

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 724 OF 2024

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

**Mr. Kamal Krishan Singh,
Rolta Private Limited**

...Applicant

Vs.

Mamta Binani

...Respondent No. 1

Peanence Commercial Private Limited

...Respondent No. 2

In the matter of

C.P.(IB) No. 530/MB/2020

Union Bank of India

Financial Creditor

Vs.

Rolta India Limited

Corporate Debtor

Order delivered on: 24.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Sr. Adv. Vikram Nankani a/w
Adv. Ameya Gokhale, Adv.
Rishabh Jaisani, Adv. Ritwik
Mustasi i/b Shardul
Amarchand Mangaldas & Co.

For the Respondent No. 2 : Adv. Shyam Kapadia i/b
Divya D. Jain

For the Resolution Professional : Adv. Sandeep Bajaj, Adv.
Aakanksha Nehra and Gunjan
Nayyar Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Application is being filed on behalf of the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 inter alia, seeking an order directing Respondent No. 1 to admit Respondent No. 2 as a member of the Committee Of Creditors with all the rights and privileges (including of voting) as a Financial Creditor of the Committee Of Creditors who is not a related party of the Corporate Debtor in terms of Regulation 28 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Applicant seeks following reliefs:

- a. *Set aside the email dated 15th February, 2023 (Exhibit N) issued by the Respondent No.1/ RP;*
- b. *Order and direct the Respondent No.1/ RP to admit Respondent No.3 as a member of the committee of creditors of the Corporate Debtor with all the rights and privileges (including of voting) as a financial creditor of the committee of creditors who is not a related party of the Corporate Debtor;*
- c. *Order and direct the Respondent No.1/ RP to update the list of claims qua the Corporate Debtor and update/ change/ revise/ reconstitute the constitution of the committee of creditors of the Corporate Debtor to include Respondent No.2 as required under the Insolvency and Bankruptcy Code, 2016.*

2. It is submitted that Respondent No.2 is a company incorporated in India under the Companies Act, 1956. The Applicant, Respondent No.2 and its promoters are not related/ connected to each other and have no past business, dealings, or commercial activities and there are no common Directors between the Applicant and Respondent No.2.

2.1. The Applicant and the Corporate Debtor entered into a memorandum of understanding dated 01.07.2016 ("MoU"), whereunder the Applicant agreed to meet the Corporate Debtor's working capital requirements by providing financial assistance in the form of intercorporate deposits from time to time in one or more tranches in accordance with the applicable law. The Corporate Debtor agreed to execute demand

promissory notes at the end of each financial year in favour of the Applicant, confirming the Corporate Debtor's outstanding for the time being.

2.2. Pursuant to the MoU, the Corporate Debtor entered into a deed of guarantee dated 29th March, 2019 of INR 700,00,00,000 in favour of the Applicant. The Corporate Guarantee was supplemented by an addendum dated 30th September, 2019 executed by the Corporate Debtor in favour of the Applicant. By the Addendum, a security interest on fully paid-up equity shares held by the Corporate Debtor in five of its subsidiaries was created in favour of the Applicant to secure the Corporate Debtor's obligations under the Corporate Guarantee. As per the terms of the MoU, the Corporate Debtor issued demand promissory notes in favour of the Applicant on (i) 31st March, 2019, (ii) 30th June, 2020, (iii) 29th October, 2021 and (iv) 23rd October, 2022. Pursuant to the adjustment of certain monies paid by the Corporate Debtor, the total outstanding to the Applicant stood at INR 634,00,00,000.

2.3. Thereafter, the Applicant issued demand notice dated 8th December, 2022 ("Demand Notice") to the Corporate Debtor, recalling an amount of INR 634,00,00,000 (Rupees Six Hundred Thiliy Four Crore). However, the Applicant did not receive any payment pursuant to the Demand Notice. The Applicant invoked the Corporate Guarantee read with the Addendum vide notice dated 09.01.2023.

2.4. The Corporate Debtor confirmed its outstanding liability towards the Applicant by acknowledging receivables by letters dated (i) 16th December, 2022, (ii) 2nd January, 2023, and (iii)

17th January, 2023. However, no payment was made by the Corporate Debtor towards such liability.

