IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No. 301

TP/11(AHM)2022 in
CP/215(AHM)2014

Order under Section 7 of IBC, 2016

In The Matter Of:

HT Media Ltd ....**Applicant**
V/s
GHCL Ltd ....**Respondent**

Order delivered on: 12/03/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-	**-SD-**
SAMEER KAKAR **MEMBER (TECHNICAL)**	**SHAMMI KHAN** **MEMBER (JUDICIAL)**

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH - COURT-I

T.P. No. 11/7/NCLT/AHM/2022
IN
C.P. No. 215 of 2014

(An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

<u>In the Matter of:</u>

HT Media Limited
Registered office at:
HT House, 18, KB Gandhi Marg,
New Delhi-110001

...APPLICANT/FINANCIAL CREDITOR

VERSUS

GHCL LIMITED
Registered office at:
GHCL House, Opposite Punjab Hall,
Near Navrangpura Bys Stand,
Navarangpura, Ahmedabad

...RESPONDENT/CORPORATE DEBTOR

Order Pronounced On: 12.03.2023

<u>CORAM:</u>
SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE

For the Applicant : Mr. Navin Pahwa, Sr. Adv. a.w.
Mr. M. N. Marfatia, Adv

For the Respondent : Mr. Mihir Thakore, Sr. Adv. a.w.
Mr. Venkat Subramanyam, Adv

O R D E R

1. Originally the petition being C.P. No. 215 of 2014 was filed before the Hon'ble high Court of Gujarat by the Applicant **HT Media Limited** (hereinafter referred to as **"Applicant/Financial Creditor"**) against the Respondent **GHCL Limited** (hereinafter referred to as **"Respondent/Corporate Debtor"**) under Section 433 & 434 of the Companies Act, 1956 seeking winding up of the the Respondent/Corporate Debtor. Subsequently, vide order dated 30.11.2021 (which is annexed at Annexure-D) case was transferred from Hon'ble High Court to this Tribunal in view of change of jurisdiction in pursuance of establishment of National company law Tribunal. The case was re-numbered as T.P. No. 11/AHM/2022.

2. Accordingly, this Application was filed on 06.10.2022 by the Applicant **HT Media Limited** (hereinafter referred to as **"Applicant/Financial Creditor"**) against the Respondent **GHCL Limited** (hereinafter referred to as **"Respondent/Corporate Debtor"**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"IBC, 2016"**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent/Corporate Debtor, to appoint Interim Resolution Professional (hereinafter referred to as **"IRP"**) and declare the moratorium for having defaulted payment of its outstanding dues **Rs.6,61,25,000/-.** The date of default is stated to be 24.02.2012.

3. Perusal of Part-I of the Form-1 reveals that the Applicant is a company incorporated under the provisions of the Companies Act, 1956 with CIN No. U22121DL2882PLC117874. The registered office of the Applicant is situated at HT House, 18-20, Kasturba Gandhi Marg, New Delhi-110001.

4. Perusal of Part-I of the Form-1 also reveals that this application has been filed through authorized representative Mr. Sachin Kalra who has been authorised by Power of Attorney dated 02.04.2020 which is annexed at Annexure-B.

5. Perusal of Part-II of the Form-1 reveals the Respondent/Corporate Debtor is a company incorporated under the provisions of the Companies Act, 1956 with CIN No. L24100GJ1983PLC006513. The registered office of the Company is situated at GHCL House, Opposite Punjabi Hall, Navrangpura, Ahmedabad, Gujarat-380009.

6. Perusal of Part-III of the Form-1 reveals that the Applicant has proposed the name of the Interim Resolution Professional **('IRP') Mr. Malav Jitendra Ajmera,** having registration No. IBBI/IPA-001/IP-P-01190/2018-2019/11908, Addrtess: A/8, 6th Floor, Safal Profitaire, Corporate Road, Prahladnagar, Ahmedabad-380015, Gujarat. There is a declaration made by him that there are no disciplinary proceedings pending

against him with the Board or in Indian Institute of Insolvency Professionals of ICAI. In addition, further necessary disclosures have been made by him as per the requirement of the IBBI Regulations.

