

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 485 of 2018

[arising out of Order dated 6th July, 2018 by National Company Law Tribunal, Chandigarh Bench in C.P (IB) No. 35/CHD/HP/2018]

IN THE MATTER OF :

Lalan Kumar Singh,
Executive Director (under suspension)
& shareholder of
M/s. GPI Textiles Ltd.,
House No. 922, Sector 7,
Panchkula,
Haryana – 134 109.

.... Appellant

Vs.

1. M/s. Phoenix ARC Pvt. Ltd.,
Registered office at
5th Floor, Dani Corporate Park,
158, CST Road, Kalina,
Santacruz (E), Mumbai – 400 098.

2. M/s. GPI Textiles Limited,
Through Interim Resolution Professional,
Shri Jalesh Kumar Grover,
SCO, 131, 2nd Floor, MDC,
Sector 5,
Panchkula.

.... Respondents

Present:

For Appellant :

**Ms. Pooja Mahajan, Ms. Mahima Singh, Mr.
Gaurav Arora, Advocates
Mr. Sanjeev Deora, CA**

Mohd. Nazim Khan, PCS

Mr. Mohtashim Kibriya, Advocate for IRP

For 1st Respondent :

**Mr. Manish Jain, Mr. Sanjay Bhatt and Ms. Divya
Sharma, Advocates**

For 2nd Respondent : Mr. Sanyam Goel, PCS

Mr. Jalesh Kumar Grover, Resolution Professional

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s. Phoenix Arc. Pvt. Ltd. (**'Phoenix'** for short) (Financial Creditor) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**'I&B Code'** for short) for initiation of 'corporate insolvency resolution process' against M/s. GPI Textiles Limited (**'GPI'** for short) (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh by impugned order dated 6th July, 2018 having admitted the application, the appellant Mr. Lalan Kumar Singh, Executive Director and shareholder of 'Corporate Debtor' has preferred this appeal challenging the said order of admission.

2. Learned counsel appearing on behalf of the appellant submitted that loan was originally granted by HSBC India (HSBC) to GPI. The Phoenix's claim is based solely on an illegal assignment of a loan purported to have been granted by HSBC by way of an 'Assignment Deed' dated 21st March 2012. Therefore, according to the Appellant 'Phoenix' is not the 'Financial Creditor' of 'GPI' and has failed to establish 'debt' and 'default' or that the 'debt was legally assigned or transferred', within the meaning of 'I&B Code'.

3. According to the learned counsel for the appellant as per Section 5(7) of the 'I&B Code' the '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. Phoenix's claim is based on assignment of loan by HSBC, which is not legal.

4. It was submitted that assignment was against RBI Guidelines dated 23rd April, 2003, which have a statutory force. As per RBI Guidelines, NPA declaration is a pre-requisite for legal assignment of loan to an asset reconstruction company. The principal amount of HSBC Loan was due on 20th April, 2014 and only the monthly interest of 11% was to be paid during the tenor. HSBC India had drawn down on SBLC/Guarantee on 15th February, 2012 for Rs. 3.7 Crores to clear pending interest payments. Hence there was no default as on 1st March, 2012 and account was not overdue for more than 90 days from the end of quarter as on 1st March, 2012 (i.e. date of NPA). Since there is no way the account could have been NPA on 1st March, 2012, the assignment was fraudulent and illegal, in clear breach of RBI Guidelines and, hence non-est.

5. Further, according to the learned counsel for the appellant, Para B of Article V of the loan agreement provides for 7 business days cure period before declaring an event of default and before acceleration. There is no notice of demand or notice of default or notice of acceleration or notice of cure issued by HSBC India. It is also submitted that the impugned Assignment also contravenes the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI Act'). Section 5(3) of SARFAESI Act provides for assignment of the loan with all underlying security and guarantees etc. HSBC Loan was assigned under the SARFAESI Act but without assigning the most important and liquid security of HSBC SBLC/Guarantee, which was backed by lien and security over cash fixed deposit by the largest shareholder of GPI and formed the very backbone of financing arrangements between 'HSBC India', 'GPI' and 'GLAM'. Further,

Clause 2(1)(j) of SARFAESI Act defines 'default' only upon classification of NPA. Despite no default by 'GPI', 'Phoenix' was served with SARFAESI notice demand of Rs. 131 Crores.

