

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

**CP (IB) No.123/Chd/CHD/2017
with
C.A No.19/2018**

Under Section 7 of IBC, 2016

In the matter of:

Phoenix Arc Private Limited
having its registered office at
5th floor, Dani Corporate Park,
CST Road, Kalina, Santacruz East,
Mumbai -400098, Maharashtra.

... Applicant/ Financial Creditor

Vs.

Sarbat Cotfab Private Limited
having its registered office at
SCO 35-36, Sector 17-C,
Chandigarh -160017.

...Respondent/Corporate Debtor

Order delivered on: 15.02.2018

Coram: Hon’ble Mr.Justice R.P.Nagrath, Member (Judicial)

For the Petitioner : 1.Mr. Suresh Dutt Dobhal, Advocate
2.Mr.Manish Jain, Ms.Divya Sharma, Advocate
3.Ms.Sonakshi Dhiman, Advocate

For the Respondent : 1.Mr.Sangram Patnaik, Advocate
2.Mr.Rajiv Gupta, Advocate

ORDER

This petition has been filed by the financial creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the ‘Code’) read with Rule 4 of the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016 (for brevity, the 'Rules') to initiate insolvency resolution process against the respondent-corporate debtor.

2. The petitioner M/s Phoenix ARC Private Limited is a company registered under the Companies Act, 1956 on 20.06.2008 (though in the master data of the company it has been mentioned as 02.03.2007) and allotted CIN U67190MH2007PTC168303. The original lender in respect of the financial debt was Canara Bank which has assigned the debt in favour of the petitioner vide Registered Assignment Agreement dated 26.06.2014 Annexure-6. The petitioner thus claims to be financial creditor as an assignee falling within the scope of the definition given in Section 5(7) of the Code.

3. The Board of Directors of the 'financial creditor' passed resolution dated 20.09.2017 Annexure-1, authorising various officials of the company (13 in number) including Mr.K.B.Ajit, authorising them severally to represent the Company or the Trust, in any Court of Law (civil and/or criminal), Consumer Courts any Commissions, Forums & Tribunals including but not limited to Debt Recovery Tribunal, Debt Recovery Appellate Tribunal, Arbitration Tribunal, National Company Law Tribunal, National Company Law Appellate Tribunal, in connection with all legal proceedings **including filing application or petition under the provisions of the Insolvency and Bankruptcy Code, 2016** and to do all the necessary acts in the progress of the matter. The instant petition has been filed in Form No.1 as prescribed in Rule 4(1) of the Rules. The contents of the application are supported by the affidavit of Mr.Ajit Kewin.

4. The respondent-corporate debtor was incorporated on 17.01.2005 under the Companies Act, 1956 and allotted CIN

U17110CH2005PTC027853 having Authorised Share Capital of ₹10 crores divided into 1 crore equity shares of ₹10/- each. The Paid-up share capital of the respondent-corporate debtor is ₹9,49,67,000/- divided into 94,96,700 equity shares of ₹10/- each. The registered office of the respondent-corporate debtor is at Chandigarh and therefore, the matter falls within the jurisdiction of this Tribunal.

5. The corporate debtor made an application dated 12.10.2006 Annexure-10 to Canara Bank for the grant of loan facility. For the said purpose, Board of Directors of the corporate debtor passed a resolution dated 20.09.2006 Annexure-11 for borrowing moneys from Canara Bank to the tune of ₹35 crores. The Bank granted term loan of ₹22 crores vide sanction letter dated 31.03.2007 Annexure-13. Annexure-15 is the resolution of Board of Directors of the respondent-corporate debtor authorising the Managing Director to execute documents for availing loan facilities to the tune of ₹22 crores. Various documents executed by the corporate debtor viz. copy of term loan agreement; copy of hypothecation agreement; copy of subordination agreement; copy of letter of undertaking; copy of undertaking/consent; another undertaking not to divert funds; undertaking to operate projects in a sound manner; documents containing stipulation to give guarantee by the corporate debtor; copy of undertaking not to pay fee/commission; copy of undertaking to meet cost overrun; various other documents; copy of guarantee agreement executed by the respondent and Mr. Bhupinder Singh, all dated 13.04.2007 are from Annexures 16 to 28.

6. By way of security, the corporate debtor also created equitable mortgage of immovable properties situate at Tehsil Samana, District Patiala by way of First Charge, details of which are given against Column.1 of Part V of the application. The estimated value of the properties for which equitable mortgage was created in the year 2014 was ₹8,63,50,000/-. Copy of letter evidencing deposit of the title deed; copy of the sale deed dated 12.08.2005; copy of investigation report of the Advocate; copy of another letter evidencing deposit of title deed and the consequent sale deed; another investigation report of Advocate; another letter dated 13.04.2007 with regard to the deposit of title deeds and the consequent documents to secure the loans are from Annexures 29 to 44. The respondent-corporate debtor also created hypothecation of entire stock of raw materials etc., and hypothecation of Plant & Machinery. The last letter of deposit of title deed of equitable mortgage is dated 30.03.2011. The certificate of charge issued by the Registrar of Companies has also been relied upon as at Annexure-42 and Annexure-43 is the Form 8 under Companies Act, 1956 in this regard.

