

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**Company Petition No. (IB) – 547/(ND)/2023**

**IN THE MATTER OF:**

**GHV Advanced Care Pvt. Ltd.**

Third Floor, Capital Cityscape,  
Sector -66, Gurugram  
Haryana- 122101

**... Applicant/  
Operational Creditor**

**VERSUS**

**M/s Diyos Men's Health Centers Pvt. Ltd.**

A-1/26 F/F, Ch. Chhandu Singh Marg,  
Near Green Field School  
Safdarjung Enclave,  
New Delhi - 110029

**... Respondent/  
Corporate Debtor**

**Section: 9 of IBC, 2016**

**Order Delivered on: 09.02.2024**

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**

**SH. L.N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

**For the Applicant** : Adv. Richa Sharma, Mr. Kafil Malik AR, Mr. Jatin  
Sharma AR

**For the Respondent** : Adv. Fanish Kumar Rai, Adv. Gaurav

**ORDER**

**PER: SHRI ASHOK KUMAR BHARDWAJ**

The captioned petition has been preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the '**IBC, 2016**') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016, by GHV Advanced Care Pvt. Ltd. the **'Applicant/ Operational Creditor'**) praying therein to initiate the Corporate Insolvency Resolution Process against M/s Diyos Men's Health Centers Private Limited (for brevity, the **'Respondent/ Corporate Debtor/CD'**).

2. As stated in the Petition M/s Diyos Men's Health Centers Private Limited is a company incorporated in terms of the provisions of the Companies Act, 2013 with CIN U74999DL2016PTC302158 having its Registered Office at A-1 /26 F/F, Ch. Chhandu Singh Marg, Near Green Field School, Safdarjung Enclave, New Delhi – 110029, thus is amenable to the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent is Rs. 4,38,00,000/- and its Paid-up Share Capital is Rs. 4,37,00,000/-.

3. Stating tersely, the case of the Petitioner (Operational Creditor) is that the parties had executed an Agreement dated 11.03.2021 in terms of which the parties had agreed to provide jointly, the healthcare services to the patients, as per the terms and conditions including financial terms, as enumerated therein. It is the case of the Applicant that the parties had inter alia had agreed thus: -

- (i) Qua any patient brought in by Operational Creditor, the Operational Creditor shall be responsible for final bill to be raised on the patient, in coordination with Corporate Debtor.
- (ii) The Corporate Debtor will discharge the patient upon collection of dues from the patients/on agreement for mode of collection in consultation with Operational Creditor.

(iii) Regarding timely payment of dues, based on a timeline, as mutually agreed between the parties for the purpose of settlement of dues.

(iv) The Corporate Debtor could not outsource insurance claim submission for any cashless/ reimbursement patient without written consent of Operational Creditor.

4. To establish the existence of debt and default the Operational Creditor espoused thus:

4.1 The Corporate Debtor was making ad-hoc payments to Operational Creditor against the Bills, and the payments were duly credited in the books of accounts maintained by Operational Creditor. As per the books of accounts maintained by Operational Creditor, a sum of INR 1,19,70,302.04/- (Indian Rupees One Crore Nineteen Lakh Seventy Thousand Three Hundred and Two and Four Paise only) is due and payable by the Corporate Debtor to the Operational Creditor.

4.2 Accordingly, the officials of Operational Creditor had approached the Corporate Debtor on various occasions and demanded the payment of their dues. However, the Corporate Debtor failed to release the aforesaid acknowledged and admitted amount/debt.

4.3 On inspection of the Balance sheet for the year ended 2021-2022 qua the Corporate Debtor, it is observed that the CD acknowledged its liability for the amount of Rs. 55,70,635/- (Indian Rupees Fifty Five Lacs Seventy Thousand Six Hundred and Thirty Five only).

5. Since the Respondent defaulted in making the payment of operational debt, it served upon it Demand Notice dated 17.04.2023 under Section 8 of IBC, 2016, at the registered office of the Respondent vide speed post.

