

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB)/7(MB) 2024

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

In the matter of

Metamorphosis Trading LLP.

[LLPIN : AAX-2069]

... Applicant/Financial Creditor

Versus

Kumar Motors Private Limited

[CIN: U34102PN2004PTC018890]

... Respondent/Corporate Debtor

Order Pronounced on 08.04.2024

Coram:

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

Hon'ble Member (Technical): Sh. Prabhat Kumar

Appearances:

For the Financial Creditor : Mr. Pulkit Sharma,
Advocate

For the Corporate Debtor : Mr. Avinash Khanolkar,
Advocate

ORDER

Per: Justice V. G. Bisht (Retd.), Member (Judicial)

Brief facts:

1. This Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC/Code**") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Metamorphosis Trading LLP** ("hereinafter referred to as Applicant/ Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Kumar Motors Private Limited** ("hereinafter referred to as Respondent/Corporate Debtor").
2. The Corporate Debtor is a Private Limited company incorporated on 10.02.2004 under the Companies Act, 1956 with the Registrar of Companies, Maharashtra, Pune. Its registered office being situated at Gat no. 316, At Kasar-Amboli, Post Ambedwet, Pune, Maharashtra – 412111. Therefore, this Bench has jurisdiction to deal with this Petition. The Authorised share capital of the Corporate Debtor is Rs. 20,20,18,500/- whereas the paid up capital is Rs. 20,20,18,490/-.
3. The Corporate Debtor is a company involved in the business of manufacturing, hiring, assembling, dealing, trading, etc. of automobiles, motor vehicles, water ski jets, etc.
4. The present Application is filed before this Adjudicating Authority on the ground that the Respondent has defaulted to repay total amount of Rs. 8,70,03,275/- (Rupees Eight Crores, Seventy Lakhs, Three Thousand Two Hundred Seventy-five only).
5. The date of Default is stated to be 21.07.2021 as per record of Financial Information maintained by National E-Governance Services Limited.

Submissions made by the Learned Counsel of the Applicant:

6. On 06.09.2011 the Corporate Debtor entered into a Subscription and Share Holder's Agreement ("**SSA**") with M/s Innoventive Industries Limited.
7. As per the terms of the SSA, Innoventive Industries Limited advanced a debt of Rs.8,70,03,275/- (Rupees Eight Crores Seventy Lakhs Three Thousand Two Hundred Seventy-Five only).

8. The Corporate Debtor vide its letter dated 05.03.2013 addressed to Innoventive Industries Limited denied the existence of the debt and refused to provide any update on the repayment of the investment together with the interest accrued.
9. Therefore, on 20.06.2013 Innoventive Industries Limited was constrained to file Company Petition No. 468 of 2013 before the Hon'ble High Court Judicature at Bombay under Section 450 of the Companies Act, 1956 for Winding Up of the Corporate Debtor and appointment of the Official Liquidator to take over the assets of the Corporate Debtor. The said Company Petition was admitted by the Hon'ble Bombay High Court vide order dated 04.08.2015, wherein it was observed by the Hon'ble Court that the Corporate Debtor had no merit in any of the defenses raised and that there was no bonafide dispute concerning Innoventive Industries Limited's debt and the statutory notice not being complied with, and that there was a clear deemed inability to pay on the part of the Corporate Debtor. Thus, liquidation of the Corporate Debtor was initiated following the appointment of the Official Liquidator, High Court Bombay.
10. Subsequently, vide order dated 08.12.2017 in Company Petition (IB) No. 1 of 2016 passed by this Hon'ble Bench, liquidation proceedings were admitted against Innoventive Industries Limited, and Mr. Dhinal Shah was appointed as the Liquidator for Innoventive Industries Limited. In furtherance to the above, Mr. Dhinal Shah issued a Process Memorandum dated 14.06.2021 inviting bids for auction of certain Claims/Transferred Assets of Innoventive Industries Limited (that essentially included all sundry debts, receivables, right to recover, causes of action and as more particularly set out therein) ("Transferred Assets").
11. On 21.07.2021, the Financial Creditor was selected as the successful bidder and entered into a Deed of Assignment with Mr. Dhinal Shah whereby the Transferred Assets of Innoventive Industries Limited were transferred in favor of the Financial Creditor.
12. In terms of the aforesaid, the Financial Creditor herein and Innoventive Industries Limited (through Mr. Dhinal Shah) entered into a Letter of Intent dated 01.07.2021, in terms of which the Financial Creditor agreed to acquire from Innoventive Industries Limited all the rights, title and beneficial interest/ property of

Innoventive Industries Limited in the Transferred Assets, on the terms and conditions as more particularly set out therein.