7. In addition thereto, Canara Bank granted further sanction of various loan facilities dated 11.06.2008 as under:-

- a. OCC / ODBD facility of ₹3.35 crores (fund based)
- b. PC / FDB / FBE facility of ₹2.00 crores (fund based)
- c. Bank Guarantee of ₹1.00 crore (non-fund based)

To secure the said credit facilities, various security documents including the Promissory Note for the enhancement of facility which are from Annexures 45 to 51 (colly) and also relating to the creation of mortgage of

immovable properties. The loan facility was enhanced from time to time which was sanctioned and Board resolutions were passed and the documents relating to the increase of loan limits have been attached with the paper book up to Annexure-105.

8. It is stated that the mortgage over the immovable property was also extended from time to time as security for renewed and enhanced facility. The last letter for equitable deposit of title deed is dated 30.03.2011. According to the petitioner, the assignor bank, in the year 2011 enhanced credit facility from ₹33.21 crores to ₹34.81 crores and the same were disbursed in favour of the corporate debtor.

9. The petitioner has made application on the basis of the registered assignment agreement dated 26.06.2014 executed between Canara Bank and Phoenix ARC Private Limited under which 13 borrower loans advanced by Canara Bank including the respondent-corporate debtor were assigned. This assignment deed was got registered with the Sub-Registrar, Kanpur in the state of Uttar Pradesh for which Form CHG-1 for modification of charge was filed with the Ministry of Corporate Affairs.

10. The financial creditor has also furnished information relating to certain other documents which emanated from the Canara Bank. Canara Bank had issued legal notice Annexure-4 dated 16.11.2012 to the corporate debtor recalling the loan. It is stated in this notice that the corporate debtor did not adhere to the repayment schedule of both the credit facilities granted to the corporate debtor and the account was not kept regular. At the time of issuance of the notice, the outstanding amount was ₹23,31,00,227.37 in cash credit limit

and ₹12,11,30,673.90 in term loan, totalling ₹35,42,30,901.27 with interest calculated upto 03.11.2012. The bank also claimed that it was entitled to penal interest @2% per annum.

11. The Canara Bank also filed original application (OA) before the Debt Recovery Tribunal, Chandigarh against the corporate debtor and its Directors. Copy of this OA No.665/2013 is at Annexure-5. The petitioner-financial creditor applied for being substituted as the applicant in place of Canara Bank and vide order dated 21.03.2017 Annexure-7, English translation of which is also annexed, the prayer was accepted and the petitioner was substituted as an Applicant in place of Canara Bank by virtue of Section 5(5) of SARFAESI Act.

12. The respondent has also filed consumer complaint before the National Consumer Disputes Redressal Commission (NCDRC), New Delhi Annexure-8 bearing complaint No.324 of 2012 claiming an amount of more than ₹9 crores with interest of ₹3 crores under the fire insurance policy and another amount of more than ₹6 crores with interest of more than ₹2 crores under LOP (Fire) policy apart from other claims. The claim has been made for deficiency in service and against repudiation of claim of loss caused by major and devastating fire which broke out in the cotton godown of the corporate debtor on the intervening night of 20/21.12.2010. Before the NCDRC, the petitioner has also filed an application for being impleaded as a necessary party. Copy of the application dated 16.09.2010 is at Annexure-9. The complaint before the NCDRC is stated to be still pending.

13. In Part IV of the application in Form No.1 it is stated against column 2 that the total amount of outstanding against the respondent as on 31.08.2017 is ₹80,20,77,741/- along with the pendent-lite and future interest as per the loan documents. The petitioner has also annexed copies of statements of account of the respondent duly maintained under the Bankers Books Evidence Act, 1891 along with summary of outstanding amount as on 31.08.2017 which is at Annexure-110.

14. The other documents which the petitioner-financial creditor relied upon are the copies of the acknowledgements of debt and security executed by the corporate debtor of different periods from Annexures 111 to 114. The petitioner has also attached copy of Demand Notice dated 27.02.2012 Annexure-115 issued under Section 13(2) of SARFAESI Act, 1891 in which the outstanding amount as on 21.02.2012 was ₹31,59,77,461.27. The petitioner also filed copy of written communication in Form No.2 furnished by the Resolution Professional proposed as Interim Resolution Professional.

15. Notice of this petition was issued to the respondent-corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed by the petitioner.

16. In the reply filed by corporate debtor, preliminary objections have been raised that the petitioner failed to disclose the fact that assignment deed dated 26.06.2014, on the strength of which the instant petition is filed, has been impounded vide order dated 28.07.2017 (Annexure R-1) of Additional Collector (VIR), Kanpur City with a direction to petitioner to deposit ₹9.65 crores towards the deficient stamp duty, with a further penalty of ₹5 lacs and simple interest

@1.5% per month from the date of execution till its payment, to be recovered as land revenue. This order of Additional Collector has been challenged by the petitioner before the Hon'ble High Court of Allahabad in writ petition **WP (C) No.50075/2017** titled **Phoenix ARC Private Limited Vs. State of U.P & Ors.** Copy of the Writ Petition attached with the reply is at Annexure R-2. Hon'ble Allahabad High Court, vide order dated 01.11.2017 has directed that the effect/operation/execution of the order dated 28.07.2017 shall remain stayed provided the petitioner deposits ₹25% of the deficiency within 6 weeks from the date of production of the certified copy of the order, out of which one half would be deposited by Demand Draft/Postal Order/Electronic Transfer, as the case may be, and the remaining half as the security other than Bank Guarantee. It was further directed that the previous deposit shall stand adjusted. Copy of the order of Hon'ble High Court is Annexure A-4 annexed with the rejoinder. It was, therefore, stated that till the order passed by the Additional Collector and the Hon'ble Allahabad High Court are not varied/set aside/ modified or Supreme Court does not give any finding, the so called assignment deed has no relevance in the eyes of the of law.

