

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 325 of 2019

IN THE MATTER OF:

Phoenix ARC Pvt. Ltd.

...Appellant

Vs.

**Ketulbhai Ramubhai Patel
The Resolution Professional of
Doshion Water Solutions Pvt. Ltd.**

...Respondent

**Present: For Appellant: - Mr. Rajshekhar Rao, Mr. Pai Amit and
Mr. Karthik Sundar, Advocates.**

For Respondent: - Ms. Ami Jain, Advocate for R.P.

Mr. S.R. Jariwala, C.A for CoC.

O R D E R

09.04.2019— The ‘Corporate Insolvency Resolution Process’ has been initiated against ‘Doshion Water Solutions Pvt. Ltd.’- (‘Corporate Debtor’). The Appellant filed Miscellaneous Application under Section 60(50) (c) of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) claiming it to be the ‘Financial Creditor’ and challenged the decision of the ‘Resolution Professional’. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, held that the Appellant do not come within the meaning of ‘Financial Creditor’ and there is no assignment in its favour.

2. Learned counsel appearing on behalf of the Appellant submits that the shares have been pledged which have been assigned in favour of the

Appellant. This amounts to raising money under the transaction having commercial effect on borrowings. He relied on Assignment Agreement dated 30th December, 2013 signed between 'L&T Infrastructure Finance Company Limited (as Assignor) and the Appellant- 'Phoenix ARC Private Limited' (as Assignee).

3. It is submitted that in terms of Section 176 of the Contract Act, the Appellant is entitled to file a suit against the owner i.e. the 'Corporate Debtor'.

4. We have heard Mr. Rajshekhar Rao, learned counsel appearing on behalf of the Appellant; Ms. Ami Jain, learned counsel appearing on behalf of the 'Resolution Professional' and Mr. S.R. Jariwala, Chartered Accountant on behalf of the 'Committee of Creditors'.

5. From the record, we find that 'L&T Infrastructure Finance Company Limited' and 'Doshion Water Solutions Pvt. Ltd.'- ('Corporate Debtor') executed a 'Facility Agreement' dated 12th May, 2011 in respect of the financial facility of Rs.40,00,00,000/-. As per the 'Facility Agreement', the financial facility was to be repaid along with applicable interest at the applicable rate in 72 structured monthly instalments after the initial Moratorium period contemplated therein.

6. As per the 'Facility Agreement', repayment of the financial facility *inter alia* required to be secured by a pledge by 'Doshion Water Solutions Pvt. Ltd.'- ('Corporate Debtor') of 100% shares of 'Gondwana Engineers Ltd.' in favour of 'L&T Infrastructure Finance Company Limited'. The

'Facility Agreement' provided that the Borrower would continue to hold at least 50% of the equity capital of the 'Corporate Debtor' and the 'Corporate Debtor' would continue to hold at least 51% stake in the equity capital of 'Gondwana Engineers Ltd.'. The 'Corporate Debtor' was also required to provide the Board's Resolution to create a charge on the assets of 'Gondwana Engineers Ltd.', which, as a consequence, became the subsidiary of the 'Corporate Debtor'.

7. In view of the aforesaid agreement, the assignor and the 'Corporate Debtor' executed a 'Pledge Agreement' on 10th January, 2012 whereby the 'Corporate Debtor' pledged 40,160 shares of 'Gondwana Engineers Ltd.' in favour of the assignor as a security *inter alia* for repayment of the Financial Facility.

8. Thereafter, by 'Assignment Agreement' dated 30th December, 2013, 'L&T Infrastructure Finance Company Limited' assigned all rights, title and interest in the Financial Facility including any security interest therein, in favour of the Appellant- 'Phoenix ARC Private Limited'. In view of such Assignment Agreement dated 30th December, 2013, the Appellant- 'Phoenix ARC Private Limited' claimed to be the 'Financial Creditor'.

9. Section 5(7) defines 'Financial Creditor' and Section 5(8) defines 'Financial Debt'. From the 'pledged agreement', it is clear that the shares have been assigned and in case the shares or any part of them became subject matter of an attachment by a Court or otherwise tainted for any

reason, the 'Corporate Debtor' is liable to replace the same with other securities acceptable to the Assignor. The 'Pledge Agreement' ensures the benefit of the Assignor and its successor in title.

10. In view of the aforesaid facts, we hold that the 'pledge of shares' in question do not amount to "disbursement of any amount against the consideration for the time value of money" and it do not fall within sub-clause (f) of sub-section (8) of Section 5 as suggested by the learned counsel for the Appellant.

11. So far as Section 176 of the Contract Act is concerned, we hold that the creditors have right to file a suit but that does not mean that all the creditors who are not the 'Financial Creditors' or the 'Operational Creditors' have right to file any application under Section 7 or Section 9 of the 'I&B Code'.

12. We find no merit in this appeal. It is accordingly, dismissed. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

Ar/g