6. The particulars of amount of debt allegedly defaulted to be paid, by the applicant are mentioned in Part IV of the Application. The part reads thus:

Part IV

**Particulars of Operational Debt**

<p>I. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTION ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE</p>	<p>The Corporate Debtor has failed to release the admitted liability of INR.1,19,70,302.04/- (Indian Rupees one crore nineteen lac seventy thousand three hundred and two and four paise only).</p> <p>The Corporate Debtor and Operational Creditor had executed an Agreement dated 11.03.2021 whereunder the parties had agreed to jointly provide healthcare services to the patients, in furtherance to the terms and conditions including financial terms, as enumerated therein.</p> <p>It is stated that the parties herein, inter-alia others, agreed to the following responsibilities:</p> <p>(i) Any patient brought in by Operational Creditor, Operational Creditor shall be responsible for final amount to be raised to the patient in coordination with Corporate Debtor.</p> <p>(ii) The settlement of dues, as collected from the patients, shall be done by Corporate Debtor in consultation with Operational Creditor.</p>
	<p>(iii) The Corporate Debtor will discharge the patient upon collection of dues from the patients/on agreement for mode of collection in consultation with Operational Creditor.</p> <p>(iv) Assuring timely payment of dues, based on a timeline, as mutually agreed between the parties for the purpose of settlement of dues.</p> <p>(v) The Corporate Debtor will not outsource insurance claim submission for any cashless/ reimbursement patient without written consent of Operational Creditor.</p>

		<p>In view thereof, Operational Creditor used to raise its bill in furtherance to the Invoices raised by the Corporate Debtor upon the patients. Needless to mention that though the agreement executed by parties was for a period of One year, which expired on 11.03.2022, however, GHV continue to render its services to the Corporate Debtor till April, 2022.</p> <p>The Corporate Debtor was making ad-hoc payments to Operational Creditor against the Bills, and the said amount were duly credited in the books of accounts maintained by Operational Creditor. As per the books of accounts maintained by Operational Creditor, a sum of INR.1,19,70,302.04/- (Indian Rupees One Crore nineteen lac seventy thousand three hundred and two and four paisa only) is due and payable by the Corporate Debtor to the Operational Creditor.</p> <p>Accordingly, the officials of Operational Creditor had approached the Corporate Debtor on various occasions and demanded the payment of their dues, however, the Corporate Debtor has failed to release the aforesaid acknowledged and admitted amount.</p> <p>The Debt has fallen due on _____</p>
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	<p>Total amount of debt is INR. 1,19,70,302.04/- (Indian Rupees one crore nineteen lac seventy thousand three hundred and two and four paisa only) which become due from 21.04.2022 along with a running interest @24% from the date of default till the date of initiation of Corporate Insolvency Resolution Process.</p>

7. From perusal of the Part-IV of the Application (ibid) it is observed that the Applicant had claimed Rs. 1,19,70,302.04/- as an unpaid operational debt and has relied upon the date of 21.04.2022 as the date of default.

8. On issuance of Notice, the Respondent entered its appearance. Despite opportunities the Respondent failed to file its reply. In the wake its right to

file reply was forfeited vide order dated 30.11.2023. However, in the interest of justice the submissions put forth by the Ld. Counsel for the Respondent were heard.

9. The submissions of the Ld. Counsel for the Respondent as noted in order dated 05.12.2023, reads thus:

**ORDER**

Arguments heard at great length. Ld. Counsel for the Petitioner concluded his submissions. During the course of hearing, Ld. Counsel for the CD relied upon the Judgment of Hon'ble NCLAT in "2023 (147) taxmann.com Page 66". He is directed to produce a copy of the Judgment tomorrow. Ld. counsel for the CD also submitted that the principal amount is only Rs. 55 lacs and the remaining amount claimed by the CD is only the interest and as there is no contract for payment of interest, no interest is payable thus, the amount of interest cannot be alleged as defaulted to be paid. The argument that the principal amount due is Rs.55,70,635/- (Rupees Fifty-Five Lakhs Seventy Thousand Six Hundred and Thirty-Five) only is rebutted by Ld. Counsel appearing for the Petitioner, who submitted that the amount of Rs.1, 19, 70, 302.04/- (Rupees One Crore Nineteen Lakhs Seventy Thousand Three Hundred and Two and Paise Four Only) does not include even a single penny of interest.