17. Further, the order of Debt Recovery Tribunal dated 21.03.2017 passed in OA No.224/2017 whereby the petitioner was substituted in place of Canara Bank on the basis of the assignment deed has been challenged in Appeal No.523/2017 filed before Debt Recovery Appellate Tribunal (DRAT), Delhi in which the notice has been issued vide order dated 08.12.2017. Similar order of substitution dated 02.03.2017 passed in S.A.No.55/2017 has also

been challenged by the corporate debtor before the DRAT in which the notice has been issued.

18. The petitioner even filed an application before the NCDRC to be substituted in place of Canara Bank on the basis of assignment deed which has still pending. The corporate debtor has also challenged the assignment deed in Additional Civil Suit filed before the Civil Judge (Senior Division) Samana in the state of Punjab in Suit No.6792/2017. Annexure R-4 is copy of the civil suit filed by the respondent which is attached with the application CA No.22 of 2018.

19. The other preliminary objection is that assignment deed dated 26.06.2014 which creates the right, title and interest in the immovable properties of the corporate debtor having not been registered at Samana, the same would be void being in contravention of Section 17(1) of the Registration Act, 1908, which says that a document pertaining to transfer of immovable property of the value of more than ₹100/- is compulsorily registrable in the district where the property is situated. To support this contention, reference is made to Section 28 of the Registration Act.

20. Another contention is that the assignment deed purports to be a sale and therefore, it is required to be impounded without being insufficiently stamped and the document would thus be inadmissible. In view of the above, it is alleged that the petitioner does not fall within the definition of the term 'Financial Creditor'.

21. According to the respondent, there was an outbreak of fire in the premises of corporate debtor on the intervening night of 20/21.12.2010

resulting into colossal financial loss, but still it had deposited an amount of ₹4.73 crores to Canara Bank towards interest and repayment towards the term loan instalments.

22. It is further stated that the amount in default claimed by the petitioner is ₹80,20,77,741/- which is a fictitious figure, wrongly computed and is in contravention of the contractual rate of interest.

23. The Canara Bank had issued notice dated 27.02.2012 under Section 13(2) of SARFAESI Act claiming the then outstanding amount of ₹31,59,77,461.27. While calculating the said amount Canara Bank has charged 2% per month as interest over and above the contractual rate of interest. The interest has also been illegally compounded in contravention of the judgement of the Hon'ble Supreme Court in **Central Bank of India Vs. Ravindra 2002(1) SCC 367**.

24. It is also averred that the petitioner has not filed proper statement of account certified under the Bankers Books Evidence Act along with calculation sheet. The Canara Bank had ensured that the risks are insured with National Insurance Company Limited as per the details given in para 14 of the reply. It is further averred that in case the respondent company succeeds in getting insurance claims, it will also get claim under Loss of Profit Policy. Taking into account pending insurance claims, the account of the respondent company would become regular and there will be no default of whatsoever nature. The respondent-corporate debtor has filed a complaint CC/No/324 of 2012 against the National Insurance Company Limited & Ors. which is already

pending before the NCDRC, New Delhi with next date of hearing fixed on 04.04.2018.

25. Further, the Canara Bank has also been over-charging the interest from the corporate debtor as evident from the contents of the notice under Section 13(2) of the SARFAESI Act. 2% of the additional interest claimed as penal interest cannot be added without any proper adjudication by appropriate Court of law under Section 74 of the Indian Contract Act. By declaring the account of the Corporate Debtor as NPA by the Canara Bank on 09.01.2012, the corporate debtor has also become ineligible for the interest subsidy of 5% under the TUF scheme of the Ministry of Textiles, Government of India.

26. On merits, the contents of various paragraphs of the application in Form No.1 are simply denied. The authority of Mr.Ajit Kewin to file the petition on behalf of the financial creditor is also challenged on the ground that his name does not find mention in the resolution dated 20.09.2017.

27. It is otherwise admitted that the corporate debtor was granted term loan of ₹22 crores and FLC sub limit of ₹18.50 crores on 31.03.2007 by the Canara Bank and the same was availed by the corporate debtor by execution of loan and security documents. However, it is pleaded that the Bank had obtained signatures on blank documents, columns of which were filled later on. With regard to the last enhancement of the loan, the allegations are denied by petitioner that the signatures of corporate debtor were obtained on blank documents.

28. It is further alleged that the default in payment of the bank loan occurred on account of the fire which broke out in the cotton godowns of the corporate debtor in the year 2010. This resulted in the burning of the entire stock into ashes within no time. Similar allegations have been made as taken in the preliminary objections to answer other columns of the application form. The petition was, therefore, prayed to be dismissed.