2.5. Further, the Corporate Debtor was admitted into CIRP on 19.01.2023 and the Respondent No. 1 was appointed as the Interim Resolution Process of the Corporate Debtor.

2.6. Respondent No. 1 has admitted the Applicant's claim of INR 634,55,43,228 as on 15th January, 2023. However, the Applicant is a related party qua the Corporate Debtor. Accordingly, the Applicant does not have any right of representation, participation or voting in the meetings of the Committee of Creditors.

2.7. The Applicant entered into deed of assignment dated 15th January, 2024 with Respondent No.2 an unrelated third party, whereby it assigned the Applicant's Debt to the Assignee/ Respondent No.2 for a one-time consideration of INR 50,00,00,000 on an as is where is basis. The assignment has been undertaken on an arm's length basis and as pure commercial transaction.

2.8. It is submitted that the Applicant, Respondent No.2 and its promoters are not related parties and are completely unconnected to each other, which do not have any underlying business relation.

2.9. With respect to the Deed of Assignment, the Applicant vide letter dated 6th February, 2024 sought Respondent No. 1's approval. In the said letter, the Applicant requested the RP that in view of the Assignee/Respondent No.2 being in no manner related to the Corporate Debtor and/or the Applicant; and (ii) the assignment being undertaken on an arm's length basis for

valuable consideration, the Assignee/ Respondent No.2 will not be considered as a 'related party' of the Corporate Debtor from the perspective of the first proviso to Section 21 (2) of the Insolvency Code.

2.10. The Applicant (i) emphasised the judgment of the Hon'ble Supreme Court in Phoenix ARC Pvt. Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475, to submit that the disqualification relation to participating in the CoC is not linked to the debt itself but to the relationship between the concerned related party financial creditor and the Corporate Debtor and (ii) also relied upon a legal opinion dated 30th November, 2023.

2.11. By an email dated 15th February, 2024 Respondent No. 1, *inter alia*, stated that (i) the RP was unable to issue confirmation in relation to the Deed of Assignment, and (ii) the nature of the debt would not change and no voting rights would be available to the Respondent No.2. The Respondent No. 1 has placed reliance on Legal Opinion dt. 14.02.2024.

2.12. The refusal of the RP to recognise the Deed of Assignment and confirm that Respondent No.2 would be recognised as a non-related financial creditor on the basis of the Impugned Letter is completely contrary to the provisions of the Insolvency Code and the CIRP Regulations.

2.13. As per Section 25(2)(e) of the Insolvency Code, it is the RP's duty, *inter alia*, to "maintain an updated list of claims;"

2.14. Further, Regulation 13 of the CIRP Regulations require the RP to maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount

of their claims admitted and the security interest, if any, in respect of such claims, and update it. The fact that the RP is required to update the claims is a factor which reinforces the case of the Applicant that the RP had an obligation to update the list of creditors on the basis of the Deed of Assignment such that Respondent No. 2 would be qualified as a non-related Financial Creditors of the Corporate Debtor.

2.15. Accordingly, the RP, in terms of Regulation 17 of the CIRP Regulations, must constitute the CoC. This necessarily includes revising the constitution of the CoC on receipt and verification of claims, including on the basis of assignment of debt.

2.16. Regulation 28 specifically relates to assignment of debt "during the insolvency resolution process period", which is applicable in the present case. It is evident that the RP is required to/ authorised to recognise the assignment of debt during the entire CIRP period. There is no limitation on when the RP can recognise such assignment of debt. In the present case, it is evident that RP has disregard this provision and taken a position that it is not empowered to revise the voting share and re-categorize claim at the current stage of the CIRP of the Corporate Debtor.

2.17. It is also submitted that The Respondent No. 1 suggests that since the Applicant cannot be a member of the CoC, the Assignee/ Respondent No.2, being vested with the rights of the Applicant, cannot be a member of the CoC as well. This disregards the provisions of the Insolvency Code highlighted above.

2.18. It is submitted that the moment a relationship between the related party financial creditor and the Corporate Debtor ceases to exist the exclusion/ taint attached to the debt would necessarily stand excluded. A financial creditor acquiring the debt from a related party, which is unrelated in praesenti ought to be given the statutory rights provided under the Insolvency Code. The RP has disregarded this critical aspect.