13. As part of the Transferred Assets, the Financial Creditor acquired the right to recover the amount of Rs. 8,70,03,275 (Rupees Eight Crores Seventy Lakhs Three Thousand Two Hundred Seventy-Five only) along with interest from Corporate Debtor.
14. Upon being assigned the debt of Innoventive Industries, the Financial Creditor filed Interim Application No. 3648 of 2022 on 28.09.2021 before the Hon'ble High Court of Bombay seeking transfer of Company Petition No. 468 of 2013, to this Tribunal in accordance with the provisions contained in Section 434(1)(c) of the Companies Act, 2013 read with Companies (Transfer Pending Proceedings) Rules, 2016.
15. Pursuant thereto, the Interim Application No. 3648 of 2022 stood disposed of vide order dated 27.07.2022, wherein Company Petition No. 468 of 2013 was transferred to this Tribunal upon payment of Rs.14,14,379/- (Rupees Fourteen Lakhs Fourteen Thousand Three Hundred Seventy-Nine only) by the Financial Creditor to the Official Liquidator of the Corporate Debtor for the expenses incurred by the Official Liquidator with reference to the Corporate Debtor till 31.03.2022.
16. On 10.10.2022 the Financial Creditor filed Company Petition (IB) No. 1135 of 2022 before this Tribunal under Section 7 of the Code to initiate CIRP against the Corporate Debtor. Thereafter, on 14.02.2023, Company Petition (IB) No. 1135 of 2022 was reserved for final orders upon conclusion of pleadings and arguments of both the Financial Creditor and Corporate Debtor.
17. Subsequently, on 10.03.2023 the Hon'ble High Court vide its order in Official Liquidator's Report No. 16 of 2023 in Company Petition No. 468 of 2013, recorded that the expenses of the Official Liquidator till date of the aforementioned order amounting to Rs.39,42,685/- (Rupees Thirty-Nine Lakhs Forty-Two Thousand Six Hundred Eighty- Five only) were paid by the Petitioner/ Financial Creditor. The aforementioned order further granted the Petitioner/ Financial Creditor the liberty to transfer the Company Petition No. 468 of 2013 to this Bench for adjudication.
18. Hence, this Tribunal vide its order dated 12.06.2023 in view of the transfer of Company Petition No. 468 of 2013 to this Tribunal observed that Company Petition (IB) No. 1135 of 2023 was rendered infructuous, and was therefore dismissed and disposed of

accordingly. Considering the above, it is clear that the Corporate Debtor is presently undergoing liquidation and the Official Liquidator, Bombay High Court is in control of the assets of the Corporate Debtor.

19. The ex-promoters/directors have been discharged of their duties since 04.08.2015, and have no claim to participate in the present proceedings. Therefore, the Financial Creditor on being given liberty by the Hon'ble High Court to transfer Company Petition No. 468 of 2013 to this Bench filed Transfer Petition (IB) No. 01 of 2023 on 06.06.2023.
20. However, the Bench in light of the circular passed by the Ministry of Corporate Affairs ("MCA") on 07.12.2016, disposed of the Transfer Petition (8) No. 01 of 2023 vide order dated 11.09.2023. The Financial Creditor was also given liberty to file a fresh petition under Section 7 of the Code to initiate CIRP against the Corporate Debtor. Hence, the present petition.

Submissions made by the Learned Counsel of the Respondent:

21. The Respondent has contested the present petition on the following grounds:
 - a) **No authority for initiation of insolvency against the Respondent:** Upon perusal of the Board resolution annexed with the Petition, it can be inferred that the said resolution nowhere provides any authority to initiate Insolvency Proceedings against the Respondent. The Respondent has relied upon order passed by this bench in CP (IB) 2161/MB/2019 *M/s. Rushabh Civil Contractors Pvt. Ltd. v/s. Centrio Lifespaces Limited* for the same.
 - b) **Petition stands abated:** As per the Companies (Transfer of Pending Proceedings) Rules, 2016 notified by the Government of India vide GSR 1119 (E) dated 07.12.2016, the present petition should have been submitted within 60 days from the date of Transfer of the Pending Petition from the Hon'ble Bombay High Court. It is further submitted that when the transferred petition was listed before Court IV of this Tribunal on 11.09.2023, no notice was given to the Respondent. The time limit of 60 days has already expired even if calculated from the date of disposal of the Transferred Petition.
 - c) **Claimed amount is not a financial debt:** Relying upon the SSA, the Respondent has claimed that the Petitioner has described

itself as an Investor and not a Lender in any of the SSA. Hence, the Petitioner cannot be termed as Financial Creditor. Accordingly, the claimed debt cannot be termed as a financial debt. The Respondent has also relied upon the definition of financial debt provided under S. 5(8) of the IBC Code, 2016 stating that the alleged debt is taken by the Respondent without agreeing for terms of payment of Interest and hence the alleged debt is not qualified under the provisions of S.5(8)(a) of the Code. The Respondent has further relied upon the order dated 21.04.2022 passed in Company Appeal (AT) (INS) 426 of 2022 wherein it was held that the amount given as an advance towards the Share Application money is not a Financial Debt and consequently no Petition u/s 7 is admissible for the same. Decision given in CP (IB) 949/MB/2021 dated 03.02.2023 has also been relied upon which has been upheld by Hon'ble NCLAT vide order dated 02.02.2024, which was dismissed on similar grounds.

