circular had been downloaded from the RBI website and the definition of non performing assets (para 2.1) is on the same lines as in the Master Circular of 2012 and 2015. The respondent's contention is that in **APS Star Inds. Ltd. & Ors. (supra)**, the Hon'ble Supreme Court has held that in exercise of the powers conferred by Sections 21 and 35A of the Banking Regulation Act 1949, the RBI can issue directions having statutory force of law and since these directions relating to assignment of financial assets by a bank to an asset reconstruction company are not satisfied in the present case the assignment is illegal.

24. The issue before the Hon'ble Supreme Court was the scope of the power of RBI to define what constitutes "banking business" and it was held that trading in NPAs has the characteristics of a bonafide banking business. In para No.35, the Hon'ble Supreme Court held that in exercise of the powers conferred by Section 21 and 35A of the Banking Regulation act 1949, RBI can issued directions having statutory force of law. However, the directions are to be examined to find out whether the conditions of financial asset being NPA would make the assignment illegal. The first RBI Guidelines referred to by the respondent are the RBI guidelines dated 23.04.2003 in which details of financial assets which can be sold by banks/FIs to the Securitisation Company (SC)/Reconstruction Company(RC) are given. The relevant paragraph No.3 has been extracted above. The financial assets which can be sold are not only NPA but include standard asset also i.e. where the asset is under consortium/multiple banking arrangements/at least 75% (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of asset to SC/RC etc. Therefore, subject to fulfilment of the conditions even standard asset i.e. a non-NPA can be sold by the bank/FI to SC/RC. In this context, reference may also be made to Chapter II of SARFAESI Act 2002 which *inter alia* relates to registration of asset reconstruction company, acquisition of rights or interest in financial assets by an asset reconstruction company. Section 5 (1) of the SARFAESI Act 2002 reads as follows:-

> *"5. Acquisition of rights or interest in financial assets.-(1) Notwithstanding any thing contained in any agreement or any other law for the time being in force, any (asset reconstruction*

company) may acquire financial assets of any bank or financial institution –

a) *by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or*
b) *by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.*

25. Therefore, there is no condition stipulated in section 5 of SARFAESI Act 2002 that an asset reconstruction company has to acquire only NPAs of banks or financial institutions. It is concluded that the nature of the financial asset transferred i.e. whether it is NPA or not is not such a material condition so as to make the agreement invalid. We may add here that as per para 2.1 (a) of the assignment deed dated 21.03.2012, (page 237 of the petition) it is stated that the agreement to assign is in consideration of the assignee having deposited the purchase consideration in the Escrow Account and therefore, the assignment is for valuable consideration received. Further, as para 3.1 of the assignment deed dated 21.03.2012, HSBC has represented and warranted to the petitioner that as on the date of the deed and with reference to the facts and circumstances then existing, the loans are non performing assets and have been duly and validily classified as such, in accordance with the guidelines issued by RBI in this regard and all applicable law. The consequences of the breach of representations are given in para 3.2 of the assignment deed dated 21.03.2012. It is stated therein that if any of the

representations are found to be incorrect, a consequence of which materially and adversely affects the interest of the assignee in the loans, such misrepresentation shall be rectified by the assignor forthwith and in no event later than 30 days from the date of receipt of notice by the assignor from the assignee, after a notice in respect of the breach is given to the assignor by the assignee. Therefore, the breach of representation regarding the loan being non performing asset is a matter between the petitioner and HSBC. The learned counsel for the petitioner has referred to para 52 of the decision of the Hon'ble Supreme Court in **APS Star Inds. Ltd. & Ors. (supra)** in which the Hon'ble Supreme Court held as follows:-

> *"52. Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the "transfer of account receivable" from one bank to the other."*

In the present case, the respondent cannot seek to take benefit of whether the assigned debt is a NPA and the matter lies between the petitioner and HSBC.

26. We are now taking into consideration the other issues raised by the respondent in support of its claim that the debt is not legally assigned or transferred by HSBC to the petitioner.

(i) The respondent has referred to pages 132 and 151 of diary No.1186 dated 17.04.2018 filed by the respondent and has stated that HSBC should have followed a price discovery auction process for sale of loan to the petitioner or it could do a bilateral sale with the petitioner only with the borrower's consent. We find

that page 132 is press release 2013-2014/1533 dated 30.01.2014 with reference to the RBI releasing on its website the framework for revitalising distressed assets in the economy. The framework is at pages 134 to 155. The press release itself states that the framework outlines the specific proposals RBI will implement. Moreover, the press release is of 30.01.2014 i.e. much after the assignment deed dated 21.03.2012. Therefore, the respondent's contention cannot be accepted.

(ii) The respondent has referred to page 121, 124 and 125 of diary No.1186 dated 17.04.2018 filed by the respondent to state that as per RBI guidelines, initial holding period (of NPAs) of two years has been prescribed for banks holding NPAs prior to the amendment. The reference therein sought to be relied upon by the respondent is with regard to RBI circular dated 13.07.2005. This circular is available at page 14 of diary No.1186 dated 17.04.2018 filed by the respondent. The first para thereof clearly states that the guidelines would be applicable to banks/FIs and NBFCs purchasing/selling non performing financial assets from/to other banks/FIs/NBFCs (excluding securitisation companies/reconstruction companies). Therefore, this RBI guideline is not applicable in the present case which is of an asset reconstruction company.

(iii) The learned counsel for the respondent has argued that the assignment of debt was in violation of Section 5(3) of the SARFEASI Act, 2002 which provides for assignment of the loan

with all underlying security and guarantees etc. Section 5(3) is only in respect of the rights of the asset reconstruction company in respect of contracts, deeds, bonds etc. of the predecessor bank and cannot be read to restrict the bank from assigning loan only with all underlying securities and guarantees etc. as claimed. As regards Section 13 (2) of SARFEASI Act making reference to NPA, the matter is not relevant for the purposes of present discussion whether debt is legally assigned or transferred.

(iv) It is argued by the learned counsel for the respondent that assignment of debt was contrary to the agreement between the parties and that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent company and that it was a condition precedent to the loan. It has been stated at page 3 of the respondent's reply filed by diary No.757 dated 15.03.2018 that a tripartite share subscription and shareholders agreement was entered into in March, 2007 between GLAM, the promoters and the respondent company, for investment in the respondent company and the understanding between the parties was that, to settle the dues of original lenders, GLAM will arrange financing for the respondent company, which financing shall be supported by GLAM and this understanding was the very basis of the investment in the respondent company by GLAM. However, no evidence to support the contentions raised has been filed and

moreover, the issue relates to GLAM, respondent and the promoters of the respondent company and does not have any bearing on the assignment. Article III-Security of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 between the respondent and HSBC (Annexure-IV (b) of the application) includes three paras i.e. para 3.1-Security for the Facility; para 3.2-Security cover and para 3.3-Creation of Additional Security. The details of security given in para 3.1 (A) are firstly, a first charge; secondly, a second charge; and thirdly, SBLC. Para 3.1 (B) states that the First charge and Second charge shall be created by the respondent within 180 days from the draw down date whereas the SBLC would have to be provided as the condition precedent to the draw down. Therefore, SBLC being provided as a condition precedent to the draw down has to be taken in the context that the first charge and second charge to be created by the respondent would take time especially since the earlier borrowal was from ICICI Bank and the period of 180 days from the draw down date was given for this purpose.

We find that the respondent's interpretation that SBLC was a condition precedent to the loan cannot therefore, be taken to be correct. In this context, the argument of the learned counsel for the respondent that in case of default, it was incumbent on HSBC to take recourse of the SBLC and clear the default is being considered. The condition provided for by clause 3.1 of the Corporate Rupee Loan Facility Agreement dated

08.04.2009 (supra) is minimum security cover by way of SBLC for 105% of the outstanding principal and interest calculated at the Facility Interest Rate for the next two months (including on account of exchange rate fluctuation for securities other than SBLC, minimum security cover of 1.00 is set out in clause 3.1). Clause 3.3 provides for the respondent procuring, providing and furnishing additional security when HSBC is of the opinion that the security provided for the facility has fallen below the security cover. Therefore, the clauses in Article III of the Corporate Rupee Loan Facility Agreement (supra) only provide for the minimum security cover and creation of additional security when the security provided falls below the security cover. The respondent had sought to rely on the practice followed by HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment by the respondent on the due date) without reference and often without notice to the respondent.

