

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 359 of 2022 &
I.A. No. 1321 of 2022

[Arising out of order dated 15.03.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-IV in CP(IB) No. 75/MB-IV/2020]

IN THE MATTER OF:

Prashanth Shekara Shetty

**Designated Partner of Abmay Health Ventures LLP,
Prior to the admission of the Petition**

Resident of:

Flat 552, Floor 12,

O Wing, Tara Pore Tower,

Oshiwara Mhada Colony,

New Link Road, Andheri(West),

Mumbai Maharashtra – 400053.

....Appellant

Versus

1. Alcuris Healthcare Private Limited

Having its registered office at:

2801, C Wing, Runwal Pride Co-op. Hsg. Soc. Ltd.

Behind R Mall, L.B.S. Marg, Mulund (West),

Mumbai Maharashtra – 400080.

....Respondent No.1/OC

2. Abmay Health Ventures LLP

Through its Interim Resolution Professional

Mr. Sanjay Shrivastava

205 B Suraksha Apartment

Hindustan Colony, Amravati Road, Nagpur,

Maharashtra – 440033.

Also at:

**A301, BSEL Tech Park, Sector 30A,
Opposite Vashi Railway Station, Vashi,
Navi Mumbai – 400705.**

.....Respondent No. 2/CD

Present:

**For Appellant: Mr. Abhijeet Sinha, Mohd. Umar, Mr. Aditya Shukla,
Advocates**

For Respondents: Ms. S. Janani and Mr. Nishant Kumar, Advocates

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (**'IBC'** in short) by the Appellant arises out of order dated 15.03.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-IV) in C.P.(IB) No. 75/MB-IV/2020. By the Impugned Order, the Adjudicating Authority admitted the Section 9 application under IBC filed by the Operational Creditor and initiated Corporate Insolvency Resolution Process (**'CIRP'** in short) against the Corporate Debtor with immediate effect. Aggrieved by this impugned order, the present appeal has been preferred.

2. The brief factual matrix of the case is that an Agreement dated 02.12.2015 was entered into between the Metro Heart Centre Pvt. Ltd. (MHCPL), later known as “Alcuris Healthcare Pvt. Ltd.”, the present Respondent No. 1 and “ABMAY Health Ventures LLP”, the Corporate Debtor creating a joint venture named “SRV Heart Centre - unit of MHPCL”. The heart centre as a unit became functional as per the terms of the agreement w.e.f. January, 2016. Over a period of time, differences arose between the two parties on various issues such as settlement of accounts, calculation of profit sharing ratio etc. Claiming outstanding dues as operational debt, Demand Notice under Form-3 of the IBC was sent by Respondent No. 1 to the Corporate Debtor on 07.12.2019. The Corporate Debtor sent an interim reply to the Demand Notice on 17.12.2019. A police complaint was also filed against the Corporate Debtor by Respondent No. 1 on 11.01.2020 arising out of the disputes between the parties. In addition a Legal Notice invoking Arbitration Clause for recovery of outstanding amounts was sent to the Corporate Debtor by Respondent No.1 on 16.01.2020 and Section 9 petition under Arbitration and Conciliation Act was filed by Respondent No. 1 on 24.01.2020 seeking interim relief. The Hon’ble High Court of Bombay disposed of the Section 9 petition under Arbitration and Conciliation Act on 26.02.2020 and appointed an Arbitrator to decide the dispute and differences between the parties. An application under Section 11 of Arbitration and Conciliation Act was filed by Respondent No. 1 on 30.06.2021 which was dismissed on 17th August, 2021 following which petition under Section 15 of the said Act was filed on

21.09.2021 by Respondent No. 1. The Adjudicating Authority admitted the Section 9 application under IBC filed by the Operational Creditor and initiated CIRP against the Corporate Debtor vide impugned order on 15.03.2022.

3. Making his submissions, the Learned Counsel for the Appellant stated that the agreement entered between the Corporate Debtor and Respondent No. 1 was a Profit Sharing Agreement. It was emphasized that the agreement between the two parties clearly states that *“the parties agree to the following:-*

“Abmay Health Ventures LLP” and “SRV Heart Centre of MHCPL” will both be the general profit sharing partners of the Cath Lab & Cardiac Surgery Department of SRV”.