2.19. It is therefore submitted that Respondent No. 1 ought to (i) have recognised the Respondent No.3 as non-related financial creditor of the Corporate Debtor, and (ii) updated the list of creditors to reflect the consequential changes as per the Deed of Assignment. However, the RP in complete disregard to the aforementioned requirements has disregarded the Applicant's request.

2.20. Further, as a non-related financial creditor, Respondent No.3 would have voting rights in view of the Section 21 of the Insolvency Code. Not permitting the Respondent No.3 to exercise its rights as associated with the Applicant's Debt by participating and exercising its rights in the CoC qua the Corporate Debtor, would defeat the rights associated with, and implicitly noted by the Insolvency Code. It is further submitted that the Applicant's Debt carries a substantial pro rata share of the total debt amount of the Corporate Debtor. Accordingly, the voting share associated with the Applicant's Debt is rendered nugatory. It is reiterated that, unlike the Applicant, Respondent No.2 does not constitute a related party qua the Corporate Debtor. The same legal infirmity that precludes the Applicant from being a member of the CoC

cannot be imputed upon Respondent No.2, which is an unrelated third-party.

2.21. It is further submitted that the revision of the CoC does not impede the CIRP of the Corporate Debtor. The updation of the CoC constitution will not have any bearing to any agenda voted upon and passed by the CoC prior to the Deed of Assignment. Due to the RP's refusal to recognise the assignment of the Applicant's Debt to the Respondent No.3, 4.5% of the voting share of the CoC is wasted. Accordingly, owing to the waste of 4.5% of the voting share of the CoC, which Respondent No.2 is entitled to exercise. The Respondent No.1/ RP's incorrect decision will lead to a perfectly valid business transaction being rendered infructuous. This will cause financial harm to both the Applicant and Respondent No.2.

3. The Respondent has filed the Reply stating that more assignment has yet taken place and the assignment is contingent upon occurrence of certain events which have yet not taken place. No consideration has been passed between the parties. In fact, the Applicant had merely sought a confirmation from the answering the Respondent vide their Email dated 07.02.2024 before the actual occurrence of assignment of debt.

3.1. It is further submitted that assignor is a related party of the Corporate Debtor and has been classified as such in the list of Creditors. The corporate insolvency resolution process (hereinafter referred to as "CIRP") of the Corporate Debtor is at an advanced stage, wherein 19 meetings of the CoC has been

held and the process of consideration of resolution plans is currently undergoing. Therefore, the purpose of assignment being undertaken at this stage, is required to be considered by this Tribunal in view of the settled position of law as laid down by the Hon'ble Supreme Court of India in the case of *Phoenix Arc Private Limited vs Spade Financial Services Limited & Ors.* reported at 2021 (3) SCC 475.

3.2. That it is also settled that it is a fundamental position of law that an assignor cannot transfer a better title or interest than it already has including in respect of actionable claims. Admittedly, in the present case, the assignor i.e. the Applicant has been classified as a related party and has not been given any voting right. Therefore, the right, title and interest of the assignee is required to be considered by this Tribunal in view of the said settled principles of law.

4. Heard learned counsel for the both sides and perused the records.

4.1. The Applicant entered into an assignment agreement dated 15.01.2024 with Rolta Private Limited whereby the Applicant agreed to acquire / purchase the financial assistance of Rs.634,55,43,228/- granted by the Assignor together with all the rights title and interest of the assignor upon the terms and subject to the conditions set out in the agreement in consideration of Rs.50 crores. We find that purchase consideration due date is defined to mean the date agreed upon by the Assignee and Assignor for payment of the Purchase Consideration which will be immediately upon obtaining the approval of the resolution professional of the Borrower on the recognition of the Assignee as a non-related secured financial creditor in the Insolvency Proceedings with the

confirmation that the assignee will have the full voting rights for an amount of Rs.634,55,43,228/- as financial creditor in the Committee of Creditor of the Borrower (Corporate Debtor).

4.2. The Applicant is stated to have written a letter dated 06.02.2024 to the Respondent Resolution Professional seeking confirmation that the assignee will be recognized as a non-related financial creditor of the Corporate Debtor contending that Justice (Retd.) Suresh C. Gupte has opined that the disqualification under the first proviso to Section 21(2) would not be attracted to an assignment that the bonafide and at arm's length to an unrelated party. However, the RP is stated to have refused to give confirmation stating that assignment of agreement has yet to take place vide Email dated 14.02.2024.