29. The petitioner-financial creditor has filed a rejoinder. It is admitted that the Additional Collector, Kanpur directed the petitioner to deposit deficient stamp duty of ₹9.65 crores vide order dated 28.07.2017 which was challenged in the writ petition before the Hon'ble Allahabad High Court which stayed the effect/operation/execution of the order of the Additional Collector dated 28.07.2017 subject to deposit of 25% of the awarded deficiency within 6 weeks. Copy of the order dated 01.11.2017 of Hon'ble Allahabad High Court is attached at Annexure A-4 of rejoinder. Aggrieved by this order of the Hon'ble High Court, the petitioner filed Special Leave Petition (being SLP(C) No.50075 of 2017) (now Civil Appeal / C.A.No.021823/2017) before Hon'ble Supreme Court of India. Vide order dated 08.12.2017, the Hon'ble Supreme Court has been pleased to stay the operation of the order dated 28.07.2017 passed by the Additional Collector Stamps and granted special leave to appeal. During course of arguments, learned counsel for petitioner has handed over the copy of the order dated 08.12.2017 passed by the Hon'ble Supreme Court in the special leave petition. The order passed by the Hon'ble Supreme Court is as under:-

“There shall be stay of operation of the order dated 28.7.2017 passed by learned Collector, Stamps in OS No.158/17-18, until further orders.”

30. Even the NCDRC has allowed application of the petitioner in the consumer case filed by the corporate debtor claiming compensation, to be impleaded as a party to the complaint pending before the NCDRC vide order dated 17.10.2017 on the basis of assignment in place of Canara Bank. The copy of the order of NCDRC dated 17.10.2017 is at Annexure A-5 which reveals that Canara Bank was originally the party but the name of Canara Bank had been deleted from the case vide order dated 06.11.2015. The petitioner later on applied for being impleaded in place of Canara Bank on the basis of this assignment which was permitted by the NCDRC. Regarding pendency of appeal before DRAT against the order of DRT impleading the petitioner as a party or filing Civil Suit by the corporate debtor in the Court at Samana do not have any bearing in the present proceeding. It is averred that in any case the petitioner has not received any notice of the aforesaid Civil Suit. According to the petitioner the U.P Government, vide notification dated 15.03.2005 restricted maximum amount payable on an instrument of assignment of debt to ₹1.00 lakh and relied upon the notification Annexure A-1 and copy of the subsequent notification dated 29.03.2005 in modification of the earlier notification is at Annexure A-2 with the rejoinder.

31. It is further stated that though the particulars of the corporate debtor are available from the website of Ministry of Corporate Affairs, yet the petitioner has attached copy of Memorandum and Articles of Association of the

corporate debtor as at Annexure A-6 (colly) with the rejoinder as well as Certificate of Incorporation attached as at Annexure A-7. It is further denied that assignment deed was required to be registered in the state of Punjab. The assignment deed basically is an assignment of non-performing assets of the Canara Bank in favour of the petitioner. The title/ownership of the immovable property remains unchanged. Therefore, the assignment cannot be any violation of any provision of law or to the provisions of the Registration Act, 1908. The petitioner has also filed affidavit along with the necessary certificates required under Bankers Books Evidence Act, 1891 on 18.12.2017 copy of which was supplied to the corporate debtor and its counsel. The financial creditor is said to have charged interest as per the contractual terms.

32. It is averred that the facts relating to the incident of fire in factory premises have no bearing on the adjudication of this petition. With regard to the claim pending before the NCDRC and the plea that on acceptance of the consumer case, the compensation that may be awarded would be sufficient to satisfy the demand of the petitioner the same is stated to be a baseless assumption. In fact, the corporate debtor is intentionally delaying the claim before NCDRC for years. The claim before the Hon'ble Commission is pending for more than 6 years.

33. When the matter was listed on 11.12.2017, it was noticed that the certificates attached with each of the statement of account of the corporate debtor do not bear the name and designation of the person concerned and some official has only put his initials. Notice of this defect was given to the petitioner and the petitioner was directed to remove the defect in respect of the

various statements of account as required by Bankers Books Evidence Act, 1891 within 7 days. The requisite certificates were attached with the compliance affidavit dated 13.12.2017.

34. It would be relevant to note that the Suit before the Civil Judge in the Court of Samana, Distt. Patiala, in the State of Punjab was filed on 11.12.2017 as per the endorsement thereon made by the Civil Court as at page 20 of the additional documents filed by the respondent with C.A No.22/2018, which is clearly after this petition was filed with the Registry of this Tribunal. The record of the petition shows that copy of this petition along with entire paper book was dispatched to the corporate debtor by the petitioner Bank on 23.11.2017.

35. The respondent also filed C.A.No.19/2018 with the prayer of staying the proceedings of this petition during pendency of the said application raising almost similar issues with regard to the maintainability of the petition filed through Mr.Ajit Kewin and challenging the legality of the assignment deed. No need to reiterate the facts of the said application.

36. I have heard learned counsel for the parties at length and also extensively gone through the record with their assistance. I would take controversy issue-wise hereunder:

Whether this petition has been filed through a competent person.

37. The resolution of the petitioner to trigger the insolvency resolution process is at Annexure-1 dated 20.09.2017. One of the persons authorised is Mr.K.B.Ajit for initiating proceedings under various loans on behalf of the petitioner including filing of application or petition under the provisions of the

Code and to do all the necessary acts in the progress of the case. However, in the application in Form 1 the name of the person is not mentioned as Mr.K.B.Ajit but it is Mr.Ajit Kewin through whom the petition has been filed and he is the person stated to be the representative of the petitioner company competent to accept the service of the process on behalf of the company. The affidavit in support of the application is also sworn in by Mr.Ajit Kewin and it is contended for the respondent that there is no indication from record that Mr.K.B.Ajit , the person authorised in the resolution is same through whom the petition has been filed. I do not find any force in this argument as in the relevant column of Part I of the application Mr.Ajit Kewin has mentioned as 'Head Resolution' of the petitioner against Column 5 and 6 and he has filed his affidavit stating that he has been authorised by the company to file the petition under the Code. There is no anomaly at all in the name of the authorised person to substantiate the contention by the respondent and the above seems to be too technical an objection to be given any undue weight. From this discussion, the issue is held in favour of the petitioner-financial creditor.