From the above clause, it is clear that the agreement between both the parties was for the purpose of profit sharing and that the Corporate Debtor and Respondent No.1 were profit sharing partners. It was therefore contended that failure or breach of such a Profit Sharing Agreement cannot be a ground to trigger CIRP.

4. Elaborating further on the said agreement between the parties, it was explained that the arrangement was that the Corporate Debtor and Respondent No. 1 were to collaboratively operate a cardiology unit under the name of “SRV-

Heart Centre Unit of MHCPL” with both parties having shared responsibilities. The Corporate Debtor was responsible for maintaining the operations administration and operations for the unit while the Respondent No. 1 was to maintain technical operations of the unit. In terms of the agreement, patients who required heart procedure were directed to the Cathlab Unit and profit accruing from the fee charged from the patients was shared between the two parties as per the terms of the agreement.

5. It has been also submitted that after an initial period of operationalization of this Profit Sharing Agreement, differences and disputes arose between the parties. Respondent No. 1 started failing to deliver on their responsibilities such as arranging cardiologist and cardiac surgeons, mal-functioning of Cathlab Machine, inability to maintain necessary equipment essential for the procedure etc. The Learned Counsel for the Appellant also stated that Dr. Ajay Pandey, who was an employee of the Respondent No. 1 had been breaching the Profit Sharing Agreement by unilaterally giving heavy discounts selectively to the patients. The resignation of Dr. Ajay Pandey later and the resultant vacancy in the Cathlab led to the non-operationalization of Cardiac Surgery Department by more than two months thereby causing loss of revenue to the joint venture impacting the profit-sharing formula. The Learned Counsel for the Appellant has relied on the judgement of this Tribunal in **“AS Techno Soft Pvt. Ltd.” Vs. “Gold Squares India Pvt. Ltd.” in Company Appeal (AT) No. 331/2017** that the supply of

sub-standard quantities is a ground for dispute under the IBC and that in the present case there were several material breaches by Respondent No. 1.

6. It has been further submitted that there also arose difference in the understanding of the parties on profit sharing and the manner in which the profit sharing calculation was carried out. It has been stated that this dispute with respect to rates and the calculation was raised on various occasions including the list of patients generated from the machine and on stent-pricing. That there was pre-existing dispute is substantiated by the e-mail dated 23.06.2018 sent by the Respondent No. 1 to the Corporate Debtor where the Excel sheet calculation in column 6 has been made "*as per SRV MHCPL share*" while column 8 calculation was done "*as new account as per MOU*" thus reflecting disagreement between calculations made by the Corporate Debtor and that by the Respondent No. 1.

7. Moreover, it was argued that the claim incorporated by the Respondent No. 1 in the Demand Notice was not in conformity with the terms of the agreement and the calculations made by the Respondent No. 1 are full of lacunas and actually an "*estimated*" share. Furthermore, the Corporate Debtor was to share the profit based on the total billing and on the patient foot-fall. It is further claimed that as per the terms and conditions of the Profit Sharing Agreement,

the Corporate Debtor had paid the due share of Respondent No. 1 as per Profit Sharing Agreement of an aggregate sum of Rs. 3,50,83,400/- which has been admitted by the Respondent No. 1 in Form-5. The present dispute is due to difference in calculation; breach of representation and warranties in the Agreement by the Respondent No. 1; differences in the total number of patients treated and failure on the part of Respondent No. 1 to crystallize its claim as no invoice was ever raised. The quantum of claim by the Respondent No. 1 was alleged to be over-estimated and mala-fide.

8. The Learned Counsel for the Appellant claimed that till date no invoice has been provided by the Respondent No. 1 to the Corporate Debtor and that though he was called upon to share the invoices in support of the amount claimed in the Demand Notice but no invoice has been provided. It has also been stated that there was actually no need for the Respondent No. 1 to raise any invoice in terms of the Profit Sharing Agreement as the relationship between the two parties was that in an un-registered partnership and not that of a service provider and service recipient. If the Respondent No. 1 was providing goods/services to the Corporate Debtor, only then it ought to have raised invoices to that effect.

