

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT)(Ins) No. 177 of 2019

[arising out of Order dated 29th January, 2019 by NCLT, Mumbai Bench,
Mumbai in M.A. No. 1013 of 2918 in CP No. 1458/NCLT/MB/MAH/2017]

IN THE MATTER OF:

Sagar Sharma & Another

... Appellants

Versus

Phoenix ARC Private Limited

...Respondents

Present:

For Appellants :

**Mr. Sudipto Sarkar and Dr. U.K. Chaudhary, Senior Advocates with
Mr. Shadab Jain, Mr. Mahesh Agarwal, Mr. Rajeev Kumar, Ms. Khusboo Deshmukh, Ms. Komal Khushalani, Mr. Arnav Behari and Mr. Dhruv Gupta, Advocates**

For Respondent :

**Mr. Ramji Srinivasan and Mr. Sudhir K. Makkar, Senior Advocates with
Mr. Suresh Dobhal, Ms. Sonakshi Dhiman, Ms. Sylona, Ms. Saumya gupta and Mr. Abhishek Chaudhary, Mr. Nikhil Rahdev and Ms. Prarthna Dogra, Advocates for Respondent No. 1**

**Mr. Prashanto C. Sen, Senior Advocate with
Mr. Ashish Mukhi, Ms. Raj Laxmi and Mr. Dhruv Malik, Advocate for IRP**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The 1st Respondent – ‘Phoenix ARC Private Limited’ filed an application under Section 7 of the ‘Insolvency and Bankruptcy Code, 2016 (for short, ‘the I&B Code’) against ‘Hotel Horizon Private Limited’ (Corporate Debtor) alleging

default of Rs.93,86,52,393 as on 25th September, 2017. After notice and hearing the parties by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai by 29th January, 2019 admitted the application, which is under challenge in this appeal.

2. When the matter was taken up, the learned counsel appearing on behalf of the Appellants (Shareholders/Directors) submitted that the Appellants are ready to settle the claim with the creditors and may offer something more than what could have been given by a 'successful resolution applicant'. Such submission was recorded on 22nd February, 2019 but when the matter was subsequently taken up on 15th March, 2019, the learned counsel appearing on behalf of the Appellants submitted that they have already taken up the matter for settlement with Union Bank of India and HDFC Bank Ltd., who have more than 75% of the voting share. However, it was accepted that the 1st Respondent – 'Phoenix ARC Pvt. Ltd.', who filed the application under Section 7 of the 'I&B Code' and has more than 22% of the voting share, no offer has been given or settlement made. It was also informed that the Appellants have already offered 70% of the debt amount and are still negotiating. However, as there is no settlement finally reached between the parties and the matter remains pending for a long period the case was heard on 8th July, 2019 and the following order was passed:

"Heard the parties. Judgment reserved.

However, on the request of the counsel for the Appellants, we allow further two weeks' time to the Appellant to settle the matter and bring the same to

*the notice of this Appellate Tribunal, failing which,
the judgment will be pronounced.”*

3. We have noticed the stand taken by the parties and heard the appeal on merit.

4. It was submitted that during the pendency of the matter before the ‘Joint Lenders Forum’ and finalization of ‘corrective action plan’, the petition under Section 7 of the I&B Code has been filed at the instance of 1st Respondent (Financial Creditor) which according to applicant cannot be entertained. However, in absence of any bar to entertain an application under Section 7 except in terms of Section 11(c) of the I&B Code, we hold that petition under Section 7 is maintainable even during the pendency of decision of a ‘Joint Lenders Forum’ or finalization of the ‘corrective action plan’.

5. Next it was contended that the claim of the applicant – 1st Respondent as made in the application under Section 7 was barred by limitation.

