

**BEFORE THE PRINCIPAL BENCH NATIONAL COMPANY LAW TRIBUNAL  
AT NEW DELHI**

**Present: CHIEF JUSTICE (Retd.) SHRI M.M.KUMAR, HON'BLE PRESIDENT  
& SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)  
COMPANY PETITION NO. (IB)23/PB/ 2017**

**IN THE MATTER OF SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE,  
2016 READ WITH RULE 4 OF THE (INSOLVENCY AND BANKRUPTCY APPLICATION  
TO ADJUDICATING AUTHORITIES), RULES, 2016.**

**AND**

**IN THE MATTER OF:**

**ALCHEMIST ASSET RECONSTRUCTION  
COMPANY LIMITED  
NEW DELHI-110001**

**.....Financial Creditor**

**M/S HOTEL GAUDAVAN PVT. LTD.,  
REGD. OFFICE AT  
C-22, VAISHALI NAGAR,  
JAIPUR – 302021  
RAJASTHAN.**

**..... Corporate Debtor**

**ADVOCATE FOR THE PETITIONERS:**

**Mr. Abhirup Dasgupta, Advocate,**

**ADVOCATE FOR RESPONDENT:**

**Mr. Abishek Singh, Advocate**

### **ORDER**

Brief facts as averred by the petitioner in filing this petition under Section 7 of the Insolvency & Bankruptcy Code, 2016 ( for brevity IBC) are as follows:-

1. The petitioner ( for brevity the “Financial Creditor”) is an Asset Reconstruction Company incorporated under the provisions of the Companies Act, 1956 on 19.09.2002 having its registered office at New Delhi. The respondent (for brevity the “Corporate Debtor”) is again a company registered under the provisions of Companies Act, 1956 on 06.10.1986 having its registered office at C-21 and C-22, Vaishali Nagar, Jaipur, Rajasthan – 302 201.

2. The ‘Corporate Debtor’, on 04.01.2008, was sanctioned a Term Loan of Rs.24 crores and a Cash Credit Limit of Rs 1 Crore by State Bank Of India (for brevity ‘SBI’). Pursuant to the sanction, SBI had distributed in tranches commencing from 30.01.2008, a sum of Rs.23.50 Crores towards Term Loan and the component of Cash Credit Limit of Rs.1 Crore has not been disbursed as of date as the project is yet to be completed.

3. The Corporate Debtor has been irregular in servicing the loan, in relation to both interest payment and principal repayment and despite restructuring of the

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loan on 16.01.2009 and rescheduling the repayment, the Corporate Debtor remains a persistent defaulter till today.

4. In the said circumstances SBI had issued a recall notice to the Corporate Debtor recalling the loan on 01.11.2012 demanding repayment of Rs.33,93,00,617.24 as on 31.10.2012 along with applicable interest without any avail, which forced SBI to file O.A.No.188 of 2013 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for brevity the 'RDDBFI Act') before the Debt Recovery Tribunal at Jaipur for recovery of outstanding amount as on 21.07.2013, for a sum of Rs.39,69,10,137.88.

5. Subsequent to the filing of the above O.A., SBI by way of an Assignment Agreement executed on 20.03.2014 has assigned the debt of the Corporate Debtor under Section 5 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity the 'SARFAESI Act') to the Financial Creditor and who by virtue of the above assignment had got itself substituted before the DRT in O.A.No.188 of 2013 vide order dated 09.04.2015.

6. The Counsel for the Financial Creditor while reiterating the above facts at the time of making oral submissions represented that in addition to the proceedings before the DRT which is pending and prosecuted by the Financial Creditor, SBI prior to assignment had also invoked the provisions of SARFAESI. While SBI invoked Section 13(2) of SARFAESI for the first time, the same was challenged successfully by the Corporate Debtor, on the ground that it had been invoked prematurely i.e even before the expiry of the period of 90 days for its

classification as a Non Performing Asset (NPA). DRT, Jaipur taking into consideration the said contention had set aside the Section 13(2) notice which order even though appealed against was upheld by Debt Recovery Appellate Tribunal (DRAT). However the said order in appeal passed by DRAT is under challenge before the Hon'ble High Court of Delhi in W.P.(C) No.11814 of 2015 and it is pointed out by the Learned Counsel for the Petitioner that vide order dated 16.12.2016 the Hon'ble High Court had unequivocally stated as follows:-

“The pendency of the writ petition will not prevent the petitioners from issuing a fresh notice under Section 13(2) of the SARFAESI Act”.