9. It has been admitted by the Learned Counsel for the Appellant that two payments of Rs. 5 lakhs each were made on 30.11.2019 and 31.12.2019 but

that these payments were made on the last date of the months which was towards profit sharing. These payments were claimed to have been made even before the issue of the Demand Notice and therefore has no link with admission of any debt. These were in the nature of advance amounts deposited by the Corporate Debtor time and again with the Respondent No. 1 as running costs which was liable to be adjusted at a later period and that this was in the knowledge of the Operational Creditor from the beginning and later also clarified by the Corporate Debtor in the reply to the Demand Notice dated 23.01.2020.

10. It was vehemently argued by the Learned counsel for the Appellant that deduction of tax under Section 194-J of the Income Tax Act, 1961 cannot be criteria for assuming that the relationship of the Corporate Debtor with Respondent No. 1 is that of a recipient of service and that of service provider. Furthermore, it is submitted that tax deduction under Section 194-J is not limited to technical services alone but covers other heads of deduction and TDS deduction was mutually agreed upon by both the parties not only in the Profit Sharing Agreement but also with a view to avoid further litigation and tax demands in income-tax assessment proceedings. Further, it has been contended that if TDS deduction is viewed as criteria for treating the Respondent No. 1 as service provider, then it ought to have enjoined upon the Respondent No. 1 as a service-provider and the Corporate Debtor as Receiver of Services to be registered

under the GST. But in the instant case, neither the Corporate Debtor nor the Respondent No. 1 raised any invoice which contains GST Registration.

11. Relying on the judgement of this Tribunal in **“Drulum India Pvt. Ltd.” Vs. “Sharma Kalypso Pvt. Ltd.” in Company Appeal (AT) 351/2018** it has been added that the estimated share of Respondent No. 1 as per Form-5 does not reflect the calculations as per profit-sharing agreement, hence, it is a foundation to establish existence of dispute. Moreover pre-existence of disputes is well established by the fact that the Respondent No. 1 had invoked the Arbitration on 16.01.2020 prior to filing of Section 9 petition under IBC before the Adjudicating Authority. The pre-existence of dispute is fortified by the fact that the Respondent No. 1 invoked arbitration under Arbitration Clause as contained in Profit Sharing Agreement which is still pending at the stage of cross-examination. Having already invoked Arbitration, the Respondent No. 1 cannot do forum shopping and seek resolution of a dispute which squarely falls outside the purview of IBC. It is also submitted that there are police cases filed against each other which shows pre-existing dispute.

12. Rebutting the aforesaid submissions, the Learned Counsel for the Respondent stated that the Agreement between the two parties has to be interpreted by the terms and conditions contained therein, the intention of the

parties and the interpretation as demonstrated by the conduct of the two parties in implementing the agreement.

13. The agreement between the two parties clearly show that the Respondent No. 1 was to provide service in the form of Cathlab Machine for which charges were to be paid by the Appellant/Corporate Debtor to the Respondent No. 1 and the arrangement was thus one of income-sharing and not Profit Sharing. It is also submitted that the payment entries made by the Corporate Debtor to the Respondent No. 1 were booked as Cath Lab Expenses in their ledger and not as sharing of profits. Further the fact that the Corporate Debtor deducted TDS under Section 194-J of the Income Tax Act for four years is corroborative that this was not a Profit Sharing Agreement but an income sharing arrangement wherein the Respondent no. 1 is a service-provider.

14. The agreement provided for payment of fees to Respondent No. 1 according to the service/procedure performed. The Corporate Debtor used to raise the invoice and collect the payment from the patients and thereafter made payment to Respondent No. 1. All bills and invoices were raised by the Appellant and the payment was also received by the Appellant from the patients thereafter the Appellant made payment to the Respondent on weekly basis and as per the terms

of agreement. Moreover, since the Respondent No. 1 was providing service, the outstanding amount becomes an operational debt.