Whether the petitioner can be considered as 'Financial Creditor' on the basis of the Assignment Deed.

38. The term 'Financial Creditor' is defined in sub-section (7) of Section 5 of the Code as meaning any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. So, the dispute would revolve around the effect of the Assignment Deed dated 26.06.2014 relied upon by the petitioner.

39. The first objection to the legality of the assignment deed was that it was insufficiently stamped inasmuch as the Additional Collector ordered the document to be impounded and directed the petitioner to deposit deficient amount of stamp duty and to pay the penalty. It would be seen that on the date this petition was filed on 03.11.2017, there was an order of Hon'ble High Court of Allahabad dated 01.11.2017 passed in WP(C)50075/2017 staying the effect / operation / execution of the order of the Additional Collector provided the petitioner pays within **6 weeks** of the receipt of certified copy of the order, 25% of the deficient amount of stamp duty in the manner already observed while narrating the facts of the instant case. 6 weeks' time w.e.f. 01.11.2017 would have expired by 10/11.12.2017, but before the expiry of the said period, Hon'ble Supreme Court of India in the order dated 08.12.2017 passed in the SLP stayed operation of the order of the Collector Stamps until further orders. In view of the aforesaid order of Hon'ble Supreme Court which has admittedly not been varied so far, the instrument of assignment relied upon by the petitioner cannot be said to be insufficiently stamped.

40. The assignment deed Annexure-6 was executed at Kanpur and the stamp duty leviable would have been as per the laws applicable in the state of Uttar Pradesh. The notification dated 15.03.2005 issued by Government of Uttar Pradesh is Annexure A-1 attached to the rejoinder. The notification says that Governor of Uttar Pradesh was pleased to reduce, from the date of publication in the Gazette, the stamp duty on instruments of assignment of debt by Financial Institutions chargeable as Conveyance under clause (a) of Article 23 of Schedule 1 B of the Indian Stamps Act executed in favour of an Asset

Reconstruction Company constituted under Section 3 of the SAFAESI Act, 2002 and registered under the Companies Act, 1956 by the Department of Non-Banking Supervision, Reserve Bank of India, Mumbai from rupees eighty per thousand to rupee one per thousand, provided that the duty shall not exceed rupees one lakh. The aforesaid notification was amended with effect from the original date i.e. 15.03.2005 by the Government of Uttar Pradesh vide notification dated 29.03.2005 Annexure A-2 attached with rejoinder. By this notification, it is now provided that the assignment of debt chargeable as conveyance in favour of asset reconstruction company is liable to pay stamp duty not more than ₹1 lakh instead of words “assignment of debt by **Financial Institutions**”.

41. There is no need to discuss the merit of the aforesaid contention raised by the learned counsel for both the parties for holding that the instrument of assignment is either insufficiently stamped or otherwise because the matter is now pending before the Hon'ble Supreme Court of India. In view of the above, the instrument of assignment which has been relied upon by the petitioner cannot be ignored to say that the petitioner is not an assignor. Therefore, the contention based on the judgement of Hon'ble Bombay High Court in **Santosh Anant Raut Vs. Pukharaj Chogmal Rathod and Anr. 2010(4) Mh.L.J.22** that whenever a document is insufficiently stamped should be impounded, cannot be sustained.

42. Learned counsel for respondent, however, vehemently contended that the petitioner which has relied upon the assignment deed which is the subject matter of challenge before various authorities including the order

of the Collector Stamps should have been disclosed in the petition itself. Learned counsel for petitioner, however, submitted that the petitioner has given the complete information as required by various columns of different parts in Form 1 prescribed by the Rules. I am of the view that it would have been better if the aforesaid facts were disclosed by the petitioner in the petition itself or in the synopsis, but sufficient safeguards have been provided in the Code and as per the settled law on the issue that the financial creditor is required to dispatch copy of complete paper book of the petition to the corporate debtor at the time of filing the petition as required by Rule 4(3) of the Rules and further that now the notice to the corporate debtor of the petition is also mandatory in order to comply with the principles of natural justice. The respondent has appeared, filed reply and brought these facts before the Tribunal for which there is a rejoinder filed by the petitioner and the merits of the controversy has to be decided on the basis of available facts. I, however, find that in case the document of assignment relied upon by the petitioner was found to be insufficiently stamped on the basis of the order of Collector Stamps and the said was not assailed either in appeal or in the Writ Petition and not taken upto the Hon'ble Supreme Court, the consequences were that the petitioner would have faced drastic consequences of playing fraud with the Tribunal or coming up to the Tribunal based on unsustainable documents.