6. Further according to the learned counsel for the appellant the impugned Assignment was also contrary to Agreements between the parties and the order dated 26th February, 2010 of Alipore Court read with order dated 24th June, 2011 of the High Court of Kolkata. In case of default, it was incumbent on HSBC India to take recourse to the HSBC SBLC/Guarantee and clear the default, as done in the past. Further when HSBC Loan was only due on 20th April, 2014, it was not open to HSBC India to engineer a default and make Rs. 131 Crores outstanding on 20th March, 2012, thereby making it impossible for 'GPI' to pay such a huge amount prior to its due date. Therefore, according to the appellant, the act of HSBC India in illegally engineering default and illegally assigning the HSBC Loan without the HSBC SBLC/Guarantee amounts to fundamental variation of agreements between the parties.

7. Learned counsel for the appellant also submitted that a monumental fraud has been practiced by HSBC India and 'Phoenix' to illegally take-over and extract amounts from GPI and this fraud constitutes the basis of the Section 7 Application, leading to passing of the impugned order :

- (a) Even though the HSBC SBLC/Guarantee was drawn for the last time prior to alleged release on 15th February, 2012 (to clear outstanding interest), HSBC India declared NPA on 1st March, 2012 without informing GPI. The Assignment Deed states that Assignment Agreement is executed on 20th March, 2012 though the

loan which was due on 20th April, 2014 i.e. after more than 2 years as on that day and no default existed as on that day, therefore, it was illegally made to be overdue (for more than Rs. 131 Crores). The sequence of events show that the assignment was pre-meditated and NPA was manufactured, and the loan account was illegally declared NPA in order to make the entire loan outstanding only so that HSBC India could somehow assign the loan to 'Phoenix'.

- (b) If needed, there was a default (even though the evidence shows otherwise), HSBC India had to, like before, call on the Guarantee issued by its co-branch and the co-branch had recourse on fixed deposit for making payment to HSBC.
- (c) 'HSBC India' and 'Phoenix' have enjoyed the benefit of drawdown of more than 81 Crores made on HSBC SBLC/Guarantee (which is reflecting in the bank account statement of GPI on 22nd March, 2012 (i.e. one day after assignment), and also the credit of Rs. 50 crores on 22nd March, 2012 reflecting in the bank account statement of 'GPI'. No benefit of both the aforesaid amounts has been allowed to 'GPI', whose debt admitting assignment stands fully satisfied. If HSBC SBLC/Guarantee was released between 20th March, 2012 and 21st March, 2012 (as stated in Assignment Deed), the draw down of Rs. 81 Crores from HSBC SBLC/Guarantee made on 22nd March, 2012 and the credit of balance of Rs. 50 Crores reflecting in the HSBC Bank account of GPI on 22nd March, 2012 can only be for satisfaction of debt of 'GPI'. The aforesaid facts explain the outcome of release of HSBC SBLC/Guarantee, which encashment reflects in

the bank account of 'GPI' in HSBC, and that non-transfer of SBLC/Guarantee with the assignment of loan and encashed subsequently can cause no prejudice to the satisfaction of amount recoverable from 'GPI'.

8. Therefore, according to the learned counsel for the appellant, 'Phoenix' has failed to establish 'default', within the meaning of the 'I&B Code'. The Form 1 filed by Phoenix shows a principal of Rs. 129 crores (Approx.) as on 20th March, 2012 and an interest of Rs. 2.33 Crores as on 19th March, 2012. A sum of Rs. 268 Crores (approx.) is shown as the cumulative default as on 26th December, 2017, which 'Phoenix' has failed to explain. Charging of interest being consequent upon determination of default, interest cannot be considered to have accrued when default itself is not established. Thereby, the appellant while sought for declaration of NPA as on 1st March, 2012 as illegal and has also challenged the assignment as was made by HSBC in favour of the respondent 'Phoenix'.

9. From the record, the following facts emerges :

10. The 'Corporate Debtor' was categorized as NPA on 1st March, 2012 by HSBC.

Subsequently, the account of the 'Corporate Debtor' was assigned by HSBC to 'Phoenix' with the underlying securities, save and except stand by 'letter of credit' (SBLC) vide Deed of Assignment dated 21st March, 2012.

