IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – II, CHENNAI
CP(IB)/102(CHE)/2023

(Filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of Insolvency and Bankruptcy Application to Adjudicating Authority Rules 2016)

GIRIAS INVESTMENT PRIVATE LIMITED,
No.47, 3rd Floor, 3rd Main,
15th Cross Margosa Road,
Malleshwaram, Bangalore – 560 003.

… Financial Creditor

ARIHANT RETAIL PRIVATE LIMITED,
92, G.A.Road,
Madras – 600 021.

… Corporate Debtor

Order Pronounce on ***16th February 2024***

CORAM

SHRI JYOTI KUMAR TRIPATHI, MEMBER (JUDICIAL)
SHRI RAVICHANDRAN RAMASAMY, MEMBER (TECHNICAL)

Present:
For Financial Creditor :Mr.Anand Merathia Advocate
For Corporate Debtor :Mr.V.Thayalan, Advocate

ORDER

This Application has been filed under Section 7 of Insolvency and Bankruptcy Code, 2016 by **GIRIAS INVESTMENT PRIVATE LIMITED** (hereinafter referred to as Financial Creditors) seeking to initiate Corporate Insolvency Resolution Process against **ARIHANT RETAIL PRIVATE LIMITED** (hereinafter referred to as ''Corporate Debtor').

2. In Part-I of the Application it is averred that Applicant/ Financial Creditor is a private limited company incorporated under the Companies Act, 1956.

3. Part-II of the application states that the Corporate Debtor is a private limited company incorporated under the companies Act, 1956. The Registered office of the Corporate Debtor is at 92, G.A.Road, Madras – 600 021, which is under the jurisdiction of this Tribunal.

4. In Part – III the Applicant has proposed Mr. S.Gopalakrishnan having registration No. IBBI/IPA-002/IP-N00151/2017-18/10398 to act as the Interim Resolution Professional.

5. Part – IV of the Application stated that the amount in default is Rs.2,72,35,376/- in which Principal is Rs.2,71,00,000/- and the interest amount is Rs.1,65,376/-. The Date of Default is mentioned as 18.01.2023.

6. It is averred in the application that the Corporate Debtor is in the business of Retail trading of Readymade and clothing material. The Corporate Debtor and the Financial Creditor entered in to a License Agreement dated 15.11.2014 providing license to the Applicant to utilize Shop No.2 at Ground Floor in Harbour Square (hereinafter referred to as property) for a license term of 12 years. The Financial Creditor had paid Rs.44,50,000/- as interest free refundable security deposit to the Corporate Debtor.

7. It is stated that the Financial Creditor and the Corporate Debtor entered in to another supplemental agreement wherein

from 01.04.2016 the license fee was revised to Rs.18,750/- per month. Pursuant to that afore stated security deposit Rs.44,50,000/- has been returned to the Applicant. Subsequently, The Financial Creditor provided Rs.2,69,50,000/- to the Corporate Debtor as interest free security deposit.

8. It is stated that the Financial Creditor received a notice dated 29.04.2021 from LIC Housing Finance Limited demanding the Corporate Debtor to pay the outstanding of Rs.54,96,31,528.41/-. Subsequently, issued the possession notice dated 04.12.2021.

9. It is stated that the Financial Creditor received a notice dated 04.09.2021 from Greater Chennai Corporation demanding the Financial Creditor on behalf of the Corporate Debtor to pay the outstanding property Tax of Rs.4,84,589/- that has been levied on the Property.

10. It is further stated that the water and sewerage connection to the property was disconnected by the Chennai Metropolitan Water Supply and Swerage Board (CMWSSB) due to non-payment of statutory dues of Rs.6,07,880/-. In order to continue the business in the property the Financial Creditor paid rs.1,50,000/- to the CMWSSB to restore the water and sewerage connection.

11. In a sequence, the Financial Creditor faced the same problem with the Electricity Department. Further the Financial Creditor

learned that the Notice under Section 13(4) of SARFAESI Act, 2002 has also been affixed on the premised of the Property.