43. It would be significant at this stage to refer to judgement of Hon'ble National Company Law Appellate Tribunal in **Unigreen Global (P) Ltd Vs. Punjab National Bank and Others CA (AT) (Insolvency) No.81 of 2017** decided on 01.12.2017. The Hon'ble Appellate Tribunal held as under:-

“23. Any fact unrelated or beyond the requirement under I&B Code or Forms prescribed under Adjudicating Authority Rules (form 6 in the present case) are not required to be stated or pleaded. Non-disclosure of any fact, unrelated to section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the corporate applicant has not come with clean hands except the application where the “corporate applicant” has not disclosed disqualification, if any, under section 11. Non-disclosure of facts, such as that the “corporate debtor” is undergoing a corporate insolvency resolution process; or that the “corporate debtor” has completed corporate insolvency resolution process twelve months preceding the date of making of the application; or that the corporate debtor has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under the said Chapter; or that the corporate debtor is one in respect of whom a liquidation order has already been made can be a ground to reject the application under section 10 on the ground of suppression of fact/not come with clean hand.

*24. Ist respondent-financial creditor has referred to pendency of a civil suit between **Mayank Maheshwari v. Anurag Garg and another suit between Sh.Jagar Nath Mehto v. Vedika Overseas Tradex Ltd.** Pendency of such suits cannot be a ground to deny admission of an application under section 10, if all the information in terms of section 10 of the I&B Code and Form 6 has been supplied by a corporate applicant/corporate debtor and the application is otherwise complete. Non-mentioning of suit(s) pending between the parties cannot be termed to be suppression of facts nor can be a ground to reject the application. In fact, once the application under section 10 is admitted, all such related proceedings, including suits for recovery of movable or immovable property of the corporate debtor and other proceeding cannot proceed further in any court or tribunal or Authority in view of order of ‘moratorium’ as may be declared under section 13 and prohibition that may be imposed under section 14 of I&B Code.*

25. Similarly, if any action has been taken by a “financial creditor” under section 13(4) of the SARFAESI Act, 2002 against the corporate debtor or a suit is pending against corporate debtor under section 19 of DRT Act, 1993 before a Debts Recovery Tribunal or appeal pending before the Debts Recovery Appellate Tribunal cannot be a ground to reject an application under section 10, if the application is complete.

26. Any proceeding under section 13(4) of the SARFAESI Act, 2002 or suit under section 19 of the DRT Act, 1993 pending

before Debts Recovery Tribunal or appeal pending before Debts Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed.

27. *It is also desirable to refer to section 238 of the I&B Code as quoted below:*

“238. Provisions of this Code to override other laws – The provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

44. The learned counsel for respondent, however, submitted that in case the petitioner's contention is accepted and ultimately the Hon'ble Supreme Court dismiss the SLP, there would be serious consequences if the instant petition is entertained. Learned counsel for petitioner, however, submitted and rightly so, that in case the petitioner is bound to pay the penalty and the deficient stamp duty ultimately, the result would be that the petitioner would be found to pay the amount which is recoverable as land revenue, but document on that very ground would still be not invalid until those consequences happen.

45. I am, further, of the view that the petition under the Code cannot be rejected merely on the ground that the document of assignment was a point in issue at different Forums, especially when the order of the Collector Stamps directing payment of deficient stamp duty and the penalty having been stayed by the highest Court of the land. It is, therefore, held that the document of assignment cannot be rejected by this Tribunal while disposing of the instant petition on the ground of being insufficiently stamped though the petitioner would be bound by the consequences if any adverse order on changing of stamp duty comes into play.

46. The other aspect to be discussed on this issue is that as to whether the document was required to be compulsorily registered at Samana, in Distt. Patiala, Punjab, where the mortgaged properties of the corporate debtor are situated.

47. Learned counsel for petitioner vehemently contended that the assignment deed basically amounts to transfer of mortgaged property of the corporate debtor situated at Samana, Distt. Patiala in the State of Punjab of the value of more than ₹100/- and was required to be registered at Samana before the Sub-Registrar at Samana. Learned counsel refers to Section 49 of the Registration Act, 1908 which says that no document required by section 17 of the Registration Act or by any provision of the Transfer of Property Act, 1882 to be registered shall –

- a) affect any immovable property comprised therein, or
 - b) confer any power to adopt, or
 - c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered.

48. Learned counsel also refers to Section 28 of the said Act which specifically lays down that every document mentioned in Section 17 of the Registration Act in so far as such document affects immovable property was to be presented for registration in the office of Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

49. Learned counsel for respondent-corporate debtor relied upon the judgement in **Officiating Common Manager, Bhingarpur Debottar Estate and another Vs. Brahman Nijon, Uttar Bada & Dakshinabada and others**

AIR 1990 Ori 190 in support of his contention but that judgement is not helpful to the petitioner. In the said case, the document was a sale deed and registered at a place by including a property which was non-existent merely conferring jurisdiction on the Sub Registrar where it was registered and therefore, such document was held to be invalid. In the said case it was held that a property which does not belong to the mortgagor and was not intended by the parties to be mortgaged but was merely included to get the document registered, such document was also held to be invalid. Similarly, where the property which was included in a sale deed exists, but to which the vendor had no title and yet included the same in the document merely for enabling the document to be registered in the district where the said property situates, it was held that the registration of document was invalid. The above principles were deduced from various judgements on the subject as discussed in para 8 of the Judgement of Hon'ble Orissa High Court.

50. The other judgement referred to is **Mohammad Khaja Vs. Monappa AIR 1953 Hyd 280** by the learned counsel for respondent but the same would also be not applicable to the facts of this case as that was a civil suit for possession of the land based on title deed. The Hon'ble High Court found that no part of the property was situated in the district where the document was registered and therefore, the registration of the document was void. It was held that in order to prove validity of a document, the plaintiff was required to establish the existence of the property itself.