15. It has been added that from January, 2016 to March, 2018, the Corporate Debtor issued bills to the patients for using the Cathlab equipment owned by Respondent No. 1 and send details of invoice to Respondent No. 1. The Corporate Debtor shared fees with Respondent No. 1 in terms of the agreement signed between the two parties and that the amount of fees payable by the Corporate Debtor to Respondent No. 1 for past five years aggregated to Rs. 3,63,39,186/-. However, from April 2018, the Corporate Debtor stopped sending details of the bills generated on the patients to Respondent No. 1. The Respondent No. 1 has raised a total amount of bill aggregating to Rs. 8,00,20,864/-. It has been denied that the claim is over estimated. Moreover the Corporate Debtor by their own statement at page-233 of Appeal Paper Book had admitted outstanding amount of more than Rs. 16,000/- and also paid Rs. 5 lakhs each on 30.11.2019 and 30.12.2019. Further, the fact that the Corporate Debtor had transferred Rs. 5 lakhs to the Respondent No. 1 itself shows acceptance of liability of more than Rs. one lakh.

16. On the issue of pre-existing dispute, it has been stated that Respondent No. 1 had issued the Demand Notice on 07.12.2019 following which the

Corporate Debtor submitted interim reply on 16.12.2019 followed by a final reply on 31.12.2019. In the reply, the Corporate Debtor had admitted the operational debt without however agreeing to the amount stated in the Demand notice. As regards certain e-mails referred to by the Corporate Debtor to substantiate existence of dispute in the year 2018, it has been pointed out that these were not mentioned in the reply to the Demand Notice and that they have been filed for the first time before this Tribunal and that the Adjudicating Authority had no occasion to consider these e-mails. Learned counsel for the Respondent No. 1 has raised objections to reply being sent in two stages and that this is in contravention of the IBC provisions. It has also been stated that this is the only dispute raised by the Corporate Debtor in four years of association between the two parties. As regards the arbitration proceedings as a ground to show existence of dispute, it has been clarified that this was initiated after the Section 9 petition and was not confined to the disputed amount only but for restraining the Corporate Debtor from removing the Cathlab Machine and other equipment unilaterally from the hospital.

17. It has also been stated that non-raising of invoice cannot be a tenable ground for rejection of Section 9 petition since raising of invoice is not mandatory and buttressing their stand has relied on the judgement of the **Hon'ble Supreme Court in M/s Consolidated Construction Consortium Vs. M/s Hitro Energy Solutions Private Ltd.**” As regards the contention of the Appellant that there

was material breach on account of giving of discount by Dr. Ajay Pandey, it was stated that it cannot be a ground for dispute since it was a discount given to poor and needy patients and the hospital was being run for the benefit of general public. It has been contended that even after resignation of Dr. Ajay Pandey, there was a continuous flow of patients as can be evidenced from the register of patients and output from Cathlab equipment and hence a frivolous ground of dispute raised by the Corporate Debtor. Moreover, it is denied that there was any deficiency on the part of Respondent No. 1 in the working of Cathlab and that the Appellant had not enclosed any document evidencing deficiencies. On the cost of stents, it was stated that the same was to be recovered from patients and hence cannot be the subject matter of dispute. Moreover, all charges were as per the Government prescribed rate and there is no documentary evidence enclosed by the Corporate Debtor showing dispute in rate difference having been raised and that not even a single mail or letter has been enclosed stating that the calculation of outstanding dues was wrong.

18. We have duly considered the detailed arguments and rival contentions advanced by the Learned Counsel for both the parties and perused the records carefully.

19. The primary issue before us for our consideration is whether claim raised by the Respondent No. 1 is actually an operational debt and whether the said

operational debt exceeds an amount of Rs. 1 lakh. Only after we arrive at a determinative opinion on this aspect that we may then proceed to examine whether the debt has become due and payable and if any default has been committed by the Corporate Debtor in respect of payment of such operational debt and if so whether such debt is hemmed by any pre-existing dispute. This examination would be in consonance with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Ltd. (2018) 1 SCC 353** for the Adjudicating Authority while examining an application under Section 9, the relevant excerpts of which are as follows:-

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the

adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

20. To apply the Mobilox test, at this stage, we may first look into the provisions of the IBC to find out as to how ‘Operational Creditor’ and ‘Operational Debt’ is defined and thereafter have a look at the salient relevant clauses of the agreement entered between the SRV Heart Centre Unit of Metro Centre Pvt. Ltd. (MHCPL) and SRV Hospital to better appreciate the relationship between the Corporate Debtor and Respondent No.1.