7. Perusal of Part-IV of the Form-1 reveals that total dues as claimed by the Applicant is Rs.6,61,25,000/- (consisting of Rs.5,00,00,000/- being principle and amount of Rs.1,61,25,000/- as interest.)

8. The averments made by the Applicant in its petition are summarized hereunder: -

   a) The Applicant on the assurances provided by the Respondent, entered into a debenture subscription agreement with M/s Rosebys Interiors India Limited. Within this agreement, the Respondent committed to bring an Initial Public Offering (IPO) of M/s Rosebys Interiors India Limited by 23.02.2012 and to acquire the equity shares either personally or through a nominee. Additionally, the Respondent agreed to indemnify the Applicant for any losses resulting from a violation of the debenture subscription agreement.

b) The Applicant were allotted 5,00,000 fully convertible debentures of Rs.100/- each of M/s. Rosebys Interiors India Limited for which payment of Rs.5,00,00,000/- was made by the Applicant. The said debentures were converted into 1839 equity shares of Rs.10/- each.

c) Neither the Respondent nor M/s. Rosebys Interiors India Limited came up with an IPO before 23.02.2012 therefore, the Applicant addressed a letter to the Respondent calling upon the Respondent to purchase 1839 equity shares of M/s. Rosebys Interiors India Limited held by the Applicant.

d) In response to the letter of the Applicant the Respondent informed the Applicant that they cannot purchase the shares as the Hon'ble High Court of Gujarat has admitted a winding up petition against M/s. Rosebys Interiors India Limited vide order dated 05.09.2011 and the appeal in the matter is pending.

e) Once again the Applicant called upon the Respondent to purchase shares of M/s. Rosebys Interiors India Limited and this time the Respondent informed the Applicant that M/s. Rosebys Interiors India Limited have gone into liquidation.

f) Subsequently, the Applicant, via written correspondence, requested the Respondent to remit a sum of Rs. 5,00,00,000/- along with interest at a rate of 15% compounded annually. The Respondent replied, expressing readiness to provide "reasonable compensation." In light of this acknowledgment by the Respondent, the Applicant terminated the agreement.

g) Thereafter, the Applicant issued a statutory notice under section 433 and 434 of the Companies Act,1956 upon Respondent calling upon it to pay Rs. 5,00,00,000/- along with interest at the rate of 15% compounded annually for the period from 24.02.2012 to 23.02.2014 aggregating to Rs. 6,61,25,000/-

h) Despite of several reminders the Respondent failed to make the payment thus, the Applicant filed winding up application being Company Petition No. 215 of 2014 before Hon'ble High Court of Gujarat under section 433 & 434 of the Companies Act, 1956 for initiation of winding up process against the respondent.

i) Subsequently, the Hon'ble High Court of Gujarat transferred the above mentioned winding up application to this Tribunal vide order dated 30.11.2021. Hence, the present application for initiating Corporate Insolvency Resolution Process against the Respondent.

9. The Respondent has filed an affidavit in reply before this Tribunal on 23.02.2023 vide diary no. D747. The averments of Respondent in brief are as follows:

A. M/s. Rosebys Interiors India Limited, a wholly owned subsidiary of Respondent had approached the Applicant for the purpose of advertising its home furnishing products. The Applicant instead of accepting payments for advertisement expressed his willingness to invest in M/s. Rosebys Interiors India Limited.

B. Accordingly, the Applicant, M/s. Rosebys Interiors India Limited and the Respondent being promoter of the borrower entered into Debenture Subscription Agreement dated 24.02.2009 wherein the Applicant agreed to subscribe to 5,00,000 fully convertible debentures of Rs.100/- each of M/s. Rosebys Interiors India Limited which were to be compulsorily converted into Equity shares on 31.05.2010 in terms of clause 2.2 of the Agreement.

C. In accordance with clause 2.2 of the said first agreement the 5,00,000 fully convertible debenture of Rs.100/- each issued by M/s. Rosebys Interiors India Limited were converted into Equity Shares of RS.10/- each on 26.02.2011.

D. It is stated that the respondent had undertaken to indemnify the Applicant from any losses arising due to the breach of the Agreement.