In the wake of the order dated 18.10.2023 the right of the CD to file a reply is forfeited. Nevertheless, the Ld. Counsel Mr. Fanish Kumar Rai Ld. Counsel entered an appearance on behalf of the CD and produced his power, which is also not stamped. As there is representation of the CD, in the interest of justice, we heard the submissions made by him. Ld. Counsel for the CD shall also bring proper stamped Vakalatnama.

List on 06.12.2023.

In the meantime, it would be open to the parties to enter into settlement/reconciliation qua the amount mentioned in the petition, if any.

10. Additionally, the Ld. Counsel for the Respondent contended that the Agreement entered into between the parties was in the nature of profit sharing and the breach of a Profit-Sharing Agreement cannot be a ground to trigger CIRP. The Respondent further placed reliance on the Judgement of Hon'ble

NCLAT in the matter of **Prashanth Shekara Shetty vs. Alcuris Healthcare Private Limited & Anr** (Company Appeal (AT) (Ins.) No. 359 of 2022), dated 20.10.2022, the contents of which reads thus

“28. In the present matter, the clauses of the agreement entered between the two parties, who are described as “general profit sharing partners” therein, furnish the key to the minds of the makers of this agreement. The clauses of the agreement disclose an intent that both parties shall exercise joint control over the SRV Heart Centre and will be accountable to each other for their respective acts with reference to the functioning of the Cathlab. We also note that both the parties also combined their investments, property, efforts, resources, skill and knowledge in this unit. There are unmistakable signs of reciprocal rights and obligations contained in the agreement besides evidence of common participation/joint control in the management as well as sharing of profits and losses. When shared control of interest or enterprise and shared liability for profit and losses is so clearly manifested, it cannot be denied that both parties are implicit partners and co-adventurers in the Cathlab venture rather than one being a consumer and the other a service provider. From the material on record, facts and circumstances there arises no clear or unambiguous jural relationship between the two parties as one of Corporate Debtor and Operational Creditor. Rather both the Corporate Debtor and Respondent No. 1 are like the principal as well as the agent of the other party. This spirit is not only captured in the body of the agreement but also demonstrated in the actions and conduct of both parties in their role as “general profit sharing partners”. Thus, for the above reasons, we are not inclined to agree with the contention of the Respondent No. 1 that the outstanding amount so claimed constitutes an operational debt under the IBC. As we hold that the claim is not in the nature of Operational debt, we need not go further to examine whether there was any default in respect of a debt which had become due and payable and whether it was laced with pre-existing dispute.

29. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously admitted the application under Section 9 of the IBC. We therefore set aside the impugned order. The orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing Interim Resolution Professional and all other orders pursuant to impugned order are declared illegal and set aside. The Corporate Debtor company is released from the rigours of CIRP and is allowed to function independently through its board of directors with immediate effect. The appeal is allowed with the aforesaid observations. With this IA No. 1321 of 2022 also stands disposed of. No order as to costs.