21. **Section 5(20)** of the IBC lays down that unless the context otherwise requires “**operational creditor**” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred and **Section 5(21)** provides that “**operational debt**” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

22. From a plain reading of the above definition of operational debt, it is clear that it is a claim in respect of provisions of goods or services including dues on

account of employment or a debt in respect of repayment of dues arising under any law for the time being in force payable to Centre or State Government or local authorities. It is, thus, confined to four categories viz. goods, services, employment and Government dues. We therefore need to examine whether in the background of the agreement signed between the two parties as extracted above, the claim of the Respondent No. 1 falls within the purview of operational debt and whether the admission of the Section 9 petition under IBC by the Adjudicating Authority is legally tenable in the present case.

23. For this purpose, we may now turn our gaze towards some of the salient features of the agreement entered between the SRV Heart Centre Unit of Metro Centre Pvt. Ltd. (MHCPL) and SRV Hospital which have a bearing on the present matter and recite them as follows:

The parties agree to the following:

“ABMAY HEALTH VENTURES LLP” and “SRV Heart Centre of MHCPL” will both the general profit sharing partners of the Cathlab and Cardiac Surgery department of SRV Hospital. Whereas “SRV Hospital” agreed to outsource the Cathlab and Cardiac Surgery department to SRV Heart Centre Unit of MHCPL situated at Plot No. 178, Jawahar CHS Ltd., Jawahar Nagar Road No. 2, Kamala Charan Building, Near Railway

Station, Goregaon (W) Mumbai – 400062 on following terms and condition:-

“SRV Hospital” will be responsible for:

- 1. Providing premises for Cathlab;*
- 2. Providing electrical supply for Cathlab room as per the requirements of the Cathlab in conjunction with SRV Heart Centre and the Cathlab equipment manufacturer. Providing Airconditioning and lighting system at Cathlab Room.*
- 3. One administration room – Please specify requirement of administration Room*
- 4. Providing the Major Operation theatre of SRV Hospital for the purpose of using it for cardiac operation and providing the Ventilator & IABP machine.*
- 5. CSSD facility.*
- 6. Be responsible to provide hospitalization of Post cardiology or cardiac surgery patient into general, ICCU and Post-surgical ICU department and provide medical & nursing care for the same.*
- 7. Providing Hospitalization of any allied Cardiac Patient for medical care under care of SRV Heart Centre Unit of MHCPL (Subjective to availability of Bed at SRV Hospital).*

“SRV Heart Centre unit of MHCPL” will be responsible for:

1. *Providing Electrical system for Cathlab with Earthing system and interior of the cathlab including lighting and airconditioning.*
 2. *Purchasing of a Cathlab and install at SRV Hospital.*
 3. *To arrange all the necessary equipment for Cathlab.*
 4. *To install all the necessary equipment to the major operation of SRV Hospital (except the equipment SRV Hospital already having) for cardiac, surgery – Heart Lung Machine, BTCO2*
 5. *Performing all the angiography, angloplasty, pacemaker insertion other allied cathlab procedure and cardiac surgery.*
 6. *Arranging Cardiologist, Cardiac surgeon, Anesthetics, Technician & Administration – Please detail out role of administration. Additionally costs related to cardiologist, cardiac surgeon, anesthetics, technician bought in by Metro will be borne by Metro. The hospital staff and technicians will be (illegible and smudged)*
- Income sharing offer: Both the parties broadly agree on the below mentioned charges and sharing ratio. The same can be reviewed every six months and can be changed if required by both the parties agreeing in writing.*

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Discount to patients:- Any discounts to be given to any patient deviating from the above charges mentioned have to be ratified by authorized personnel from both the parties.