12. Aggrieved by the aforestated incidents, the Financial Creditor issued notice dated 27.05.2022 to the Corporate Debtor demanding to repay the security deposit paid by the Financial Creditor. In reply, the Corporate Debtor vide letter dated responded that it is not a proper financial position to pay the security deposit.

13. Thereafter, vide letter dated 22.06.2022 the Financial Creditor indicated its intension to vacate the property and demanded the repayment of the Security Deposit and other outstanding dues liable to be paid to the Financial Creditor. In addition to that the Financial Creditor offered an option to convert the Security Deposit and other outstanding to be paid as a loan with an interest rate of 15% per annum.

14. The Corporate Debtor vide letter dated 28.06.2022 accepted to convert the Security Deposit and other outstandings into loan but requested to reduce the interest to 12% per annum which was accepted by the Financial Creditor vide letter dated 02.07.2022.

15. Thereafter, the Financial Creditor and the Corporate Debtor entered into a Loan Agreement dated 15.07.2022. The tenure of the repayment of loan was agreed as 36 months from 05.08.2022 to 05.07.2025 with the equated monthly instalment (EMI) of Rs.7,52,777.77/-. In furtherance to the Loan Agreement the

Director of the Corporate Debtor herein executed a Personal Guarantee Agreement on 17.07.2022 in favour of the Financial Creditor.

16. It is stated that the Corporate Debtor failed to pay the EMI as agreed in the Loan Agreement. Despite various communications the Corporate Debtor failed to pay the dues to the Financial Creditor. Aggrieved by the default of the Corporate Debtor the Financial creditor preferred this application to initiate CIRP against the Corporate Debtor.

17. Upon notice Ld.Counsel Mr.Vishal Surana appeared for the Corporate Debtor. Despite several opportunities given by this Tribunal the Corporate Debtor not filed its reply. This Tribunal vide order dated 04.09.2023 gave last opportunity to file subject to the payment of Rs.25000/-. On 30.11.2023 the Ld. Counsel Mr.V.Thayalan appeared for the Corporate Debtor and confirmed that neither reply was filed nor the cost imposed was complied.

18. Heard the submissions of Ld. Counsels of both the parties and perused the documents on record.

19. At the outset it is seen that this Tribunal vide order dated 30.06.2023 directed the Financial Creditor to file the Record of Default from the Information Utility. Complying the same the Financial Creditor field the Record of Default vide SR.No.3239

dated 01.08.2023 along with the affidavit. The Record of Default is reproduced under,

NeSL India's First Information Utility NATIONAL E-GOVERNANCE SERVICES LIMITED

FORM D
RECORD OF DEFAULT(RoD)

(Issued By information utility under sub- regulation (4) of regulation 21 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017)

This Record of Default is issued to the Financial Creditor M/s GIRIAS INVESTMENT PRIVATE LIMITED in respect of the default of debt as per details given below-

(a) Name of the Submitter:	M/s GIRIAS INVESTMENT PRIVATE LIMITED
(b) Schedule-2 Bank (Y/N):	N
(c) Name of Corporate Debtor:	M/s ARIHANT RETAIL PRIVATE LIMITED
(d) Unique Debt Identifier Number:	AABCG3246Q_00040120000864
(e) Registered Address:	No.47, 3rd Floor, 3rd Main, 15 th Cross Margosa Road, Malleshwaram, Bangalore
(f) Total Outstanding Amount:	27235376.00
(g) Default Amount:	27100000.00
(h) Date of Default:	18-01-2023
(i) Status of Authentication of Default:	DEEMED TO BE AUTHENTICATED

Filing of Default(Submission ID No.)	Submitted on	Status of Authentication(Authenticated /Disputed/Deemed to be authenticated)	Authentication completed on
(2)	13-06-2023 20:42:02	*DEEMED TO BE AUTHENTICATED Colour Code :YELLOW	09-07-2023 10:16:54

NeSL is authorized to issue this record of default and has accordingly affixed its digital signature, as per the provisions of the Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, Guidelines for Technical Standards for Performance of Core Services and Other Services and the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2017.