We may firstly state that as per clause (I)(C) of the Corporate Rupee Loan Facility Agreement dated 08.04.2009, “draw down date” means the date on which the facility is drawn down in the manner provided in Schedule- III i.e. the draw down has reference to the date on which the facility involving term loan not exceeding ₹129,02,00,000 is taken and utilised by the respondent for repayment of earlier loan borrowed from ICICI Bank. The draw down date has therefore, no reference to the SBLC. As already discussed above, default of payment of the

monthly interest may result in the creation of additional security. The respondent has not referred to any specific clause of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 or the Facility Rights Agreement dated 08.04.2009 by which HSBC could make the draw down of monthly interest from SBLC (in case of non payment by respondent on due date) as claimed by the respondent. On the other hand, it is seen from the Board resolutions dated 30.06.2009, 16.12.2009, 23.11.2011 and 23.03.2012 (Annexure A-IV (colly) of diary No.757 dated 15.03.2018 that consequent to HSBC issuing a default notice to the respondent, GLAM paid the amounts to cure the defaults. It was in these circumstances that the amounts were acknowledged as unsecured loans from GLAM in the books of the respondent. Therefore, the respondent's contention of practice followed by HSBC of drawing down monthly interest from SBLC (in case of non payment by the respondent on due date), without reference and often without notice to the respondent cannot be accepted.

(v) The learned counsel for the respondent has referred to clause 9.3 of the Facility Rights Agreement (Annexure R-1 of the reply) for pleading that SBLC and the HSBC loan went together and one could not be assigned without the other. Clause 9.3 states that subject to clause 5 (right of first refusal), HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under the Facility Rights Agreement and the

Transaction Documents without prior notice to or consent from either GLAM or the respondent and it is further provided that any assignment of the SBLC to a proposed assignee shall only be done together with the concurrent assignment of the Facility Rights Agreement in favour of the same assignee. The assignment of SBLC is specifically excluded in the assignment deed dated 21.03.2012 and therefore, the proviso has no effect.

As regards the other part, the prior notice to or consent from either GLAM or the respondent for assignment or transfer is required only for the rights, benefits and obligations under the Facility Rights Agreement and the Transaction Documents. Moreover, clause 9.11 of the facility rights agreement states that the agreement shall be read in conjunction with the Corporate Rupee Loan Facility Agreement and in the event there is any conflict between the terms of the two agreements, the Corporate Rupee Loan Facility Agreement shall prevail. Clause 2.1 of the Corporate Rupee Loan Facility Agreement (Annexure IV (b) of the application) clearly states that the term loan is subject to the terms and conditions contained in the Agreement as also in the General Conditions. Section 11.5 of the General Conditions states that the respondent shall not assign or transfer all or any of its rights, benefits or obligations under the Corporate Rupee Loan Facility Agreement and the Transaction Documents without the approval of HSBC and HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under

the Corporate Rupee Loan Facility Agreement and the Transaction Documents i.e. approval of the respondent or any other person is not required. Moreover, transfer need not be of all the rights, benefits and obligations. Some benefits, rights and obligations can also be transferred i.e. the assignment without SBLC can be made. Therefore, the contentions of the respondent cannot be accepted.

(vi) The learned counsel for the respondent has referred to various orders passed in Alipore Court (26.02.2010) and Hon'ble High Court of Calcutta (24.06.2011) which are stated to be specifically record the relevance of SBLC and its criticality. We find that at pages 25 and 26 of the reply filed by diary No.757 dated 15.03.2018, the respondent has stated that by SLP (Civil) No.36285 of 2011 (against the order dated 24.06.2011 of Hon'ble Calcutta High Court), the Hon'ble Supreme Court by order dated 24.03.2014 declared the order dated 26.02.2010 of the Alipore Court ineffective from the date of filing of the suit. In view of these facts, the orders of the Alipore Court and Hon'ble Calcutta High Court are not being further examined.

(vii) The pleas taken by the learned counsel for respondent for stating that the assignment of debt was contrary to agreements between the parties cannot be accepted.

(viii) The learned counsel for the respondent has submitted that a fraud was committed on the respondent and that there was also settlement of loan. The major ground taken is that HSBC and

the petitioner have failed to explain the draw down of more than ₹81 crores which was made on SBLC (reflecting in the bank account statement of the respondent on 22.03.2012 i.e. one day after assignment). It is stated at page 16 of the reply filed by diary No.757 dated 15.03.2018 that the "Demand Deposit Transaction History" of the respondent showed a receipt of ₹81,25,08,408 as "PROCEEDS UNDER GTY FROM HSBC MAR". The copy of the Demand Deposit Transaction History dated 05.04.2012 has been enclosed as Annexure R-8 of the reply. This Demand Deposit Transaction History relates to the respondent's account with HSBC and the relevant entry of 22.03.2012 reads as follows:-

page 106 of reply

Date	Transaction details	Deposit	Balance
22 March, 2012	TRANSFER HSBC-PHOENIX ARC-ESCROW FT TO GPI TEXTILES LTD WRLR-00069 11:13:52 TRANSFER PARTIAL CLAIM PROCEEDS UNDER GTY FM HSBC MAR APP ROPRTINOD TRF TO GPI TECTILE LTD.	500,000,000.00	478,088,070.50

	WRLP-00112 17: 46: 03	812,508,408	1,290,596,478.50

The respondent has only taken an extract of the narration in its reply at page 16. The contents of the noting of the transaction do not appear to justify the claim of the respondents that this was a draw down which was made on SBLC. The amount involved is substantial. However, with regard to clarification regarding the entry the respondent has mainly referred to communications in March, 2012(Annexure R-7 (colly) of reply). It has been also stated that by e-mail dated 30.03.2012 (page 109 of reply) when the respondent enquired from HSBC regarding the entry, it was told that since the account has been assigned to the petitioner with effect from 21.03.2012, all balance confirmations and outstanding details from 21.03.2012 onwards needs to be obtained from the petitioner only and when the respondent asked the petitioner by letter dated 06.07.2012, it was told by letter dated 20.07.2012 (Annexure-V (h) of the application) that the matter may be taken up separately with HSBC for seeking the details. It appears that no further action has been taken by the respondent to find out the complete details of the amount of about ₹81.25 crores. We may add that in the letter dated 20.07.2012, the petitioner has stated that they have not received any money as part of repayment towards the loan due and payable after the execution of deed of assignment and that the allegation regarding appropriation of amount received from

encashment of SBLC is incorrect and unjustified. The contention raised is of fraud committed on the respondent and settlement between HSBC, petitioner and GLAM (without knowledge and consent of the respondent). The evidence relied upon by the respondent is discussed above and in view of the discussion the contention cannot be accepted.

(ix) The learned counsel for the petitioner has pleaded that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated 20.04.2012 and thus they cannot say that they were not aware regarding the assignment and declaration of NPA. It is further pleaded that till the preliminary arguments on 21.03.2018 in the present case in this Tribunal, no case has been filed by the respondent against GLAM or HSBC and the respondents have chosen to challenge the same only in the fourth week of March, 2018 before the Hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition. It is stated that no payment whatsoever was made in respect of the loan and interest by the respondent since 21.03.2012 and this is also evidenced by the statement of dues at Annexure-V (w) of the application. The respondent's explanation is that its no objection is in view of specific representation made by HSBC stating that pursuant to the assignment deed all the financial assistance granted by it together will all underlying securities and rights, interest and title thereto were transferred and released in

favour of the petitioner i.e. all securities including SBLC were assigned. We find from page 13 of the respondent's reply filed by diary No.757 dated 15.03.2018 that the respondent has stated that it received e-mail from HSBC on 27.03.2012 stating that the assignment deed dated 21.03.2012 assigned the security interest (other than the SBLC and the rights arising thereunder). Therefore, as on the date of BIFR hearing on 20.04.2012, the respondent was well aware that SLBC has not been assigned to the petitioner. In these circumstances the reliance on the representations by HSBC is misplaced. Moreover, no further action was taken for withdrawing the no objection. As regards the challenge to the assignment deed, the respondent's reply is that the assignment deed was challenged in reply to SARFAESI notices, OA application before DRT etc. Therefore, effectively, the assignment deed dated 21.03.2012 was unchallenged.