E. It is submitted that the Clause 6.12 of the Agreement specifically stated that in case of no issuance of Initial Public Offering ("IPO") within 36 months of the Agreement, the Borrower shall purchase the equity share at the Subscription Amount along with 15% interest compounded annually at fair market price or value determined by a recognized investment banking firm, whichever is higher. The IPO could be issued on 23.02.2012 as per the Agreement, as the winding up Petition had been already admitted for the Borrower. Further, the Respondent had clearly communicated its inability to comply with Clause 6.12 of the Agreement as the transfer of the shares of the Borrower Company without express permission of Court was impossible and would have been an illegal act. Subsequent to which the winding up petition of the Borrower was admitted by the Hon'ble Gujarat High Court and a liquidator was appointed on 07.08.2015.

F. It is stated that the Applicant vide termination notice dated 27.08.2012 had terminated the Agreement and invoked Clause 10.2 of the Agreement, which was denied by the Respondent vide letter dated 17.09.2012 and further informed that in case of disputes, it can be settled through arbitration in terms of Clause 11.13 of the First Agreement.

G. It is stated that the Applicant also invoked arbitration under Clause 11.13 of the Agreement vide notice dated 01.10.2012, against which the Respondent had also nominated an Arbitrator on 31.10.2012. It is further stated that the Applicant had also filed a petition under Section 9 of the Arbitration and Conciliation Act ("A&C Act") and another petition under Section 11 of the A&C Act, before the Hon'ble Delhi High Court, which was later withdrawn by the Applicant.

H. It is stated that the Applicant had filed a Winding-Up Petition against the Respondent before the Hon'ble Gujarat High Court, which was transferred to this

Hon'ble Tribunal and the Applicant has also filed the present Application under Section 7 of IBC.

I. The Respondent in his reply submits grounds due to oppose the present application. the grounds are as follows:

   i. Lack of Jurisdiction.
   ii. Absence of Financial Debt.
   iii. Suppression of material facts by the Applicant.
   iv. The Applicant had Resorted to 'Forum Shopping'.
   v. Contractual Dispute between the parties.

10. Respondent filed an Additional Affidavit on 23.10.2023 under Inward Diary No. D4193 to put forth written submissions on behalf of the Respondents.

11. Applicant filed an Additional Affidavit on 28.11.2023 under Inward Diary No. D4715 to put forth written submissions on behalf of the Applicant.

12. Respondent filed an Additional Affidavit on 28.11.2023 under diary No. D4669 to reiterate the contentions and submissions made by the respondent in their reply and written submissions.

13. Since, Rosebys Interiors India Limited is already under liquidation in terms of the order of the Hon'ble High Court, this Tribunal issued notice to Official Liquidator to clarify whether at any stage or any point of time any claim was submitted by the present applicant with him and also the status of distribution among the claimants in the matter of Roseby Interiors India Limited. An affidavit was filed on 12.01.2024 by the Official Liquidator to clarify whether at any stage or any point of time any claim was submitted by the applicant with the Official Liquidator and also the status of distribution amounts the claimants in the matter of M/s Rosebys Interiors India Ltd. It was submitted that the applicant herein had not submitted any claim with the office of Official Liquidator. As there are no assets in the aforesaid Company in Liquidation, therefore the claims have not been invited as yet.

14. It is stated that the Applicant filed an affidavit on 13.02.2024 to put on record the list of citations to support its claims. The citations are as follows:-

a) Laxmipat Surana versus Union Bank of 1 India & ors. AIR 2021(SC) 707.
b) Orator Marketing Pvt. Ltd. versus Samtex Desinz Pvt Ltd. AIR 2021 (SC) 4040.
c) Pioneer Urban Land and Infrastructure Ltd. and Anr. V. Union of India and Ors. (SC) (2019) 8 SCC 416.
d) Shree Bhadra Parks & Resorts Ltd. versus Sri Ramani Resorts and Hotels Pvt. Ltd. (National Company Law Appellate Tribunal)

15. It is stated that the Respondent filed an affidavit on 13.02.2024 to put on record the list of citations to support its claims. The citations are as follows:-

a) IFCI Limited v. Sutanu Sinha & Another (resolution professional of IVRCL Chengapalli Tollways Ltd.) [National Company Law Apellant Tribunal, Chennai. Bench- Company Appeal (AT) (CH) (Insolvency) No. 108 of 2023]
b) Hubtown Limited v. GVFL Trustee Company Pvt. Ltd. AND GVFL Trustee Company Pvt. Ltd. V. Hubtown Limited [National Company Law Tribunal, Mumbai- M.A. 2411/2019, C.P. 4128/I&B/MB/2018, M.A. 2412/2019, C.P. 4129/I&B/MB/2018, M.A. 2413/2019, CP 4130/I&B/MB/2018, M.A. 2414/2019 4131/I&B/MB/2018 and CP 4131/I&B/MB/2018.