51. I am further of the view that the document of mortgage which the respondent-corporate debtor executed in favour of Canara Bank, may be

required to be registered in the District where the properties are situated, but the instant is a case of assignment of debt and not creation of the mortgage. There is a marked difference between the original documents of loan and creation of mortgage for securing loan, from the assignment of debt by the Bank in favour of the petitioner. Learned counsel for the respondent has not been able to refer to any notification or the case law on the subject that the document of assignment of debt registered in the other State on the basis of some notification issued by that Government of U.P could be invalidated if the same is intended to be enforced in the State of Punjab.

52. Learned counsel for the petitioner-financial creditor has relied upon judgment of Hon'ble Supreme Court in **ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Limited and Others (2010) 10, SCC 1**. The Hon'ble Supreme Court observed that NPA means an asset or account receivable of a borrower, which has been classified by banks or financial institutions in terms of the RBI Guidelines as substandard, doubtful etc. These guidelines are issued to improve quality of assets of the banks.

53. It was further held that an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). It was also held that any assignment itself with underlying security the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular

agreed price and is no longer entitled to recover anything from the borrower(s). In the said case, it was held that the moment ICICI Bank transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). The Hon'ble Supreme Court emphasized that the debts are the assets of the assignor bank. The assignor bank is only transferring its rights under a contract and its own assets, namely the debt as also mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or the assets.

54. Therefore, it is rightly contended by learned counsel for the petitioner-financial creditor that what has been assigned by the Canara Bank on the basis of assignment made in favour of petitioner is the debt, which is the asset of the Bank and in no way connected with the transfer of rights in immovable property by assignment deed compulsorily registerable at Samana in the District of Patiala, Punjab. Therefore, on this issue it is held that the petitioner-financial creditor is entitled to apply under Section 7 of the Code on the basis of assignment deed.

55. Having dealt with the controversial issues raised in the pleadings, I would now discuss as to whether the petition filed by the financial creditor complies with the various requirements of Section 7 of the Code. As per sub-section (1) of Section 7 of the Code, the application can be filed by the financial creditor when the default has occurred. As per sub-section (2) of Section 7 of the Code, an application has to be made in the prescribed form, which in this case is Form No.1 as prescribed in rule 4 (1) of the Rules.

56. Sub-section (3) of Section 7 of the Code reads as under:-

“(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.”

57. Since the information utility has not yet started functioning, the financial creditor would obviously rely upon such other record or evidence of default as specified by the Rules. This record comprises of various documents as prescribed in Form No.1 which include particulars of security held, if any, the date of its creation etc., all the documents of loan entered into between respondent-corporate debtor and Canara Bank which advanced loan to the respondent-corporate debtor. Copies of such documents have been annexed. Not only this, the Bank has also attached copies of statements of account of the respondent-corporate debtor being maintained under the Banker's Books Evidence Act, 1891. Apart from the voluminous record relied upon by the financial creditor, the petitioner has attached the acknowledgements of debt in writing, signed by the respondent. That document is at Annexure 111 at page 1009 of the paper book. The acknowledgement of debt is dated 30.06.2009, where-under the respondent admitted the then outstanding amount of ₹20,56,09,237/- with further interest @ 12.75% per annum. In the other account, the then outstanding amount was ₹2,37,90,578.09 with further interest

@ 13% per annum as per acknowledgement at page 1012 of the paper book.

This document is also dated 30.06.2009.

58. The other acknowledgment of debt is dated 08.02.2011 which shows outstanding amount w.e.f 01.12.2011 in one account was ₹6,67,84,986.94 and in the other account as at page 1016 of the paper book, which is dated 10.02.2011, the outstanding amount was ₹20,85,75,370.37 with further interest @ 15.75% per annum w.e.f from 31.01.2011.

59. It is admitted by the respondent in the written reply that the Canara Bank sanctioned and granted a term loan of ₹22 crores and FLC sub limit of ₹18.50 crores on 31.03.2007 which were availed on 13.04.2007. All the other allegations are denied that the documents were executed by the corporate debtor or that creditor facilities were enhanced or even that the corporate debtor availed of CC Limit of ₹6.35 crores.

60. The most important aspect of challenge is that the notice dated 27.02.2012 issued under Section 13(2) of SARFAESI Act, Canara Bank claimed the default amount of ₹31,59,77,461.27 whereas the amount claimed to be in default is now stated to be ₹80,20,00,000/- which the financial creditor could not justify as contended by learned counsel for the respondent. It was stated that the default has occurred because of huge fire which broke out in the factory premises on the intervening night of 20/21.12.2012 at about 2.00 a.m or 3 O'clock in the cotton godown of the corporate debtor. It took about 12 hours in bringing the fire under control. A claim with the Insurance Company has also been submitted and the complaint in this regard is pending before the NCDRC.

61. The petitioner-financial creditor has also relied upon copies of entries in the books of accounts maintained by the Canara Bank/Assignor Bank in accordance with the Bankers Books Evidence Act, 1891 along with the summary of the outstanding dues which are at Annexure-109 (colly). The financial creditor also relied upon statement of account maintained by the petitioner itself i.e. Phoenix ARC Private Limited certified under the Bankers Books Evidence Act along with the summary of outstanding amount as on 31.08.2017 which is at Annexure-110 (colly).