7. Keeping in view the above order, the Learned Counsel for the Financial Creditor represents that another notice under Section 13(2) has been issued by it on 01.02.2017. Learned Counsel for the Financial Creditor painstakingly took us through the typed set filed on behalf of the Financial Creditor to demonstrate that the debt has been repeatedly acknowledged by the Corporate Debtor in its audited accounts as well as the fact of assignment and in this connection pointed out that in the audited financial statements for the year 2013-14 the auditors have given a qualified opinion which reads as follows:-

#### BASIS FOR QUALIFIED OPINION

- 1) Financial Statements have been prepared on going concern basis in spite of notice issued by ALCHEMIST

ARC dated 21.07.2014 for recovery of its dues of Rs.45,34,13,224.78 (outstanding balance as certified by the management of the company as at 31.03.2014 is Rs.44,05,70,391.58) u/s 13(2) read with section 13(13) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The Company also has long term fund deficiency. These factors raised doubts about the company's ability to continue as a going concern which is depend upon infusion of long term funds of its pay off the outstanding amount of the term loan and/or sale of the fixed assets to pay off the amount. No provisions has been made in the accounts for additional interest, penal interest, liquidate damages etc. amounting to Rs.17,20,29,058.39 for the period from 01.04.2011 to 31.03.2014 as claimed by the above SBI/ALCHEMIST ARC. The same has been shown in the note No. (L) as contingent liability in notes to the accounts attached to the balance sheet. However, the company had been providing interest on the other names on a basis as considered appropriate by the management upto 31.03.2011. The Company has stopped providing interest on the loan of SBI w.e.f. 01.04.2011 on the ground that the loan has been declared NPA by the SBI. The Accompanying financial statements do not include any adjustments relating to the recoverability and classification of assets carrying amounts or the amount and classification of liabilities that might result, should company be enable to continue as a going concern (refer note No. (L), consequential impact thereof on the financial statements is not ascertainable.

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8. The Claim of the Financial Creditor, it is contended cannot be disputed at all as is evident at page no.441 of the typed set filed relating to 'Contingent Liabilities' which is to the following effect:

(L) CONTINGENT LIABILITIES;

Contingent liability is possible obligation that arise from past events whose existence will be confirmed by the occurrence or non occurrence of one or more uncertain future even beyond the control of the Company or a present obligation that is not recognized because it is not probable that an outflow of resources will be required to settle the obligation. A contingent liability also arises in extremely rare cases when there is a liability that cannot be measured reliably. The State Bank of India filed a suit against the company on 22.07.2013 to recover its dues of Rs.39,69,10,137.88/-. However, the State Bank of India informed vide letter No.SAMB/CL/I/42 dated 04.04.2014 that he has absolutely assigned all the rights, title and interests in financial assistance granted by him to the company, in favour of Alchemist Asset Reconstruction Company Ltd. (Alchemist ARC), vide assignments agreement dated 20.03.2014. The company received notice u/s 13(2) read with 13(13) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) dated 21.07.2014 for the amount of Rs.45,34,13,224 (outstanding balance as certified by the management of the company as at 31.03.2014 is Rs.44,05,70,391.58). In case the settlement does not come in force or settled at





the higher amount more than shown in the balance sheet then that difference amount will be contingent liability which will be not more than Rs.17,20,29,058.39 as at 31.03.2014.

9. Taking into consideration the records produced it is submitted by the Learned Counsel for the Financial Creditor that the Corporate Debtor is heavily indebted not only to it but also to other Secured Creditors as well as Unsecured Creditors and that there is a clear case for initiation of the Insolvency Resolution Process as contemplated under the IBC for the benefit of all the stake holders.

10. Even though the IBC does not expressly contemplate an opportunity of hearing being granted to the Corporate Debtor nor filing of Objections, the Corporate Debtor was given the opportunity keeping in view the Principles of Natural Justice which are implicit in the provisions of the IBC. It is only in cases where the principles of natural justice are expressly excluded then such principles cannot be implied. There this Tribunal is bound to follow those principles. Accordingly the Corporate Debtor was also given an opportunity to file reply and make oral submissions before this Tribunal keeping in view the time line of fourteen days. The claim made by the Financial Creditor has not been refuted but, the Corporate Debtor has preferred to take the following objections:-

- a. The Financial Creditor does not have the *locus standi* to maintain the Petition filed under Section 7 of the IBC as it is not a Financial Creditor.
- b. The Assignment Deed which has been executed by SBI in favour of the Financial Creditor is against the Circulars issued by the RBI as at the time





of executing the Assignment Deed the account of the Corporate Debtor was not an NPA.

- c. The Corporate Debtor has filed a suit in civil suit bearing No.194 of 2015 in the Court of Senior Civil Judge Jodhpur seeking, inter alia for a declaration that the Assignment Deed dated 20.03.2014 between SBI and Financial Creditor is void and liable to be cancelled.
- d. In W.P.No.(C) 11814 of 2015 the Hon'ble High Court of Delhi vide order dated 19.01.2016 has required status quo to be maintained as on that day and in the circumstances it cannot be disturbed.

Hence, keeping in view all the above the Corporate Debtor contends that this Tribunal must reject the petition as not maintainable.