The Record of Default clearly shows that that the status of authentication is marked as "Deemed to be Authenticated". Thus, it is clear that the debt and default is authenticated after giving reasonable opportunities to the Corporate Debtor.

20. On the other hand it is noticed that in the Supplementary Lease Agreement the Applicant provided Rs.2,25,00,000/- to the

Corporate Debtor as interest free security deposit and the Supplementary Lease Agreement came to force on 01.04.2016. Relevant extract of the said Agreement is extracted under.

Both the parties agreed to the below mentioned terms and conditions:

1. The License fee shall be revised to Rs 18750/- (Eighteen thousand seven hundred and fifty only) per month.(exclusive of all rates & taxes, present and future).

2. The licensee shall give further interest free deposit for Rs 22500000/- (Rupees Two crore twenty five lacs only) dated 1.4.2016, which shall be returned by the licensor on the termination of the agreement.

3. After the end of 5 Years from the date of original agreement, the licensor and licensee shall mutually decide whether to go ahead as per original license agreement or as per supplemental license agreement.

4. All the other terms and condition of the license agreement dated 15th November 2014 shall be in force.

5. The supplemental agreement shall come in force from 1.4.2016.

21. Thereafter, in the Loan Agreement dated 15.07.2022, it is seen that the Lender (the Applicant herein) vide licence agreement dated 15.11.2014 paid total sum of Rs.44,50,000/- towards interest free refundable Security Deposit to the Corporate Debtor. The Lender paid Rs.1,50,000/- as cost towards water and sewage board on behalf of the Corporate Debtor. Further it is seen that the Lender (the Applicant herein) agreed to convert the outstanding due to a short term loan of Rs.2,71,00,000/- with the interest of 12% per annum. Relevant extract of the Loan Agreement is reproduced under.

C. The Lender had initially approached the Borrower seeking permission to use the shop No.2 situated on the Ground Floor of Harbour Square Mall, No.18, Cemetery Road, Old Washermanpet, Chennai 600021 and entered into a Licence Agreement with the Borrower dated 15.11.2014 for a period of 12 years.

D. That the Lender vide the License Agreement dated 15.11.2014 had paid a total sum of Rs. 44,50,000/- (Rupees Forty Four Lakhs and Fifty Thousand) towards interest free refundable Security Deposit to the Borrower vide Cheque bearing number 021533 dated 15.11.2014 drawn on HDFC Bank.

F. That further during the tenure of the License Agreement, the Lender was made to pay Rs.1,50,000/- as costs towards the Water Supply and Sewage Board vide receipt No. 0197532 dated 25.10.2021 and receipt No. 0223145 dated 17.11.2021 on behalf of the Borrower.

G. Due to the inaction and lack of proper maintenance of the premises on part of the Borrower, the Lender started facing multiple difficulties making it difficult to operate from the Lease premises.

H. Therefore, the Lender terminated the Licence Agreement and the Supplemental License Agreement vide Legal Notice dated 27.05.2022 and sought for a return of a total sum of Rs. 2,71,00,000/- (Rupees Two Crores Seventy-One Lakhs only) which includes the Interest free Security Deposits and the costs incurred by the Lender on behalf of the Borrower.

I. Due to its distressed financial situation, the borrower requested the Lender, to convert the amounts payable to be converted into as a Loan in the nature of a commercial borrowing to be repaid by the Borrower to the Lender at interest calculated at 12% per annum, where time is of the essence .

J. Considering the financial difficulties being faced by the Borrower, the Lender has hereby agreed to covert the outstanding amounts due and payable to a Short-Term Loan of Rs. 2,71,00,000/- (Rupees Two Crores Seventy-One Lakhs only) with interest calculated at 12% per annum and to be repaid in 36 equal instalments within 36 months and the Borrower hereby accepted the terms of the Loan and agreed to repay the amount along with all the interest, charges and dues, in view of the changed circumstances.