62. The petitioner-financial creditor filed requisite statements of account with the supporting affidavit of the authorised representative dated 13.12.2017. Both these certificates with statement of accounts are exactly in accordance with Section 2A of the Bankers Books Evidence Act, 1891 and these are signed by the Principal Officer i.e. Head (Resolution) of the financial creditor and also the Computer In charge.

63. The question about the quantum of the amount due is to be ultimately found by the Interim Resolution Professional or the Resolution Professional, as the case may be and not to be exactly decided while disposing off the petition. It was contended by the learned counsel for respondent that the Bank-financial creditor capitalised penal interest and referred to judgement of Hon'ble Supreme Court in **Central Bank of India Vs.Ravindra 2002 (1) SCC 367** to contend that capitalisation of penal interest is against the RBI guidelines and circulars which have statutory force and thus illegal. Hon'ble Supreme Court held that 'penal interest' has to be distinguished from the term 'interest'. It was also held that 'penal interest' is an extraordinary liability

incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. While liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. It was further held that the penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

64. I do not think that this aspect should detain the Adjudicating Authority for an elaborate discussion as the role of Adjudicating Authority is only to ascertain the existence of a default and not the exact amount. In case of admission of the petition and consequent appointment of Insolvency Resolution Professional (IRP), the financial creditor has necessarily to file the claim which the IRP is to verify and the IRP or RP, as the case may be, shall obviously look into this aspect as to whether interest is being charged contrary to the principles laid down by the Hon'ble Supreme Court in the **Central Bank of India case (Supra)** and to determine the exact amount as per the binding law laid down by the Apex Court. In case any person is aggrieved by the view of the insolvency resolution professional, the remedy lies under clause (c) of Section 60(5) of the Code which reads as under :-

“60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) ----

(b) ----

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or

liquidation proceedings of the corporate debtor or corporate person under this Code.”

65. I find in this case that the financial creditor has been able to show the existence of default committed by the respondent-corporate debtor on the basis of evidence furnished by the financial creditor. In **Ajay Aggarwal Vs. Central Bank of India Company Appeal (AT) (Insol.) No.180 of 2017** decided on 13.12.2017, it was held by the Hon'ble National Company Law Appellate Tribunal that mere mismatch of the figures will *ipso facto* not invalidate the order initiating corporate insolvency resolution process under Section 7 of the Code.

66. Otherwise there was no dispute of the respondent-corporate debtor to have borrowed the debt from the Bank and that the respondent-corporate debtor is in default as defined in Section 3(12) of the Code. The "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

67. The other requirement of sub-Section (3) of Section 7 of the code is that the financial creditor is to propose the name of the Resolution Professional to act as Interim Resolution Professional. In this case, the financial creditor has proposed the name of Mr.Manoj Sehgal, registered Resolution Professional with the IBBI to act as Interim Resolution Professional and filed written communication in Form No.2 Annexure-116 which is found in order. He has furnished his registration number also.

68. The application being complete and it is made out that the corporate debtor has committed default, the petition deserves to be admitted.

The instant petition, therefore, is admitted declaring moratorium for prohibiting all of the following in terms of Section 14(1) 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.

69. 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) shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

70. That the order of moratorium shall have effect from the date of this order till 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.

71. I further issue the following directions: -

(i) Appoint Mr. Manoj Sehgal, Registration No. IBBI/IPA-002/IP-N00108/2017-18/10256, resident of Flat No.304, Tower 5, Ansal Valley View Estate, Gwal Pahadi, Gurugram, Haryana - 122003; Mobile 9812010519; e-mail manojsehgal_1121@yahoo.co.in; as Interim Resolution Professional;

(ii) The term of appointment of Mr. Manoj Sehgal shall be for a period of 30 days from the date of his appointment as Interim Resolution Professional or as may be determined by the committee of creditors whichever is earlier;

(iii) In terms of Section 17 of 'the Code', from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the 'Corporate Debtor' shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the 'Code', including taking control and custody of the assets over which the 'Corporate Debtor' has ownership rights recorded in the balance sheet of the 'Corporate Debtor' etc. as provided in Section 18 (1) (f) of the 'Code'. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the 'Corporate Debtor';

(iv) The Interim Resolution Professional shall strictly act in accordance with the 'Code', all the rules framed thereunder by the

Board or the Central Government and in accordance with the 'Code of Conduct' governing his profession as an Insolvency Professional with high standards of ethics and moral;

(v) The Interim Resolution Professional shall endeavour to constitute the Committee of Creditors at the earliest but not later than three weeks from the date of this order. It is hereby directed that the 'Corporate Debtor', its properties, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the 'Corporate Debtor' as a going concern and extend all co-operation in accessing books and records as well as assets of the 'Corporate Debtor';

(vi) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the 'Code' read with Section 15 calling for the submission of claims against 'Corporate Debtor' and

(vii) As required under Rule 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Interim Insolvency Resolution Professional shall within seven days from today, appoint two registered valuers to determine the liquidation value of the Corporate Debtor in terms of Regulation 35.

72. It is further directed that the Interim Insolvency Resolution Professional shall positively file report of events to this Tribunal every seventh day in relation to the 'Corporate Debtor'.

73. CA No.19 of 2018 stands dismissed.

74. A copy of this order be communicated to both the parties. The petitioner shall also communicate this order to the Interim Resolution Professional. The Registry is directed to send copy of this order at the e-mail address of the Interim Resolution Professional.

Sd/-

(Justice R.P.Nagrath)
Member (Judicial)
Adjudicating Authority

Pronounced in
Open Court
February 15, 2018
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