11. The 'Corporate Debtor' had full knowledge of such assignment without SBLC as is apparent from the following facts:

The 'Corporate Debtor' by its letter dated 19th March, 2018 agreed for assignment by HSBC in favour of 'Phoenix', relevant portion of which is quoted below:

ANNEXURE 9 (COLLY)



GPI TEXTILES LIMITED
(AN ISPAT GROUP COMPANY)



IS/ISO 9001:2008

Works & Registered Office : Bharatgarh Road, Nalagarh – 174101, District Solan (H.P.) India
CIN No. U17117HP2000PLC026391 Ph. : +91-1795-222282, +91-98163-00380-82 Fax : + 91-1795-222601
E-mail : rgupta@gpitrtextiles.com Website : www.gpitrtextiles.com

GPT/2017-18/19032018/01
Dated: 19th March 2018

1. The Department of Banking Regulation,
Reserve Bank of India
12th Floor, Central Office Building,
Shahid Bhagat Singh Road,
Mumbai-400 001
2. The Department of Non-Banking Regulation,
Reserve Bank of India
Centre I, World Trade Centre,
Mumbai-400 005
3. The Department of Banking Supervision,
Reserve Bank of India,
Centre I, World Trade Centre,
Mumbai-400 005
4. The Department of Non-Banking Supervision,
Reserve Bank of India
Central Office, Centre I,
World Trade Centre,
Mumbai-400 005
5. The Regional Director
Reserve Bank of India
6, Sansad Marg
New Delhi - 110 001
6. The Reserve Bank of India
Central Vista, Sector 17,
Chandigarh - 160 017

Sub: Request to investigate certain fraudulent, illegal, mala fide and arbitrary actions by The Hongkong and Shanghai Banking Corporation Limited, Barakhamba Branch, Delhi and Phoenix ARC Private Limited

Dear Sir,

We, GPI Textiles Limited (Company) are a company incorporated under the provisions of the Companies Act, 1956, with its registered office at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh.

We are writing this letter to bring to your attention, certain fraudulent, illegal, mala fide and arbitrary actions by The Hongkong and Shanghai Banking Corporation Limited, Barakhamba Branch, Delhi (HSBC India) and Phoenix ARC Private Limited (Phoenix).

HSBC India, being a scheduled commercial bank, and Phoenix, being an asset reconstruction company (ARC) are under Your regulatory supervision. We are bringing certain actions taken by HSBC India and Phoenix, in collusion with each other, which require serious and urgent investigation by Your good offices.

The facts leading up to the present letter are as follows:

1. The Company had initially availed loans from IDBI Bank Ltd., IFCI Ltd. and ICICI Bank Ltd. (Original Lenders). In 2007, in order to streamline our accounts and settle then outstanding debts with the Original

Panchkula Office:- House No. 922, Sector-7, Panchkula- 134109, Haryana. Ph- +91-172-2596780

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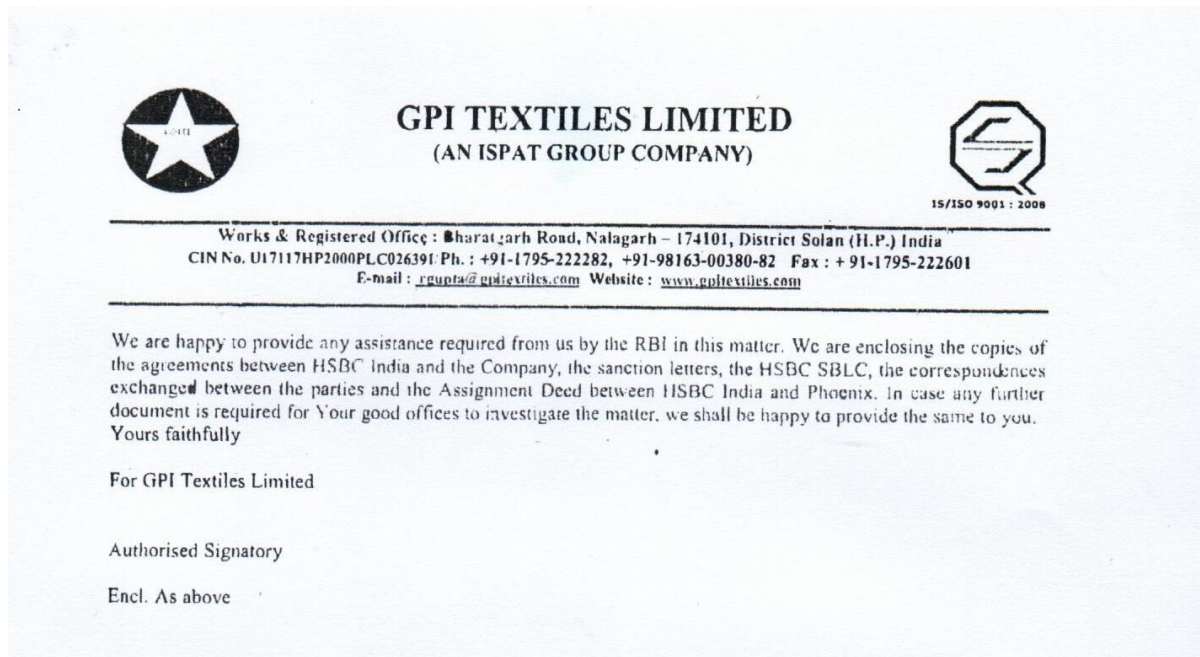
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The 'Corporate Debtor' had also conveyed its consent for substitution of "Phoenix" as the secured creditor in place of HSBC during the course of proceedings before the BIFR on 20th April, 2012. Admittedly, the 'Corporate Debtor' never challenged the said order dated 20th April, 2012.