11. The Applicant has rebutted the submissions made by the Respondent in its written submissions and has stated that the aforesaid Judgement of Hon'ble NCLAT is not applicable to the facts of the case. To buttress the plea a comparison has been drawn by the Respondent in its Written Submissions, the relevant excerpts of which reads thus:

<b><u>S.No.</u></b>	<b><u>Points laid in the Judgement</u></b>	<b><u>Position in the present case</u></b>
1	Both the Corporate Debtor and Operational Creditor entered into an <i>express joint venture</i> and created a separate unit all together	Both the parties entered into an agreement which neither by implication nor expressly is a joint venture
2	It was a <i>profit sharing agreement</i> as both the parties will be the <i>general profit sharing partner</i> & the profit is shared between both the parties	As per clause 16 of the Agreement CD will get 35% of the <i>settled amount</i> if settled amount is less then Rs. 78,000/- and 30% if it is more then 78,000/-  It is clearly mentioned in the agreement that 35% or 30% as the case may be of the amount received from the patient <u><i>it is not the profit share as profit can be arrived only after deducting cost from the amount received but in this case there is no role of profit a fix percentage from the accrued amount is shared by both the parties there is no express or implied calculation on profit in this case.</i></u>

		<p>Further the profit of both the parties can vary per transaction as per the cost incurred by both parties in each case which has no bearing with other parties' profit</p> <p>Further, in joint venture profit and loss is to be shared in a percentage by both the parties but in the present case the profit of both the parties are totally indifferent from each other and has no bearing on each other.</p>
3	<p><i>No invoice was ever raised as it was a profit sharing arrangement and partners in business can't raise invoice on each other.</i></p>	<p><i>In the present matter valid invoices were raised by the Petitioner / OC which was never disputed by the Respondent / CD, furthermore even the TDS was deducted by the Respondent / CD which is reflective in 26AS.</i></p> <p><u>It is a very clear position a partner in joint venture can't deduct TDS of other partner and a TDS can be deducted only if any service is provided.</u></p>

12. We have heard the submissions of the parties and have perused the documents placed on record. The Respondent has objected to the admission of the Application on the ground that the debt in question is not an operational debt, as the parties were working jointly to provide health care services to the parties. Further, the agreement executed between the parties was in the nature of profit sharing. To buttress the plea the Respondent has relied upon the Judgement of Hon'ble NCLAT (ibid). Per contra the Respondent has contended that the parties had not entered into a joint venture either expressly or impliedly. Further, there was no defined profit sharing ratio between the parties.

13. In order to resolve the controversy, it is necessary to examine the clauses of the Agreement relevant, with regard to intent of signing the agreement. Thus, we refer to the recital clause of the Agreement, the contents of which reads thus:

Agreement with Hospital

This agreement ("Agreement") is made at Gurugram, Haryana and executed on 11<sup>th</sup> March , 2021 between Diyos Hospital, having its registered address at A1/26, Safdarjung Enclave, New Delhi - 110029 ("First Party") and GHV Advanced Care Private Limited, a private limited company incorporated and existing under the Laws of India and having its registered office at 6<sup>th</sup> Floor, 54, Delta Towers, Sector 44, Gurugram 122002, Haryana. ("Second Party").

First Party and Second Party shall collectively be referred to as "Parties" and individually as "Party".

**WHEREAS:**

- A. The First Party is a registered and licensed hospital operating in the territory of Delhi.
- B. The Second Party is engaged in the business of surgeries in Proctology, Laparoscopy, Urology, General Surgery, Vascular, ENT, Orthopedics, Obstetrics & Gynecology and Cosmetic procedures.
- C. The Parties are desirous of entering into this Agreement to record their mutual agreement on the terms of cooperation for jointly providing health care services to prospective patients and the responsibilities of each party are set out as below. Further, the joint involvement of both the parties are essential for rendering health care services to the prospective patients.

From perusal of the above clause it is observed that both the parties have joined hands for providing health care services to prospective patients and joint involvement of both the parties were required for the same.

14. In order to examine the payment terms we refer to Clause 16 of the Agreement, the contents of which reads thus:

**16) Payment terms for health care service provided by Hospital:**

Following shall be the deductibles from the total cost of the surgery.