22. From the above it is understood that the original transaction between the Applicant and the Corporate Debtor is an interest free

security deposit for availing lease in the property of the Corporate Debtor.

23. In the backdrop, we turn to relevant provision of IBC, 2016.

> **"Section 5 Definition:**
> **...**
> (8) "financial debt" means a debt alongwith 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 dematerialised 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;
> >
> > …

24. Section 5(8) stipulates that financial debt is a debt disbursed against consideration for time value of money. In the instant case the original transaction i.e. interest free security deposit paid through supplementary lease deed is not disbursed against consideration for the time value of money and is in the nature of operational credit. Due to inability of the Corporate Debtor to repay the security deposit it agreed to convert the aforesaid debt in to term loan vide loan agreement dated 15.07.2022. It is thus apparent that the Applicant and the Corporate Debtor converted the transaction which in operational in nature into a term loan.

25. From the above fact and finding this Tribunal perceives that the intention of the Applicant is only to recover its debts. This application was not filed for resolution of any insolvency of the Corporate Debtor but for the recovery of its outstanding debts behind mask of Financial Creditor. This Tribunal will not permit any such attempt taken by the Applicant to use this Tribunal as a recovery forum which against the very object of IBC.

26. In the case ***of Jambudwip Exports and Imports Limited Vs.U P Bone Mills Private Limited*** ((IB)-447(ND)/2021 order dated 23.05.2022) New Delhi Bench of this Tribunal held as under

> *"we conclude that the amount advanced by the Applicant Company to the Corporate Debtor for purchase of certain goods was neither disbursed as loan per se nor the conversion of the said advance into an InterCorporate Loan through the instrument of an MoU is in accordance with the law. Further, it is observed that by executing the MOU dated 10.05.2019, the parties have cleverly attempted to convert an Operational Debt into a Financial Debt.*
>
> *25. The Application is accordingly, Dismissed."*

27. The Hon'ble Supreme Court in case of ***M/s. Invent Asset Securitisation and Reconstruction Private Limited v. M/s. Girnar Fibres Limited*** [Civil Appeal No. 3033/2022] observed that *"time and again, it has been expressed and explained by this Court that the provisions of the Code are essentially intended to bring the corporate debtor to its feet and are not of money*

recovery proceedings as such. The intent of the appellant had only been to invoke the provisions of the Code so as to enforce recovery against the corporate debtor."

28. In so far as the Record of Default (RoD) is concerned we see that the Applicant is classified as Financial Creditor in the RoD. The RoD of the information utility i.e. NeSL verify only existence of debt and default but not the nature of the debt. In the instant case the Applicant converted the interest free security deposit into a term loan i.e. financial credit, before registering in the Information Utility. In such circumstances relying the RoD alone will not be will not be sufficient to arrive decision in the present case.

29. Hon'ble Supreme Court in the case of ***Vidarbha Industries Power Limited Vs. Axis Bank Limited*** reported in (2022) 8 SCC 352 held that "*the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition."*

30. In light of the above findings and the observations made in the cases *supra* we did not find any sufficient reason to consider this case relying on RoD. In our considered view, the conversion of interest free security deposit into a term loan though an agreement

will not alter the nature of the debt. The nature of transaction recorded in the Supplementary Lease Agreement which came to force on 01.04.2016, is not qualified as Financial Debt. And hence, the present application filed under Section 7 of IBC is deserved to be rejected.

31. As a result of above discussion the instant case CP(IB)/102(CHE)/2023 stands **dismissed**.

Sd/- **Sd/-**

RAVICHANDRAN RAMASAMY
MEMBER (TECHNICAL)

JYOTI KUMAR TRIPATHI
MEMBER (JUDICIAL)