(x) In view of the above discussion, we reject the contention of the respondent that the debt is not legally assigned or transferred to the petitioner. It is therefore, held that the petitioner is a financial creditor as defined in Section 5(7) of the Code and is entitled to initiate CIRP in the case of the respondent under Section 7 of the Code. We are also satisfied that the conditions provided for by Section 7(5) (a) of the Code are satisfied in as much as a default has been proved to have occurred; the application under Section 7(2) of the Code is complete; and there are no disciplinary

proceedings pending against the proposed Resolution Professional i.e. Shri Jalesh Kumar Grover.

27. The petition is, therefore, admitted under Section 7(5) (a) of the Code and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code:-

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 Securitisation 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.

28. It is further directed that the supply of essential goods or services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) of Section 14 of the Code shall however not apply to such transactions as may

be notified by the Central Government in consultation with any financial sector regulator.

29. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section(1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

30. The matter be posted on 12.07.2018 for passing formal order to appoint Interim Resolution Professional with further directions.

Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

Sd/-
(Pradeep R. Sethi)
Member (Technical)

July 06, 2018
arora

IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"

CP (IB) No.35/Chd/HP/2018

Under Section 7 of IBC, 2016.

In the matter of:

Phoenix Arc Private Limited
Acting in its capacity as Trustee of
Phoenix Trust FY 15-7 having its
registered Office at 5th Floor,
Dani Corporate Park,
158, CST Road, Kalina,
Santacruz (E), Mumbai-400098 …Petitioner-Financial Creditor

Vs.

M/s GPI Textiles Limited,
having its registered office at
Bharatgarh Road, Nalagarh,
District Solan, (H.P.)-174101 …Respondent-Corporate Debtor

Judgement delivered on 06.07.2018.

Coram: Hon'ble Mr.Justice R.P.Nagrath, Member (Judicial)
Hon'ble Mr.Pradeep R.Sethi, Member (Technical

For the Petitioner : 1. Mr. Manish Jain, Advocate
2. Ms. Divya Sharma, Advocate

For the Respondent : 1. Ms. Pooja Mahajan, Advocate.
2. Mr. Gaurav Arora, Advocate.

Per: Pradeep R. Sethi, Member(Technical)

JUDGEMENT

The instant petition has been filed in Form No.1 by M/s Phoenix Arc Pvt. Ltd. (hereinafter referred to as the petitioner) for initiation of the corporate insolvency resolution process (CIRP) in the case of M/s GPI Textiles

Ltd. (hereinafter referred to as the respondent). The petition is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the IBC Rules). It is stated that the respondent was incorporated on 29.09.2000 having been allotted CIN U17117HP2000PLC026391 and its registered office is at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh-174101. Therefore, the matter lies within the territorial jurisdiction of this Bench of the Tribunal.

2. It is stated that the respondent is engaged in the business of manufacturing of cotton yarns, polyester yarn and blended yarn from cotton and polyester fibre and that on the request of the respondent, The Hongkong and Shanghai Banking Corporation Ltd. (hereinafter referred as HSBC) granted working capital and term loan facilities to the respondent vide sanction letter dated 24.03.2009 for an amount of ₹129,02,00,000 for a period of 60 months and the respondent and HSBC entered into a Crporate Rupee Loan Facility Agreement dated 08.04.2009, wherein all the terms of the loan agreement were set in and the respondent also executed deed of hypothecation and memorandum of entry in favour of HSBC to secure the loan, stipulating therein all the conditions regarding the creation of charge on moveable and immoveable properties of the respondent in favour of HSBC. It is submitted that due to defaults committed by the respondent in repayment of the loan amount, the account of the respondent was classified as NPA on 01.03.2012 by HSBC in its books of account. It is stated that subsequently on 21.03.2012, HSBC assigned the debts of the respondent together with the

underlying securities, save and except Stand By Letter of Credit (SBLC) in favour of the petitioner through an assignment deed. It is submitted that since on account of the continuous default of the respondent, and HSBC having already classified the account of the respondent as NPA on 01.03.2012, the petitioner issued a demand notice dated 15.05.2012 under the provisions of Section 13 (2) of the SARFAESI Act, 2002 and that the respondent filed reply to the above notice by its reply dated 06.07.2012. It is stated thereafter, the petitioner issued a notice dated 30.09.2015 under Section 13(4) of the SARFAESI Act to take possession of the secured assets of the respondent and against the said notice, the respondent filed SA 281/2015 which is pending for adjudication before the DRT-1, Chandigarh.

3. It is stated further that the petitioner filed an application for recovery by OA # 919/2016 under Section 19 of the Recovery of Debts due to Banks & Financial Institutions Act, 1993 for recovery of ₹222,07,13,590 alongwith interest till realisation of the entire amount and expenses of ₹73,35,840 and the said application is still pending for adjudication before the DRT-1, Chandigarh. It is submitted that due to the continuous failure of the respondent to pay the loan amount, the petitioner issued recall notice dated 19.01.2016 thereby recalling its all financial facilities. In para 2 of Part IV of Form 1, the amount in default is stated to be ₹268,29,20,033 as on 26.12.2017 and workings and computation of the amount of default and date of default are stated to be attached in the table of date of defaults annexed as Annexure-IV (d) of the petition.

4. In Part III of the petition, the name of Shri Jalesh Kumar Grover IBBI Regd. No.IBBI/IPA-01/IP-P00200/2017-18/10390 has been proposed to

act as an Interim Resolution Professional and Form 2 has been annexed as Annexure-III of the petition. In the Form 2, Shri Jalesh Kumar Grover has certified that there are no disciplinary proceedings pending against him with the Board or ICSI Insolvency Professional Agency. The petition is accompanied with a copy of the assignment deed dated 21.03.2012 (Annexure-IV (c) of the petition). The contents of the petition are supported by affidavit of the authorised representative of the petitioner, namely; Gurleen Chhabra, one of the authorised person as per Board resolution dated 20.09.2017 of the petitioner (Annexure-I (c) of the petition). A copy of the petition is also stated to be sent to the respondent by speed post on 01.02.2018.

5. Notice of this petition was issued to the respondent. The respondent contested the petition by filing a written reply. It is stated that the petition is an exercise in fraud practised upon the respondent by the petitioner and its alleged assignor, HSBC and that the assignment purported to be undertaken by HSBC in favour of the petitioner was not only against the agreements between the respondent and HSBC but also against the guidelines of the Reserve Bank of India (RBI) and as such the purported assignment was illegal, malafide, fraudulent and undertaken by HSBC with ulterior motives in connivance with the petitioner and there is no debt owed to the petitioner which can sustain the present application. It is averred that the respondent was incorporated in September, 2000 and gained good reputation in the textile industry and to support its business it availed loans from IDBI Bank Ltd., IFCI Ltd. and ICICI Bank Ltd. In the year 2007, in order to streamline its accounts and settle the outstanding debts with the

above original lenders, the respondent entered into an arrangement with GL Asia Mauritius-II Ltd. (GLAM), a non-resident investor for investment and infusion of funds into the respondent company and for arranging refinancing/one time settlement of the loans of the original lenders and in pursuance thereof, GLAM arranged ₹129 Crores from ICICI Bank Ltd. against a Stand By Letter of Credit (SBLC) issued by Citi Bank N.A., Hongkong Branch to ICICI Bank Ltd. which was fully cash collateralized by GLAM.