4.3. The Hon'ble Supreme Court in the case of ***Phoenix Arc (P) Ltd. vs Spade Financial Services Ltd. (2021) 3 SCC 475*** held that –

103. Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing the financial creditor party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.

104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a “related party” before the corporate debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors.

4.4. In the present case the consideration of Rs.50 crore on assignment of debt of Rs.634,55 crores is payable only upon approval of the resolution professional of the borrower a non-related secured financial creditor having full voting rights. It is undisputed fact that the Assignor Rolta Private Limited is related party of the Corporate Debtor and the suspended board of the Corporate Debtor has a right of representation on the CoC where at the resolution plans of prospective resolution application are placed and discussed. This resolution plans clearly show the amounts set aside in each plan towards payment related as well as unrelated financial creditors. In other words the suspended board of the Corporate Debtor is privy to the amounts set aside for payment to Rolta Private Limited in the plan and in this case the amounts so set aside towards related party creditors payment is nil. It is also an undisputed fact that Rolta Private Limited does not have voting rights in the CoC because of disqualification attached to it in terms of proviso to Section 21(2) of the Code. In view of these facts we are of the

considered view that the assignment becoming affecting only upon confirmation from Resolution Professional of treating the Applicant as unrelated secured financial creditor with voting rights in itself cannot be said to be a bonafide transaction.

4.5. The Hon'ble NCLAT in the case of ***Pankaj Yadav vs. State Bank of India Limited (2018) ibclaw.in 49 NCLAT*** held that *the debt's is in the form of loan from a 'financial institution', the debtor is referred as a 'borrower' and if the debt is in the form of securities, such as bonds, the debtor is referred to as an 'issuer'. Undisputedly, the assignment is the transfer of one's right to recover the debt of another person as contractual right. Rights of an 'assignee' are no better than those of the 'assignor'. It can be, therefore, held that 'assignor' assigns its debt in favour of the 'assignee' and 'assignee' steps in the shoes of the 'assignor'. The 'assignee' thereby takes over the right as it actually did and also takes over all the disadvantages by virtue of such assignment.*

4.6. In the case of ***Citi Securities & Financial Services Pvt. Ltd. vs Sudip Bhattacharya Resolution Professional of Reliance Naval & Engineering Ltd. (INV P/02/AHM/2021 in CP(IB) 418/AHM/2018)*** the Coordinate Bench of Ahmedabad held that *the whole series of events lead us to believe that the present assignment of debt was not in good faith as portrayed and rather shows that the arrangement was made with a view to get backdoor entry into the CoC through the Applicant assignee to have a control over the process of the CIRP as the Reliance Infrastructure Ltd. being the related party to the Corporate Debtor could not be the member of the CoC. An act of this kind done with malafide intention cannot give an equivalent right with that of the unrelated financial creditors. Hence we are of the considered opinion that the Applicant is disqualified as financial creditor under the first proviso to Section 21(2) of Code as relate party while*

stepping in the shoes of assignor being related party and cannot be permitted to enter the Committee of Creditors as a member.

- 4.7. In view of above judicial propositions, we are of the considered view that in this case also the assignment of the financial debt by the Rolta Private Limited to the Applicant is not a bonafide transaction and has been undertaken so as to circumvent the bar contained in proviso to Section 21(2) and the proposal of the Resolution Plan setting aside lower value to the related financial creditor than the unrelated financial creditor. This intent is Writ large for the consideration under the assignment agreement having been made payable only upon receipt of confirmation from the resolution professional which is in this case having been denied by the Resolution Professional stating that no assignment of the debt has yet been taken place so as to warrant any consideration in change of status. After taking into consideration all these facts, we hold that the present case does not fall under the default rule as expounded in the case of *Phoenix Arc (P) Ltd. (supra)*.
- 4.8. Accordingly, we hold that the assignee shall take over all the disadvantages by virtue of such assignment and cannot claim better share in the location to the creditors as well as the voting of the CoC.
5. In view of the foregoing, IA 724 of 2024 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)