6. However, on perusal of the record, the following facts emerge --,

The ‘Corporate Debtor’ approached the ‘IDFC Limited’ (**IDFC**) in March, 2008 and requested for ‘financial facilities’ which was acceded to by the ‘IDFC’. The ‘IDFC’ and the ‘Corporate Debtor’ executed various loan documents pursuant to which ‘IDFC’ sanctioned and advanced a term loan of Rs.55,00,00,000/- (Rupees Fifty-five Crores) in favour of the ‘Corporate Debtor’. In November, 2009, the ‘Corporate Debtor’ again sought for further financial assistance from ‘IDFC Limited’ and ‘HDFC Limited’ and a ‘Rupee Term Loan Agreement’ was entered into with the ‘Corporate Debtor’ on 20th November, 2009 for an additional amount of Rs.22,00,00,000/- (Rupees

Twenty-two Crores) which was repaid by the 'Corporate Debtor' in quarterly instalments commencing from 15th July, 2012.

7. Thereafter, the 'Corporate Debtor' sought financial assistance from 'IDFC', 'HDFC' and 'Union Bank of India' and a 'Facility Agreement' ('Secured Term Loan Agreement') was executed on 24th May, 2012 between the aforesaid three Banks and the 'Corporate Debtor' for advancement of further amount of Rs.46,00,00,000/- (Rupees Forty-six Thousand Crores). 'IDFC' also executed an 'Inter-creditor Agreement' dated 24th May, 2012 as well as 'Security Trustee Agreement' dated 24th May, 2012.

8. The 'Term Loan I' was repaid by the 'Corporate Debtor' to 'IDFC' and the claim of the 1st Respondent does not constitute any part of the said 'Term Loan'.

9. The '2nd Term Loan' was secured by a 'Deed of Mortgage' with a further charge dated 27th November, 2009. The 2nd Term Loan was repaid partly to the tune of Rs.17,10,20,020/-(Rupees Seventeen Crores Ten Lakhs Twenty Thousands and Twenty only) (out of Rs. 22,00,00,000/-) and the outstanding amount as claimed by the Assignee (Appellant) is Rs.9,35,15,240/- (Rupees Nine Crores Thirty five Lakhs Fifteen Thousand and Two hundred Forty only).

10. No amount has been repaid by the 'Corporate Debtor' pursuant to 'Term Loan III' and the outstanding amount is Rs.84,51,37,153/- (Rs.46,00,00,000/- being the principal amount + interest @ of 3.5% as on 25th September, 2017) is payable.

11. The 'IDFC Ltd.' assigned all rights, title and interest in the debt owed by the 'Corporate Debtor' in favour of the 1st Respondent (Phoenix ARC Private Limited – Assignee) vide 'Assignment Agreement' dated 11th September, 2014.

The account of the 'Corporate Debtor' was declared 'Non-Performing Asset' (NPA) on 11th March, 2015.

12. It is not in dispute that the Limitation Act, 1963 is applicable to the applications filed under the 'I&B Code'. For filing the application under Section 7 of the 'I&B Code', Part II – 'Other Applications' of Third Division of schedule of Limitation Act is applicable as quoted below:

PART II – OTHER APPLICATIONS

Description of application	Period of Limitation	Time from which period being to run
137. Any other application for which no period of limitation is provided elsewhere in this division	Three years	When the right to apply accrues.

13. Admittedly, 'I&B Code' has come into force since 1st December, 2016, therefore, the right to apply accrued to 1st Respondent on 1st December, 2016. Therefore, we hold that the application under Section 7 was not barred by limitation.

14. The next question is whether the claim of the Appellant is barred by the limitation. If it is barred by limitation then the 'Corporate Debtor' has right to take plea that the 'debt' is not payable. In the present case, we find that the immovable property of the 'Corporate Debtor' was mortgaged in favour of the 'Financial Creditor' by 'Deed of Mortgage' and a further charge was made on 27th November, 2009 by the 'Corporate Debtor' in favour of 'IDFC Ltd.'. Thereafter by 'assignment agreement' debt payable by 'Corporate Debtor' to IDFC was assigned on 11th September, 2014.

15. The 'Financial Creditor' has right to get immovable property mortgaged and thereafter may transfer the mortgage assets for a valuable consideration for which 12 years of limitation has been prescribed for filing a suit relating to immovable property under Article 61 of Part V of the First Division of the Schedule of Limitation Act. Therefore, we hold that the claim of the 1st Respondent is not barred by limitation.

16. As the appeal is devoid of merit, no relief can be granted. It is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

New Delhi

5th September, 2019

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