6. It is further alleged that on or about 08.04.2009 the ICICI Bank Ltd. loan was swapped with a loan from HSBC and a corporate loan facility agreement dated 08.04.2009 was entered into between HSBC and the respondent (sanction letter is stated to be dated 24.03.2009). Further, HSBC, the respondent and GLAM also entered into tripartite facility rights agreement dated 08.04.2009 (Annexure R-1 of the reply). It is submitted that as per the HSBC sanction letter, the HSBC facility agreement and facility rights agreement, the entire principal outstanding of terms loan of ₹129.02 crores was to be repaid by the respondent to HSBC by way of a bullet repayment at the end of 60 months from the drawn down i.e. with effect from 20.04.2014 and further monthly interest of 11% per annum basis was payable on 20th of each month and the HSBC loan was required to be backed by a SBLC denominated in USD from HSBC Mauritius. It is submitted that as per sanction on 25.03.2009 by HSBC Mauritius of banking facility to GLAM, the HSBC SBLC was fully cash collateralised by way of a term deposit given by Glam to HSBC Mauritius for the full amount of SBLC. It is submitted that the primary security for all amounts due to HSBC from the respondent under the HSBC facility agreement was the HSBC SBLC and that whenever the respondent

did not pay the interest/processing fee to HSBC on the date (20th of the month), HSBC used to draw down on the SBLC for the said amount and as and when such draw down was made, the funding of interest and processing fee was acknowledged by the respondent as interest free unsecured loan of GLAM in the books of the respondent in terms of Board resolutions dated 30.06.2009, 16.12.2009, 23.11.2011 and 23.03.2012 (Annexure R-4) (colly) of the reply).

7. It is then submitted that the last payment of interest (before the purported illegal assignment to the petitioner on 21.03.2012) was made to HSBC by way of draw down from the HSBC SBLC on 15.02.2012 which was against the interest over dues for the month of November, 2011 to January, 2012. It is submitted that all of a sudden, without warning, without notice and without any hint of proposed action, the respondent received a letter dated 23.03.2012 from HSBC through e-mail on 26.03.2012, stating that HSBC had assigned the HSBC loan to the petitioner and that through e-mail on 27.03.2012, it was informed by HSBC that by way of a deed of assignment dated 21.03.2012, executed between HSBC and the petitioner, the HSBC loan, "alongwith the underlying financial documents and the security interest (other than the SBLC and the rights arising thereunder)" has been assigned to the petitioner. It is stated that details of specific transaction dated 22.03.2012 in the "demand deposit transaction history" of the respondent showed a receipt of ₹81,25,08,408 as "(PROCEEDS UNDER GTY FROM HSBC MAR)" (transaction dated 22.03.2012), was asked from HSBC by the respondent but no response was received. It is stated that when State Bank of India, a secured creditor of the respondent, was informed of the impugned assignment, SBI specifically asked HSBC the reasons for assignment of the

debt to the petitioner when the recourse was available to HSBC to invoke the HBSC SBLC and also asked to HSBC to confirm that the assignment met "all required RBI/BIFR guidelines", but no response was given by HSBC to SBI. With reference to Notice under Section 13(2) of SARFAESI Act issued by the petitioner, the respondent raised objections as to how it had been classified as NPA by HSBC when interest had been recovered and the principal only became due on 20.04.2014; no notice of default was given to the respondent after 2009; HSBC appeared to have received approximately ₹81 crores by way of transfer from HSBC and on the other hand transferred the entire HSBC loan to the petitioner.

8. According to the respondent several legal proceedings were pending between the promoters of respondent-company and GLAM before and around the time of the impugned assignment. Further on 16.06.2012, the promoters of respondent company filed Title Suit No.38 of 2012 before the Civil Judge (Senior Division), 1st Court, Alipore alongwith an application under order 39 Rule 1 & 2 read with Section 151 of Civil Procedure Code, 1908 inter alia assailing the validity of the assignment deed and the impugned assignment. It is stated that vide order dated 21.04.2014, the ex-parte ad interim order dated 17.07.2012 was made absolute till final disposal of the promoter's suit. The ex-parte ad interim order is stated to restrain the petitioner and others from enforcing any rights under the impugned assignment. It is submitted that against the interim injunction order, Revision Application bearing C.O. 2089 of 2014 was filed by the petitioner before the Hon'ble Calcutta High Court which was dismissed as not maintainable by order dated 28.07.2014 and the petitioner thereafter moved the Hon'ble Supreme

Court of India by way of SLP No.28146/2014. It is submitted that the respondent understands that in the meanwhile, on 27.08.2015, the promoter's suit got dismissed in default (for non-appearance), as a result of which the Hon'ble Supreme Court on 28.09.2015 dismissed SLP No.28146/2014 as infructuous and that the respondent further understands that in January, 2016, the promoters of the respondent company filed a restoration application against the dismissal of the promoter's suit alongwith an application for condonation of delay and that the delay in filing restoration application has been condoned and the restoration application was listed for 07.04.2018.

9. As regards notice under section 13 (2) of the SARFAESI Act, appeal is stated to be filed before the DRT objecting to the classification of the respondent's account as NPA and assailing the validity of the assignment deed. As regards recall notice of the petitioner issued on 19.01.2016, it is stated that this was duly responded to by the respondent on 17.02.2016 reiterating its objections to the impugned assignment and similar objections were also taken with reference to O.A. under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 filed by the petitioner on 07.06.2016. It is further stated that meanwhile, in 2015 the GLAM sold its 44.44% shares to one ADAL Media Pvt. Ltd. in 2015. It has been submitted that HSBC was in a great hurry to somehow classify the respondent's account as NPA and then surreptitiously assigned the same to the petitioner without the primary security of the HSBC SBLC. It is stated that in any case, as there is an encashment under the HSBC SLBC which was after about one day of the impugned assignment, the said encashment led to full and complete satisfaction of the outstanding of the respondent alleged being in default. It is

stated that under the Code, financial creditor is defined to inter alia include any person to whom the debt has been legally assigned or transferred to and that the impugned assignment is not only fraudulent but also illegal in view of the RBI guidelines dated 23.04.2003 and 01.07.2015 and that the impugned assignment is illegal as the same was made in breach of the agreements between the parties. It is submitted that the impugned assignment is contrary to Section 5(3) of the SARFAESI Act and that it was not open to HSBC to conveniently pick and choose securities which are to be assigned and which are not to be assigned and/or released. It is submitted that in absence of the books of the petitioner and of HSBC, duly certified in accordance with the Bankers Books Evidence Act, 1891, the defaults alleged on part of the respondent cannot be ascertained. It is stated that the assignment deed enclosed with the petition mentions one "Annexure-A" purportedly being "Details of Ledger Extract" but Annexure-A is missing from the assignment deed filed alongwith the petition. It is stated that HSBC was not made a party to the petition, even though it had to answer various critical unanswered questions surrounding the impugned assessment. It is stated that the respondent cannot be considered in default (as the security stood encashed by HSBC) and in fact the respondent stood discharged. It has been prayed that the petition be dismissed with exemplary costs.

10. By order dated 06.04.2018, it was directed that the RBI guidelines referred to by the learned counsel for respondent be filed in spiral bound paper book. The learned counsel for the respondent also sought time to file copies of orders passed in Civil Suit filed by the promoters of the respondent, orders passed by the Hon'ble High Court and Hon'ble Supreme

Court of India and copy of application for restoration in the aforesaid Civil Suit which was dismissed in default. These documents were filed by the respondent by diary No.1186 dated 17.04.2018 and taken on record as per order dated 09.05.2018. When the matter was listed on 09.05.2018 this Tribunal also issued notice of defect regarding non-enclosure of ledger extract Annexure-A to the assignment deed dated 21.03.2012. The compliance was made by diary No.1575 dated 15.05.2018 and order of the BIFR in case No.50/2011-M/s GPI Textiles Ltd. for hearing on 20.04.2012 was also filed. The compliance was noted in this Tribunal's order dated 23.05.2018 and the arguments were heard.