Some of the other salient additional points are:

- Vendor payment & GR payment policy to be in line with the hospital policy. MHCPL will ensure that all liabilities and risks arising from payments to vendors & G.P's to the SRV Heart Centre will be the responsibility of MHCPL.*
- Any medico-legal issues, staff related issues who are working under cardiology center will be complete responsibility of Metro.*
- The billing system for the SRV Heart Centre will be through hospital used software-21st Century-All settlements of payments from MHCPL to SRV Hospital or from SRV Hospital to MHCPL will be done on a weekly basis. Simultaneously, all settlements of pharmacy & pathology bills will be done on a weekly basis.*
- All risk insurances in line with the hospital policies to be taken by Metro.*
- Any discounts to be given to patients from the agreed pricing as mentioned above will be on a case to case basis and will be needed to agreed upon by authorized personnel from both parties.*

- *Duration: The duration of the Contract shall be for Five years with a lock in for three years. The Income sharing part can be reviewed every year with mutual discussion by both the Party.*
- *The above payment if liable for Tax Deduction at Source under Income Tax Act, 1961 will be deducted and balance payment will be made.*
- *The parties agree that any dispute which may arise regarding the activities or any other issue will be settled by mutual discussion or through arbitration.*
- *The parties may mutually agree to modify this agreement at any time with six months' prior notice.*

24. We also find that the Corporate Debtor on 30.12.2019 in their second reply to the Demand Notice issued by the Respondent No. 1 has contested that the Respondent No. 1 was not a provider of goods and services and that the claim made is not therefore an operational debt. The excerpts from the letter is as reproduced below:

“Our Client states that your client is not Operational Creditor as your client has not provided any goods or services to our Client. In fact, our Client had entered into an agreement dated December 2, 2015 with your client for sharing income / profit and expenses arising out of running of Cathlab and

Cardiac Surgery Department in the premises situated at Plot no. 3/178, Jawahar C.H.S. Ltd., Jawahar Nagar Road No. 2, Kamla Charan Building, Goregaon (W), Mumbai 400062(Hospital) owned by our Client. Therefore, whatever your client is claiming through the Demand Notice is nothing but a claim with respect to profit/income earned out of the business arrangement which both the parties had between them by virtue of the Agreement. Therefore, the alleged claim under the Demand Notice is not Operational Debt under the provisions of Insolvency and Bankruptcy Code and hence your client is not operational creditor under the provisions of Insolvency and Bankruptcy Code thereby has no right to issue the Demand Notice under the provisions of Insolvency and Bankruptcy Code.”

25. We also note that the Corporate Debtor had strongly pleaded before the Adjudicating Authority that the Respondent No. 1 did not provide goods and services to them and neither raised any invoices and hence in the absence of operational debt, the jurisdictional precondition for initiation of Section 9 IBC proceedings was non-existent. It was also urged that since this was a dispute arising out of a profit-sharing arrangement, it is either for the Commercial Court

to go into the details or be resolved by invoking the Arbitration clause as provided in the Agreement.

26. While we do not agree that invoices are to be necessarily raised by any Operational Creditor in support of their claim for outstanding dues, we find that the Adjudicating Authority has rather cursorily glossed over the other arguments raised by the Corporate Debtor in this regard and merely on the pretext that the Respondent No. 1 had supplied Cathlab equipment to the Corporate Debtor and made payments of Rs. 5 lakhs on 30.11.2019 and 30.12.2019 before and after the issue of Demand Notice has proceeded to admit the Section 9 petition.

27. It is of paramount importance to keep in mind the objectives of IBC which is, inter-alia, to promote entrepreneurship, maximize value of assets, make available credit, and balance the interest of all stakeholders, in a time bound manner. It is therefore equally important to always remain alert and cautious so as to prevent any stakeholder from taking any undue benefit of the provisions of the IBC and obligates that the nature of transactions alleged in a Section 9 petition gets properly examined and analysed so that the Corporate Debtor is not dragged into the rigours of the CIRP for facile reasons.

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
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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.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 20.10.2022

Shashi

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