- a. In cash cases, 35% of the settled amount shall be First party's share if settled amount is less than Rs. 78,000/- & if settled amount is more than 78,000/- 30 % of the settled amount shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.
- b. In cashless cases of private insurances, 35% of the settled amount shall be First party's share if settled amount is less than Rs. 78,000/- & if settled amount is more than 78,000/- 30 % of the settled amount shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.


- c. In GIPSA cases, 35% of the settled amount shall be First party's share if settled amount is less than Rs. 78,000/- & if settled amount is more than 78,000/- 30 % of the settled amount shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.
- d. Second Party shall be allowed to use their own laser machine and other specialty equipment and instrumentation for the cases.
- e. Any implant/ consumable brought by second party will be excluded from the patient bill before reconciliation as per clause 16

Following shall be the deductibles from the total cost of the surgery for ortho surgery.

- f. In cash cases, 38.5% of the settled amount (excluding implants) shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.
- g. In cashless cases of private insurances, 38.5% (excluding implants) of the settled amount shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.
- h. In GIPSA cases, 38.5% of the settled amount (excluding implants) shall be First party's share including private room, OT, anesthetist, RMO, Medical & Non medical consumables, Lab and Radiology, PAC, nursing staff charges, equipment charges, PPE kit, patient and one attendant food and any other miscellaneous charges purporting to the patient without any major expense.
- i. Second Party shall be allowed to use their own laser machine and other specialty equipment and instrumentation for the cases.
- j. Any implant/ consumable brought by second party will be excluded from the patient bill before reconciliation as per clause 16

From perusal of the above the profit sharing was determined on case to case basis, like in cash cases, 35% of the settled amount was to be First party's share if settled amount is less than 35%. The aforesaid indicates that the Applicant and Respondent were profit sharing partners.

15. To further examine the transaction entered between the parties, reference may be made to one of the invoices raised by the Applicant, which reads thus:

BILL OF SUPPLY			
		GHV Advanced Care Pvt Ltd 5A, SECTOR 4 RING ROAD LAJPAT NAGAR, DELHI, South Delhi, Delhi, 110024 07AAHCG4389A12N	
		INVOICE No  IPDM/DL/21220666	Dated  31-01-2022
Bill to Diyos Hospital A1/26, Safdajung Enclave, New Delhi - 110029  GST No.			
Description of Service	HSN CODE	QTY	Amount (in INR)
Charges/share towards the health care services against IPDM DL 21220666	9993		1737692.96
Total			1737692.96
Amount Chargeable (in words) Rupees Seventeen Lacs Thirty Seven Thousand Six Hundred Ninety Two and Ninety Five Paises		For GHV Advanced Care Pvt Ltd  Authorised Signatory	
Company's PAN : AAHCG4389A Company's CIN No : U85300HR2018PTC075460  Remittance Details - A/c name: GHV Advanced Care Private Limited A/C No.: 50290033466575 FSC Code: HDFC0001202 Bank Name: HDFC Bank Limited Branch: DLF Galleria Branch		<small>This is computer generated invoice hence signature not required</small>	
<small>Corporate Office: 3rd Floor, Capital Cityscape, Sector-46, Gurugram, Gurgaon, Haryana, 122102</small>			

From perusal of the invoices the Applicant has claimed charges/share for providing health services. It is worth observing that the Applicant had not charged any GST in the invoice amount, which indicates that the Applicant had not supplied any services to the Respondent. Even otherwise, the recital clause and payment clause reflect that both the Applicant and Respondent were together supplying services to the patients. However, there was no inter se supply of goods or services amongst them. Hence, we are of the view that the debt of the Applicant does not fall in the category of operational debt

16. As there were clauses with respect to profit sharing and by implication, we are of the view that the arrangement between the parties was in the nature

of joint venture. **Ergo, the Application is found devoid of merits and is accordingly rejected.**

**Sd/-  
(L.N. GUPTA)  
MEMBER (T)**

**Sd/-  
(ASHOK KUMAR BHARDWAJ)  
MEMBER (J)**