11. During the course of the arguments, learned counsel for the petitioner has contended that as per Section 7(5) (a) of the Code, the Adjudicating Authority is required to satisfy itself regarding default; application under Form 1 is complete; and there are no disciplinary proceedings against the Interim Resolution Professional. It was argued that as per Article V of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 between the respondent and HSBC (Annexure-IV (b) of the petition reference to BIFR would constitute an event of default and that it is also provided that not acting on the event of default will not constitute the same as having been condoned by HSBC, unless specifically communicated by HSBC. It was argued that there is no requirement under any Act to inform the borrower about declaration of his account as NPA and the only obligation in law is that this fact must be declared in the notice under Section 13(2) of the SARFAESI Act, 2002 which has been duly complied with (page 497 of the petition). It is argued that other than trying to hide behind frivolous issues, the respondent has not mentioned

a single word on their liability to make any repayment whereas in their reply it is admitted that there was complete erosion of net worth which led to filing of reference to BIFR raising serious questions about their capability to repay the secured debts. It is argued that as per Section 11.5 of General Conditions to the Corporate Rupee Loan Facility Agreement dated 08.04.2009 (Annexure-IV (b) of the petition, HSBC has a right to assign in part or whole of the Facility and any dispute that the company may have with regard to SBLC can be raised with HSBC. It is submitted that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated 20.04.2012. It is argued that GLAM was the investor of the respondent company since 2007 and therefore, it cannot be contended that there was collusion between the HSBC, petitioner and GLAM. It is stated that the Facility Rights Agreement (Annexure R-1 of the reply) is related to SBLC facility only and thus will not be binding upon the petitioner. It is submitted that till the preliminary arguments on 21.03.2018 in this Tribunal, no case was filed by the petitioner against GLAM or HSBC and the respondent have chosen to challenge the same only in the 4th week of March, 2018 before the Hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition vide order dated 29.03.2018. It is argued that both HSBC and the petitioner have undergone many RBI audits and thus the allegation on behalf of the respondent that there is collusion between the parties or that the default has been manufactured is misconceived and wrong. It is submitted that the respondent has acknowledged its debt vide its letter dated 15.03.2012 towards HSBC on page 839 of the application and also admitted that the said acknowledgement would be binding upon any assignee

of HSBC. It is submitted that the date of the assignment agreement is 21.03.2012 wherein the cut off date of the principal is mentioned as on 20.03.2012 and the cut off date for the interest due is on 19.03.2012. Therefore, it is pleaded that in respect of entry for transfer of amount of ₹81.25 crores dated 22.03.2012 in the demand deposit transaction history, the borrower cannot take any benefit of any accounting entry subsequent to the cut off date and the posting of such entries is the sole domain of the assignor. As regards the entry of ₹50 crores on 22.03.2012 in the demand deposit transaction history, the same is stated to relate to the consideration which was paid by the petitioner through RTGS to HSBC in lieu of the assignment agreement. As regards the reliance by the respondent on the objections to assignment by SBI, it was pleaded that there was no consortium loan and the assignment of debt does not cause any change qua the status of SBI as another secured creditor and the fact remains that the respondent has not even repaid the debts of SBI which is around ₹100 crores. The learned counsel for the petitioner has relied on the judgement of **ICICI Bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd. (2010) 10 Supreme Court Cases 11 (para No.52)** in which it was stated that NPAs are created on account of the breaches committed by the borrower, he violates his obligations to repay the debts, one fails to appreciate the opportunity he seeks to participate in the “transfer of account receivable” from one bank to the other.

12. In reply, the learned counsel for the respondent has submitted that the petitioner is not a financial creditor under Section 5(7) of the Code, as the debt was not legally assigned by HSBC to the petitioner. It is submitted that as per RBI guidelines dated 23.04.2003 (page No.42 of the reply), a

financial asset (i.e. loan) can be sold to a securitisation company/asset reconstruction company (like the petitioner) by a bank/FI (like HSBC) where the asset is declared as NPA and that NPA declaration is a pre-requisite for assignment of loan and in case of interest payment remaining over-due, banks should classify and account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. It is argued that the principal amount of HSBC loan was due on 20.04.2014 and as regards the monthly interest of 11%, the last payment of interest took place on 15.02.2012 by drawing down SBLC for ₹3.7 crores and hence the account was not over due for more than 90 days from end of quarter as on 01.03.2012. It is stated that the HSBC loan was not accelerated and there is no notice of demand or notice of default or notice of acceleration or notice of cure issued by HSBC to the petitioner. It is submitted that the guidelines issued by RBI on NPAs and loan assignments have a statutory force and must be complied with by referring to APS Star Industries Ltd. (supra) case. It is argued that since the account could have not been NPA on 01.03.2012, the very assignment was fraudulent and illegal in clear breach of RBI guidelines and hence non-est. It is pleaded that the impugned assignment is in violation of Section 5(3) of the SARFAESI Act which provides for assignment of loan with all underlying security and guarantees etc. It is argued that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent and it was a condition precedent to the loan and that various orders passed in Alipore court (26.02.2010) and High Court of Calcutta (24.06.2011), specifically record the relevance of SBLC and its criticality. It is pleaded that it was incumbent on HSBC to take recourse to SBLC and clear

the default and this was also the practice followed by HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment of by the respondent on the due date), without reference and without notice to the respondent. It is pleaded that the sequence of events show that the assignment was pre-meditated and NPA was declared and entire loan was made outstanding on 20.03.2012 only so that HSBC could somehow assign the loan to the petitioner and in addition, the loan was settled by payment of ₹81 crores from SBLC and if at all, it is GLAM which is the creditor of the respondent and Glam is free to file a claim against the respondent for the same. It is submitted that the impugned assignment was challenged by the promoters on 16.06.2012 before the Civil Judge, First Court, Alipore and in addition, the respondent has challenged the assignment before DRT and has also filed a writ petition before the Hon'ble High Court of Himachal Pradesh. It is pleaded that the petitioner has failed to establish default on part of the respondent and failed to explain how more than ₹268 crores is amount in default and as evidence of default, old notices of 2009 have been placed on record, even though the default under such notices were cured in 2009 itself and the only other evidence of default is SARFAESI notice which is itself under challenge. As regards the arguments of the learned counsel for the petitioner, the learned counsel for the respondent reiterated that for an assignee to claim as financial creditor, it must be shown that the debt was legally assigned by HSBC to the petitioner.

13. As regards the petitioner's arguments regarding event of default in the Corporate Rupee Loan Agreement dated 08.04.2009, it is submitted by the learned counsel for the respondent that the default under the Code is

defined as non-payment of financial debt, and not an “event of default” under some agreement. As regards petitioner’s arguments regarding assignment of debt being permitted under Section 11.5 of General Conditions of the Corporate Rupee Loan Facility Agreement, it is pleaded by the learned counsel for the respondent that the facility agreement does not talk of assignment and that however, facility rights agreement talks of assignment and states that assignment can only take place subject to clause 5 and that SBLC and loan go hand in hand.

14. With reference to petitioner’s arguments that Facility Rights Agreement is not binding on the petitioner, it is stated that the Facility Rights Agreement was assigned to the petitioner by HSBC vide assignment deed (Serial No.92 of Part II of Assignment Deed at page 255 of the petition). As regards the petitioner’s arguments that the respondent admitted/accepted the transfer of HSBC loan in the BIFR hearing on 20.04.2012, it is submitted that the no objection was given on the specific representation made by HSBC during the BIFR hearing that they have transferred and released in favour of the petitioner all the financial assistance granted by it together with all underlying securities and rights, interest and title thereto. With reference to the petitioner’s contention that the respondent has never challenged the assignment deed before any authority, it is submitted that various clarifications on the assignment deed were sought from HSBC; the assignment deed was challenged in the reply to the SARFAESI notice as well as to the O.A. application before DRT and that in any event, such admissions and non-challenge cannot make illegal assignment legal and this cannot be construed as a waiver of RBI guidelines. With reference to the petitioner’s submissions

with regard to the entry of ₹81.25 crores on 22.03.2012 in the Demand Deposit Transaction History, it is submitted that HSBC stated that the details be obtained from the petitioner and the petitioner stated that the details be obtained from HSBC. With reference to the petitioner's argument that orders in cases filed by promoters are not relevant and further they have been dismissed, it is reiterated by the learned counsel for the respondent that the orders are relevant to the extent they recognise the importance of SBLC to the entire loan structure and that the restoration application filed by the promoters is still pending.