12. 'Phoenix' issued the notice dated 15th May, 2012 u/s 13(2) of the SARFAESI Act, 2002 to the 'Corporate Debtor' demanding Rs.131,21,11,929.50 as on 20th March, 2012 along with further interest and other charges thereon at the contractual rates starting from 21st March, 2012 till actual payment and/or realization. 'Phoenix' also issued a notice dated 30th September, 2015 u/s 13(4) of the SARFAESI Act to take possession of secured assets of the 'Corporate Debtor'. The 'Corporate Debtor' has filed S.A. No. 919/2016 challenging the action u/s 13(4). Subsequently Respondent No. 1 has also filed OA No. 919/2016. Both the matters are pending in DRT-I, Chandigarh.

13. Thereafter, 'Phoenix' filed petition u/s 7 of the I&B Code before the Adjudicating Authority, Chandigarh Bench which satisfied the following three requirements as laid down u/s 7(5)(a):

- i. Existence of Default
- ii. Application under Form 1 being complete, and
- iii. No disciplinary proceedings against the IP proposed as IP.

14. Apart from the above, the 'Corporate Debtor' had executed balance-cum-security confirmation letter dated 15th March, 2012 admitting the debt due to the 'Financial Creditor'.

15. The loan agreement contains a covenant that the loan can be assigned in part or in whole without permission of the borrower.

16. The appellant has challenged the 'Deed of Assignment' executed between the 'HSBC & Phoenix', but while filing reply to the notice issued during the admission of application u/s 7 of the I&B Code, such issue cannot be raised as it cannot be decided by the Adjudicating Authority on objection.

17. In '**ICICI Bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd. & Ors.**' – (2010) 10 SCC 1 it was observed :

“Before concluding we may state that NPA’s 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 another”.

18. In '**M/s. Innoventive Industries Ltd. Vs. ICICI Bank Ltd. – (2018) 1 SCC 407**', the Hon'ble Supreme Court, *inter alia*, held that the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the 'financial creditor' to satisfy itself that a default had occurred and observed :

“28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the*

applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7

days of admission or rejection of such application, as the case may be.

30. *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise. “*

19. In the present case we find that the appellant has sought declaration that the assignment made by HSBC to ‘Phoenix’ as illegal, which can be raised only in a civil suit. The appellant is trying to convert the proceedings under the ‘I&B Code’ as civil proceedings akin to a trial which is not the legislative intent.

20. In **“Binani Industries Ltd. Vs. Bank of Baroda and Ors.”** in ‘Company Appeal (AT)(Insolvency) No. 82 of 2018, this Appellate Tribunal by its judgment dated 14th November, 2018 observed and held that I&B Code is for reorganisation and insolvency resolution of ‘corporate persons’; it is not a

sale that is selling or buying the 'Corporate Debtor'; it is not an auction; it is not a recovery and it is not a liquidation.

21. The objective of the I&B Code is to ensure re-organization and insolvency resolution of the corporate persons, partnership firms and individuals, in a time bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit and balance of interest of all stakeholders. The assignment cannot be challenged in the petition under Section 7 and that too by a party who had the knowledge of 'Assignment Deed' as back as in the year 2012, as noted above, the DRT, Chandigarh, when it requested and never challenged the same before a court of competent jurisdiction.

22. We have noticed the letter written by the 'Corporate Debtor', on 19th March, 2018 from which it is clear that the 'Corporate Debtor' agreed for assignment by HSBC in favour of 'Phoenix'. In this background, it is not open to the appellant either to raise allegation of *mala fide* against the HSBC or to allege that the assignment is illegal.

23. In view of the discussion as made above and the reason as shown, no relief can be granted. The appeal is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi
20th December, 2018

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