11. We have carefully considered the rival submissions of the respective parties. In relation to the requirements which need to be satisfied in order to maintain a petition under Section 7 of the IBC we have already delineated the same in detail in Nikil Mehta and Sons (HUF) & Ors Vs. AMR Infrastructure Ltd (C.P.No.(IB)- 03(PB)/2017) decided on 23.01.2017 and again reiterated in Sanjive Kanwar v. AMR Infrastructure (CP(IB) No.06/2017) decided on 16.02.2017 and Tomorrow Sales Agency Pvt. Ltd Vs. Raipur Power and Steel Ltd & Ors (C.P.No. (IB) – 09(PB)/2017) decided on 23.02.2017. Taking into consideration the above decisions and the overwhelming evidence placed before us to establish the claim of the Financial Creditor in our view it is, *prima facie* established that the Corporate Debtor is heavily involved in debts as at present it is not able to service even the interest component, leave alone the repayment of the principal amount due to the Financial Creditor. It is also evident from Annexure P 16 filed by the Financial Creditor which is extracted from MCA portal relating to Corporate



Debtor which relates to charges registered. It reveals that there are other Financial Creditors as well, to whom amounts are owed. However from Annexure P 16 it is further seen that in relation to some of the loans for which the properties of the Corporate Debtor had created charges have been satisfied as recently as 27.04.2016 evidencing that the Corporate Debtor is having cash flow and is in a position to service loans. However in relation to the Term Loan taken originally from SBI and subsequently assigned by it to the Financial Creditor herein the Corporate Debtor has defaulted is clearly evident in terms of Section 3(12) of the IBC which defines 'default' in the following terms:

*"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;

12. The audited financial statements of the Corporate Debtor as extracted in the earlier paragraphs for the year 2013-14 coupled with Annexure P-16 and the statement of accounts annexed as Annexure P 11 filed upto 24.01.2017 by the Financial Creditor discloses the extent of the debts owed and defaulted by the Corporate Debtor. Can it be merely wished away based on some technical pleas put forth by the Corporate Debtor? Would it be fair to defeat equity by accepting technical pleas. We are afraid it cannot be so for the reason that the definition of "Financial Creditor" as defined in Section 5(7) of the IBC also includes a person to whom such debt has been legally assigned or transferred to. The assignment it is

contended by the Financial Creditor has been made by virtue of the provisions of Section 5 of the SARFAESI Act by SBI being the original Lender.

13. A combined reading of Section 5 of the SARFAESI Act with Section 2(l), 2(v) and 2(za) wherein "financial asset", "reconstruction company", "securitisation company" have been respectively defined which shows that the Financial Creditor was/is in a position to acquire rights or interest in a financial asset defined to include any debt or receivables secured by, mortgage of, charge on, immovable property notwithstanding any thing contained in any agreement or any other law. The assignments of NPAs/debt has been considered elaborately by the Hon'ble Supreme Court in the case of ICICI Bank v. APS Star Industries reported in (2010) 10 SCC 1 and it has been held that banks have the power to assign the debts due to it since debt is an asset in the hands of bank as a secured creditor or mortgagee or hypothecatee and that a Bank can always transfer its asset and such transfer in no manner affects any right or interest of borrower (Corporate Debtor) and the moment bank transfers debt with underlying security, borrower(s) ceases to be borrower(s) of assignor Bank and becomes borrower(s) of assignee bank. In view of the above position of law we are unable to appreciate the contentions of the Corporate Debtor. It is also to be noted that for invoking the provisions of Section 13(2) of SARFAESI Act, NPA may be a criteria but in relation to unfolding the Corporate Insolvency Resolution Process as contemplated under the IBC, NPA classification is not a condition precedent and proceedings pending before the Hon'ble High Court of Delhi will not be a bar for this Tribunal in considering the instant petition. Further it is also not seriously disputed by the Respondent when learned counsel for the Petitioner/Financial

Creditor apprised this Tribunal about the status quo order by stating that it was issued to protect the possession of the assignee 'financial creditor' and therefore it would not be affected by triggering insolvency process which has been invoked by the Petitioner itself.

14. It is also pertinent to note that the Insolvency Resolution Process as contemplated under the IBC is for the benefit of all stakeholders including the Corporate Debtor as the very Scheme of the IBC contemplates not only the insolvency resolution process being put in motion by a financial or operational Creditor but also the Corporate Debtor itself and this Tribunal has to take a holistic view in entertaining the petition keeping in mind the interest of all the stake holders. In view of the pending SARFAESI proceedings initiated by the Financial Creditor herein it is no doubt evident that the assets of the Corporate Debtor are being put to coercive action which is detrimental to the Corporate Debtor, particularly when possession is in the hands Financial Creditor.

15. Keeping in view all of the above we are inclined to admit the Petition as well as grant a moratorium in terms of Section 14 of the IBC to be enjoyed by the Corporate Debtor. The Interim Resolution Professional proposed in Form I of the petition who has also given his consent as prescribed in Form 2 is hereby appointed as the Interim Resolution Professional to exercise all powers and subject to all duties as contemplated under the provisions of the IBC.

16. In the circumstances the petition is admitted on the above terms and the parties will offer their co-operation to the Interim Resolution Professional (IRP) to discharge the duties enjoined on him as contemplated under IBC.

SDK  
(CHIEF JUSTICE M.M.KUMAR)  
PRESIDENT

SDK  
(R.VARADHARAJAN)  
MEMBER(JUDICIAL)

Date: 31.03.2017

(u.d.mehta)