c) Narendra Kumar Maheshwari v. Union of India & Ors. [Supreme Court of India Transfer Cases No. 161-165 of 1988]

d) Agarwal Polysacks Limited v. K.K. Agro Foods and Storage Limited [National Company Law Appellate Tribunal Principal Bench, New Delhi- Company Appeal (AT) (Insolvency) No. 1126 of 2022].

e) South East Asia Marine Engineering and Constructions Ltd. V. Oil India Limited and Oil India Limited v. South East Asia Marine Engineering and Constructions Ltd. [Supreme Court of India- Civil Appeal No. 673 of 2012 with Civil Appeal No. 900 of 2012].

f) IFCI Limited Vs. Sutanu Sinha & Others [Hon'ble Supreme Court in Civil Appeal No. 4929 of 2023 reported in Neutral Citation - 2023 INSC 1023]

g) Star Chemicals (Bombay) Limited Vs. Vitta Mazda Limited reported in [2008] 145 Comp Cas 455 (Guj).

16. We have heard the counsels from both sides and have perused the records.

17. The Applicant has claimed himself as Financial Creditor, though the investments by way of convertible debentures were made in Rosebys Interiors India Limited. It is an admitted fact that the said convertible debentures have since

been converted to equity shares and that the Rosebys Interiors India Limited is presently under liquidation.

18. The Applicant has filed written submissions on 28.11.2023 under which it is submitted in Point 13 (d) that:-

> *"As per the provisions contained in Sec. 5(8)(f), (h) r/w. (i) of the IBC, the Corporate Debtor owes a financial debt to the petitioner along with interest. The amount disbursed by the petitioner with the expiry is covered by the definition of the phrase "financial debt" as defined in Sec. 5 (8) of the IBC and in particular as stipulated in Clause (f) thereof."*

19. The Section 5 (8) of IBC,2016 is reproduced as under:

> *"**financial debt** means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes--*
> *(a) money borrowed against the payment of interest;*
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
> *(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
> ***(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;***
> ***[Explanation----For the purposes of this sub-clause,--***

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, allottee and real estate project shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

20. The Applicant is claiming to be Financial Creditor in terms of Section 5(8)(f), (h) r.w (i) of IBC, 2016. The Respondent/ Corporate Debtor is admittedly indemnifier as per Debenture Subscription Agreement. However, Section 5(8)(h) deals with in respect of Guarantee, Indemnity, bond, documentary letter of credit or any other instrument issued by a bank or Financial Institution. However, in the present case, the Applicant is neither a bank nor Financial Institution.

Hence, the applicant cannot be construed as Financial Creditor against the Respondent/ Corporate Debtor.

21. Further, the National Company Law Tribunal, Mumbai Bench ("**NCLT**") in its judgement dated October 7, 2022 ("**Judgement**"), in the matter of ***Reserve Bank of India v. Reliance Capital Limited [CP. (IB) No. 1231/MB/C-I/2021]*** held that indemnity obligations under an agreement is not a 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

22. Moreover, the Hon'ble Supreme Court of India in the case of **Narendra Kumar Maheshwari Vs. Union of India & Ors**., held that, "Any instrument which is compulsorily convertible into shares, is regarded as an "equity" and not a loan or debt."

23. From the facts of the case, based upon the indemnity the applicant is claiming himself as the financial creditor. The second contention is regarding buy back of shares.

24. In regard to the above averments and interpretation of the Section 5(8)(f), (h) and (i) this Tribunal is of the view that the debt claimed by the Applicant does not falls under the ambit of the Financial debt provided under the Section 5(8) of IBC, 2016. Therefore, the present petition is not maintainable and hence stands **Rejected** accordingly.

-SD-	**-SD-**
SAMEER KAKAR	**SHAMMI KHAN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Shubhanshu-LRA