15. In rejoinder, the learned counsel for the petitioner reiterated his submissions and pleaded that in view of the decision of the Hon'ble Supreme Court in **APS Star Industries Ltd. (supra)**, the borrower could not take advantage since he was in default. It was pleaded that the petition be allowed and CIRP proceedings initiated against the respondent.

16. We have carefully considered the submissions of the learned counsel for the parties and have also perused the records.

17. The present petition is filed under Section 7 of the Code. In respect of the plea of the petitioner that the conditions as per Section 7 (5) (a) of the Code are satisfied, the respondent's argument is that even before that, it must be shown that the debt was legally assigned by HSBC to the petitioner. Therefore, the respondent has not raised any objection to the satisfaction of the conditions provided for in Section 7 of the Code and Rule 4 of the IBC Rules. In its reply, the respondent had stated that the assignment deed dated 21.03.2012 (Annexure-IV (c) of the application) mentions one Annexure-A

purportedly being “details of ledger extract” and that the said Annexure-A is missing from the assignment deed filed alongwith the application. Notice of this defect was given to the petitioner and the defect was removed and Annexure-A was filed alongwith compliance affidavit by diary No.1575 dated 15.05.2018.

18. The other objection (page 57 of the reply) is that the petitioner has failed to substantiate the amount claimed to be in default as per the requirements of the Code. The respondent’s contention is that the support given of the claimed default amount is not in accordance with the Bankers Books Evidence Act, 1891. We find that in Annexure-V (w) of the application the details of statement of dues showing total dues (including interest and penal interest) of ₹268,29,20,033 is accompanied by a certificate under Section 2A of the Bankers Books Evidence Act. This is also noted in this Tribunal’s order 13.02.2018. Therefore, the contention that the certificate in accordance with Bankers Books Evidence Act 1891 is not filed cannot be accepted. As pointed out by the respondent, we have noted that as per the statement of dues (supra), the outstanding dues with interest as on 20.03.2012 as per assignment agreement is noted as ₹131,35,70,672. This is the amount as stated in the assignment deed dated 21.03.2012 (Annexure-IV (c) of the petition). However, there is a rectification in the outstanding amount made by letter dated 09.05.2012 of HSBC to the petitioner (page 286 of the application) in which the total outstanding is computed at ₹131,21,11,929.50. The difference is on account of interest due (as on 19.03.2012) taken at ₹233,70,672.36 in the assignment deed date 21.03.2012 and interest due as on 19.03.2012 of ₹2,19,11,929.50 taken in the rectification letter date

09.05.2012. It is explained in the letter dated 09.05.2012 that due to some clerical mistake, the particulars of loan as mentioned in Clause 1 Details of Loans of Schedule 1 of the deed of assignment deed dated 21.03.2012 referred different interest due amount as on 20.03.2012 which is being rectified with this letter. It therefore, appears that the notice under Section 13(2) of SARFAESI Act 2002 dated 15.05.2012(Annexure-V (g) of the petition) mentioned the outstanding dues under the facility as aggregating to ₹131,21,11,929.50 as on 20.03.2012. Further, in the statement of dues (Annexure-V (w) of the application, the outstanding dues with interest as on 20.03.2012 are taken i.e. it appears that one day's interest of 20.03.2012 is added and the outstanding dues with interest are thereby shown at ₹131,35,70,672. We therefore, do not find any force in the objection raised by the respondent.

19. The only issue therefore, requiring consideration is whether the petitioner is a financial creditor of the respondent. The respondent has referred to the provisions of Section 5(7) of the Code which reads as follows:-

> *"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to."*

20. The respondent's contention is that the debt should be legally assigned or transferred to make the person to whom the debt is assigned or transferred a financial creditor. The respondent has referred to the Guidelines on sale of financial assets to Securitisation Company (SC)/Reconstruction Company (RC) (created under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) and related

issues dated 23.04.2003 (2003 RBI Guidelines) (page 8 of diary No.1186 dated 17.04.2018 in which the details of financial assets which can be sold is given in para 3 as follows:-

> *"3. A financial asset may be sold to the SC/RC by any bank/FI where the asset is :*
>
> *i) A NPA including a non-performing bond/debenture, and*
> *ii) A Standard Asset where:*
> *a) the asset is under consortium/multiple banking arrangements,*
> *b) at least 75% by value of the asset is classified as non-performing asset in the books of other banks/FIs, and*
> *c) at least 75% (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of the asset to SC/RC."*

21. Further reference is made to para 2.1 of the RBI's Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 01.07.2015 (Prudential Norms 2015) defining an NPA as under (page 43 of the reply):-

> *"2.1.1 An asset including a leased asset, becomes non-performing when it ceases to generate income for the bank.*
>
> *2.1.2 A non-performing asset (NPA) is a loan or an advance where;*
>
> *a) Interest and/or instalment of principal remain over due for a period of more than 90 days in respect of a term loan.*
>
> *XXX*
>
> *2.1.3 In case of interests payments banks should, classify an account as NPA only if the interest due and charged*

during any quarter is not serviced fully within 90 days from the end of the quarter.

22. The respondent's contention is that the principal amount of HSBC loan was due on 20.04.2014 and only monthly interest of 11% was to be paid during the tenure of the HSBC loan and that even the balance confirmation letter dated 15.03.2012 (on which reliance is sought to be placed by the petitioner) mentions outstanding interest of only two months and therefore, the account of the respondent could not be classified as NPA on 01.03.2012 as on the said date no interest has been outstanding for more than 90 days from the end of the quarter in which it was due as per RBI guidelines.

23. Vide diary No.1186 dated 17.04.2018, the respondent has submitted the RBI Prudential Norms circulated by Master Circular dated 02.07.2012 (page 20 of diary No.1186 dated 17.04.2018). The definition of non performing assets (para 2.1.3) is on the same lines as in the 2015 Prudential Norms. The 2012 Prudential Norms refer to RBI Master Circular dated 01.07.2011. This master circular had been downloaded from the RBI website and the definition of non performing assets (para 2.1) is on the same lines as in the Master Circular of 2012 and 2015. The respondent's contention is that in **APS Star Inds. Ltd. & Ors. (supra)**, the Hon'ble Supreme Court has held that in exercise of the powers conferred by Sections 21 and 35A of the Banking Regulation Act 1949, the RBI can issue directions having statutory force of law and since these directions relating to assignment of financial assets by a bank to an asset reconstruction company are not satisfied in the present case the assignment is illegal.

24. The issue before the Hon'ble Supreme Court was the scope of the power of RBI to define what constitutes "banking business" and it was held that trading in NPAs has the characteristics of a bonafide banking business. In para No.35, the Hon'ble Supreme Court held that in exercise of the powers conferred by Section 21 and 35A of the Banking Regulation act 1949, RBI can issued directions having statutory force of law. However, the directions are to be examined to find out whether the conditions of financial asset being NPA would make the assignment illegal. The first RBI Guidelines referred to by the respondent are the RBI guidelines dated 23.04.2003 in which details of financial assets which can be sold by banks/FIs to the Securitisation Company (SC)/Reconstruction Company(RC) are given. The relevant paragraph No.3 has been extracted above. The financial assets which can be sold are not only NPA but include standard asset also i.e. where the asset is under consortium/multiple banking arrangements/at least 75% (by value) of the banks/FIs who are under the consortium/multiple banking arrangements agree to the sale of asset to SC/RC etc. Therefore, subject to fulfilment of the conditions even standard asset i.e. a non-NPA can be sold by the bank/FI to SC/RC. In this context, reference may also be made to Chapter II of SARFAESI Act 2002 which *inter alia* relates to registration of asset reconstruction company, acquisition of rights or interest in financial assets by an asset reconstruction company. Section 5 (1) of the SARFAESI Act 2002 reads as follows:-

> *"5. Acquisition of rights or interest in financial assets.-(1) Notwithstanding any thing contained in any agreement or any other law for the time being in force, any (asset reconstruction*

company) may acquire financial assets of any bank or financial institution –

a) *by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or*
b) *by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.*

25. Therefore, there is no condition stipulated in section 5 of SARFAESI Act 2002 that an asset reconstruction company has to acquire only NPAs of banks or financial institutions. It is concluded that the nature of the financial asset transferred i.e. whether it is NPA or not is not such a material condition so as to make the agreement invalid. We may add here that as per para 2.1 (a) of the assignment deed dated 21.03.2012, (page 237 of the petition) it is stated that the agreement to assign is in consideration of the assignee having deposited the purchase consideration in the Escrow Account and therefore, the assignment is for valuable consideration received. Further, as para 3.1 of the assignment deed dated 21.03.2012, HSBC has represented and warranted to the petitioner that as on the date of the deed and with reference to the facts and circumstances then existing, the loans are non performing assets and have been duly and validily classified as such, in accordance with the guidelines issued by RBI in this regard and all applicable law. The consequences of the breach of representations are given in para 3.2 of the assignment deed dated 21.03.2012. It is stated therein that if any of the

representations are found to be incorrect, a consequence of which materially and adversely affects the interest of the assignee in the loans, such misrepresentation shall be rectified by the assignor forthwith and in no event later than 30 days from the date of receipt of notice by the assignor from the assignee, after a notice in respect of the breach is given to the assignor by the assignee. Therefore, the breach of representation regarding the loan being non performing asset is a matter between the petitioner and HSBC. The learned counsel for the petitioner has referred to para 52 of the decision of the Hon'ble Supreme Court in **APS Star Inds. Ltd. & Ors. (supra)** in which the Hon'ble Supreme Court held as follows:-

> *"52. Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the "transfer of account receivable" from one bank to the other."*

In the present case, the respondent cannot seek to take benefit of whether the assigned debt is a NPA and the matter lies between the petitioner and HSBC.

26. We are now taking into consideration the other issues raised by the respondent in support of its claim that the debt is not legally assigned or transferred by HSBC to the petitioner.

(i) The respondent has referred to pages 132 and 151 of diary No.1186 dated 17.04.2018 filed by the respondent and has stated that HSBC should have followed a price discovery auction process for sale of loan to the petitioner or it could do a bilateral sale with the petitioner only with the borrower's consent. We find

that page 132 is press release 2013-2014/1533 dated 30.01.2014 with reference to the RBI releasing on its website the framework for revitalising distressed assets in the economy. The framework is at pages 134 to 155. The press release itself states that the framework outlines the specific proposals RBI will implement. Moreover, the press release is of 30.01.2014 i.e. much after the assignment deed dated 21.03.2012. Therefore, the respondent's contention cannot be accepted.

(ii) The respondent has referred to page 121, 124 and 125 of diary No.1186 dated 17.04.2018 filed by the respondent to state that as per RBI guidelines, initial holding period (of NPAs) of two years has been prescribed for banks holding NPAs prior to the amendment. The reference therein sought to be relied upon by the respondent is with regard to RBI circular dated 13.07.2005. This circular is available at page 14 of diary No.1186 dated 17.04.2018 filed by the respondent. The first para thereof clearly states that the guidelines would be applicable to banks/FIs and NBFCs purchasing/selling non performing financial assets from/to other banks/FIs/NBFCs (excluding securitisation companies/reconstruction companies). Therefore, this RBI guideline is not applicable in the present case which is of an asset reconstruction company.

(iii) The learned counsel for the respondent has argued that the assignment of debt was in violation of Section 5(3) of the SARFEASI Act, 2002 which provides for assignment of the loan

with all underlying security and guarantees etc. Section 5(3) is only in respect of the rights of the asset reconstruction company in respect of contracts, deeds, bonds etc. of the predecessor bank and cannot be read to restrict the bank from assigning loan only with all underlying securities and guarantees etc. as claimed. As regards Section 13 (2) of SARFEASI Act making reference to NPA, the matter is not relevant for the purposes of present discussion whether debt is legally assigned or transferred.

(iv) It is argued by the learned counsel for the respondent that assignment of debt was contrary to the agreement between the parties and that the arrangement of SBLC by GLAM (by way of cash deposit by GLAM) was the very basis of investment of GLAM in the respondent company and that it was a condition precedent to the loan. It has been stated at page 3 of the respondent's reply filed by diary No.757 dated 15.03.2018 that a tripartite share subscription and shareholders agreement was entered into in March, 2007 between GLAM, the promoters and the respondent company, for investment in the respondent company and the understanding between the parties was that, to settle the dues of original lenders, GLAM will arrange financing for the respondent company, which financing shall be supported by GLAM and this understanding was the very basis of the investment in the respondent company by GLAM. However, no evidence to support the contentions raised has been filed and

moreover, the issue relates to GLAM, respondent and the promoters of the respondent company and does not have any bearing on the assignment. Article III-Security of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 between the respondent and HSBC (Annexure-IV (b) of the application) includes three paras i.e. para 3.1-Security for the Facility; para 3.2-Security cover and para 3.3-Creation of Additional Security. The details of security given in para 3.1 (A) are firstly, a first charge; secondly, a second charge; and thirdly, SBLC. Para 3.1 (B) states that the First charge and Second charge shall be created by the respondent within 180 days from the draw down date whereas the SBLC would have to be provided as the condition precedent to the draw down. Therefore, SBLC being provided as a condition precedent to the draw down has to be taken in the context that the first charge and second charge to be created by the respondent would take time especially since the earlier borrowal was from ICICI Bank and the period of 180 days from the draw down date was given for this purpose.

We find that the respondent's interpretation that SBLC was a condition precedent to the loan cannot therefore, be taken to be correct. In this context, the argument of the learned counsel for the respondent that in case of default, it was incumbent on HSBC to take recourse of the SBLC and clear the default is being considered. The condition provided for by clause 3.1 of the Corporate Rupee Loan Facility Agreement dated

08.04.2009 (supra) is minimum security cover by way of SBLC for 105% of the outstanding principal and interest calculated at the Facility Interest Rate for the next two months (including on account of exchange rate fluctuation for securities other than SBLC, minimum security cover of 1.00 is set out in clause 3.1). Clause 3.3 provides for the respondent procuring, providing and furnishing additional security when HSBC is of the opinion that the security provided for the facility has fallen below the security cover. Therefore, the clauses in Article III of the Corporate Rupee Loan Facility Agreement (supra) only provide for the minimum security cover and creation of additional security when the security provided falls below the security cover. The respondent had sought to rely on the practice followed by HSBC when they used to draw down the monthly interest from SBLC (in case of non-payment by the respondent on the due date) without reference and often without notice to the respondent.

We may firstly state that as per clause (I)(C) of the Corporate Rupee Loan Facility Agreement dated 08.04.2009, “draw down date” means the date on which the facility is drawn down in the manner provided in Schedule- III i.e. the draw down has reference to the date on which the facility involving term loan not exceeding ₹129,02,00,000 is taken and utilised by the respondent for repayment of earlier loan borrowed from ICICI Bank. The draw down date has therefore, no reference to the SBLC. As already discussed above, default of payment of the

monthly interest may result in the creation of additional security. The respondent has not referred to any specific clause of the Corporate Rupee Loan Facility Agreement dated 08.04.2009 or the Facility Rights Agreement dated 08.04.2009 by which HSBC could make the draw down of monthly interest from SBLC (in case of non payment by respondent on due date) as claimed by the respondent. On the other hand, it is seen from the Board resolutions dated 30.06.2009, 16.12.2009, 23.11.2011 and 23.03.2012 (Annexure A-IV (colly) of diary No.757 dated 15.03.2018 that consequent to HSBC issuing a default notice to the respondent, GLAM paid the amounts to cure the defaults. It was in these circumstances that the amounts were acknowledged as unsecured loans from GLAM in the books of the respondent. Therefore, the respondent's contention of practice followed by HSBC of drawing down monthly interest from SBLC (in case of non payment by the respondent on due date), without reference and often without notice to the respondent cannot be accepted.

(v) The learned counsel for the respondent has referred to clause 9.3 of the Facility Rights Agreement (Annexure R-1 of the reply) for pleading that SBLC and the HSBC loan went together and one could not be assigned without the other. Clause 9.3 states that subject to clause 5 (right of first refusal), HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under the Facility Rights Agreement and the

Transaction Documents without prior notice to or consent from either GLAM or the respondent and it is further provided that any assignment of the SBLC to a proposed assignee shall only be done together with the concurrent assignment of the Facility Rights Agreement in favour of the same assignee. The assignment of SBLC is specifically excluded in the assignment deed dated 21.03.2012 and therefore, the proviso has no effect.

As regards the other part, the prior notice to or consent from either GLAM or the respondent for assignment or transfer is required only for the rights, benefits and obligations under the Facility Rights Agreement and the Transaction Documents. Moreover, clause 9.11 of the facility rights agreement states that the agreement shall be read in conjunction with the Corporate Rupee Loan Facility Agreement and in the event there is any conflict between the terms of the two agreements, the Corporate Rupee Loan Facility Agreement shall prevail. Clause 2.1 of the Corporate Rupee Loan Facility Agreement (Annexure IV (b) of the application) clearly states that the term loan is subject to the terms and conditions contained in the Agreement as also in the General Conditions. Section 11.5 of the General Conditions states that the respondent shall not assign or transfer all or any of its rights, benefits or obligations under the Corporate Rupee Loan Facility Agreement and the Transaction Documents without the approval of HSBC and HSBC may at any time assign or transfer all or any of its rights, benefits and obligations under

the Corporate Rupee Loan Facility Agreement and the Transaction Documents i.e. approval of the respondent or any other person is not required. Moreover, transfer need not be of all the rights, benefits and obligations. Some benefits, rights and obligations can also be transferred i.e. the assignment without SBLC can be made. Therefore, the contentions of the respondent cannot be accepted.

(vi) The learned counsel for the respondent has referred to various orders passed in Alipore Court (26.02.2010) and Hon'ble High Court of Calcutta (24.06.2011) which are stated to be specifically record the relevance of SBLC and its criticality. We find that at pages 25 and 26 of the reply filed by diary No.757 dated 15.03.2018, the respondent has stated that by SLP (Civil) No.36285 of 2011 (against the order dated 24.06.2011 of Hon'ble Calcutta High Court), the Hon'ble Supreme Court by order dated 24.03.2014 declared the order dated 26.02.2010 of the Alipore Court ineffective from the date of filing of the suit. In view of these facts, the orders of the Alipore Court and Hon'ble Calcutta High Court are not being further examined.

(vii) The pleas taken by the learned counsel for respondent for stating that the assignment of debt was contrary to agreements between the parties cannot be accepted.

(viii) The learned counsel for the respondent has submitted that a fraud was committed on the respondent and that there was also settlement of loan. The major ground taken is that HSBC and

the petitioner have failed to explain the draw down of more than ₹81 crores which was made on SBLC (reflecting in the bank account statement of the respondent on 22.03.2012 i.e. one day after assignment). It is stated at page 16 of the reply filed by diary No.757 dated 15.03.2018 that the "Demand Deposit Transaction History" of the respondent showed a receipt of ₹81,25,08,408 as "PROCEEDS UNDER GTY FROM HSBC MAR". The copy of the Demand Deposit Transaction History dated 05.04.2012 has been enclosed as Annexure R-8 of the reply. This Demand Deposit Transaction History relates to the respondent's account with HSBC and the relevant entry of 22.03.2012 reads as follows:-

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Date	Transaction details	Deposit	Balance
22 March, 2012	TRANSFER HSBC-PHOENIX ARC-ESCROW FT TO GPI TEXTILES LTD WRLR-00069 11:13:52 TRANSFER PARTIAL CLAIM PROCEEDS UNDER GTY FM HSBC MAR APP ROPRTINOD TRF TO GPI TECTILE LTD.	500,000,000.00	478,088,070.50

	WRLP-00112 17: 46: 03	812,508,408	1,290,596,478.50

The respondent has only taken an extract of the narration in its reply at page 16. The contents of the noting of the transaction do not appear to justify the claim of the respondents that this was a draw down which was made on SBLC. The amount involved is substantial. However, with regard to clarification regarding the entry the respondent has mainly referred to communications in March, 2012(Annexure R-7 (colly) of reply). It has been also stated that by e-mail dated 30.03.2012 (page 109 of reply) when the respondent enquired from HSBC regarding the entry, it was told that since the account has been assigned to the petitioner with effect from 21.03.2012, all balance confirmations and outstanding details from 21.03.2012 onwards needs to be obtained from the petitioner only and when the respondent asked the petitioner by letter dated 06.07.2012, it was told by letter dated 20.07.2012 (Annexure-V (h) of the application) that the matter may be taken up separately with HSBC for seeking the details. It appears that no further action has been taken by the respondent to find out the complete details of the amount of about ₹81.25 crores. We may add that in the letter dated 20.07.2012, the petitioner has stated that they have not received any money as part of repayment towards the loan due and payable after the execution of deed of assignment and that the allegation regarding appropriation of amount received from

encashment of SBLC is incorrect and unjustified. The contention raised is of fraud committed on the respondent and settlement between HSBC, petitioner and GLAM (without knowledge and consent of the respondent). The evidence relied upon by the respondent is discussed above and in view of the discussion the contention cannot be accepted.

(ix) The learned counsel for the petitioner has pleaded that the respondent has admitted the assignment in favour of the petitioner which has been duly recorded in the BIFR order dated 20.04.2012 and thus they cannot say that they were not aware regarding the assignment and declaration of NPA. It is further pleaded that till the preliminary arguments on 21.03.2018 in the present case in this Tribunal, no case has been filed by the respondent against GLAM or HSBC and the respondents have chosen to challenge the same only in the fourth week of March, 2018 before the Hon'ble Himachal Pradesh High Court which too has raised doubts about the maintainability of the writ petition. It is stated that no payment whatsoever was made in respect of the loan and interest by the respondent since 21.03.2012 and this is also evidenced by the statement of dues at Annexure-V (w) of the application. The respondent's explanation is that its no objection is in view of specific representation made by HSBC stating that pursuant to the assignment deed all the financial assistance granted by it together will all underlying securities and rights, interest and title thereto were transferred and released in

favour of the petitioner i.e. all securities including SBLC were assigned. We find from page 13 of the respondent's reply filed by diary No.757 dated 15.03.2018 that the respondent has stated that it received e-mail from HSBC on 27.03.2012 stating that the assignment deed dated 21.03.2012 assigned the security interest (other than the SBLC and the rights arising thereunder). Therefore, as on the date of BIFR hearing on 20.04.2012, the respondent was well aware that SLBC has not been assigned to the petitioner. In these circumstances the reliance on the representations by HSBC is misplaced. Moreover, no further action was taken for withdrawing the no objection. As regards the challenge to the assignment deed, the respondent's reply is that the assignment deed was challenged in reply to SARFAESI notices, OA application before DRT etc. Therefore, effectively, the assignment deed dated 21.03.2012 was unchallenged.

(x) In view of the above discussion, we reject the contention of the respondent that the debt is not legally assigned or transferred to the petitioner. It is therefore, held that the petitioner is a financial creditor as defined in Section 5(7) of the Code and is entitled to initiate CIRP in the case of the respondent under Section 7 of the Code. We are also satisfied that the conditions provided for by Section 7(5) (a) of the Code are satisfied in as much as a default has been proved to have occurred; the application under Section 7(2) of the Code is complete; and there are no disciplinary

proceedings pending against the proposed Resolution Professional i.e. Shri Jalesh Kumar Grover.

27. The petition is, therefore, admitted under Section 7(5) (a) of the Code and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code:-

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 Securitisation 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.

28. It is further directed that the supply of essential goods or services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) of Section 14 of the Code shall however not apply to such transactions as may

be notified by the Central Government in consultation with any financial sector regulator.

29. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section(1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

30. The matter be posted on 12.07.2018 for passing formal order to appoint Interim Resolution Professional with further directions.

Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

Sd/-
(Pradeep R. Sethi)
Member (Technical)

July 06, 2018
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