- d) **Claimed amount is not paid by the Petitioner in entirety:** The Respondent has contended that the amount claimed by the Petitioner was never paid to the Respondent by the Petitioner. Even upon perusal of the bank statements, there is no record of transfer of amount to Innoventive. The Respondent has also contended the order dated 04.08.2015 passed by the Hon'ble High court on the same grounds. Also, the amounts transferred to the respondent have been transferred by third party and not by Innoventive.
- e) **No default has occurred:**
- i. The Respondent has submitted that the default has not been proved by the Petitioner and that the Petitioner has described itself as an investor and not a lender in the SSA. The Respondent has recorded its dissatisfaction vide letters issued by the Respondent and there is no waiver to the conditions precedent of the SSA in writing by the Petitioner. The petitioner also did not assist the Respondent in availing credit facilities despite being requested by the Respondent.
 - ii. The respondent has further submitted that while issuing letters dated 04.03.2013 and 21.03.2013 Innoventive Industries has mischievously partly extracted clause 2.i.a of SSA hiding its obligation that Innoventive had to subscribe to the shares.

- iii. Moreover, the Petitioner has failed to mention the date of default thereby making the petition defective. Also, the Petitioner is put to strict proof by the Respondent that the present SSA in question is to be executed and acted upon between the parties and other SSAs are to be considered as infructuous. The aforesaid clarification has not been reached by the parties.
22. The Respondent further submits that the present petition has been filed for recovering amount through this Tribunal and that this Tribunal has limited jurisdiction which is summary in nature and same cannot be used to seek specific performance of the terms of the inter-se agreement entered between the parties.

Findings and Decision:

23. Heard learned Counsel for both the parties and perused the documents placed on record.
24. We note that the Petitioner had paid a sum of Rs. 6 Crores in terms of SSA, which required the petitioner to arrange credit facility for the Corporate Debtor of an equivalent amount and in case of failure to arrange such facilities the Petitioner was itself liable to pay this amount till such time the credit facilities were arranged. It is not in dispute that the credit facilities could not be arranged for the Corporate Debtor till the time the original investor, that is Innoventive Industries Ltd. was admitted into CIRP. This debt was acquired by the Applicant from the liquidator of the original investor.
25. Clause 4A.5 of the SSA provides that *“Promoters agree to convert Warrants into Warrant Shares as envisaged in this Agreement subject to fulfillment of obligations specified in Clause 4A (1) & (2) by the Investor.”*
26. Clause 4 (A) 1 of the SSA reads as follows: *“The Investor will arrange required debt of Rs. 600,00,000/- (Rupees Six Crores only) for the company for the financial year 2011-12 in the following manner;*
- (a) *The investor will arrange for Cash Credit Account or Letter of Credit or Purchase Bill Discounting limit(s) or equivalent amount of credit to the Company which will take care of the Company’s stocks.*
- (b) *In the event, Investor is unable to arrange debt of Rs. 600,00,000/- (Rupees Six Crores only) to the company by the end of September 2011, the Investor will make the payment of said Rs. 600,00,000/- (Rupees Six Crores only) directly to the Company till the time funds have been arranged in above sub-clause (a).”*

27. It is not in dispute that the then investor i.e. Innoventive Industries Ltd. failed to comply with the obligations in Clause 4A.1 and 4A.2 of SSA, which imply that conversion in terms of shares and warrants in accordance with clause 4A.5 of the SSA could not be claimed by the original investor.
28. On a careful reading of clause 4.A.5, clause 2.1 of SSA and recital A of the SSA we find that the original investor was roped in as an equity investor and accordingly was called investor in the agreement. Recital A of SSA reads as “*the Investor has, for consideration and on terms and conditions detailed herein, agreed to subscribe to the investor shares and in the investor warrants*” and the agreement nowhere casts any obligation on Corporate debtor to refund the amount paid in terms of clause 4A.1 & 4A.2 or repay towards the warrants acquired on conversion contemplating clause 4A.5. In the absence of any obligation of the Corporate Debtor, a default cannot be said to exist because the default in terms of Section 3 (12) means “*non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the Corporate Debtor, as the case may be*”. Accordingly, we are of the considered view that the present application is not maintainable in the absence of default.
29. Nonetheless, it is trite in law that the amount given as an advance towards the Share Application money is not a Financial Debt and consequently no Petition u/s 7 is admissible for the same. Accordingly, the present petition is not admissible since upon perusal of the SSA, it is clearly evident that the amount paid by the Financial Creditor is against the subscription of investor’s shares and warrants.
30. The Petition bearing CP (IB) 7/(MB) 2024 filed by **Metamorphosis Trading LLP** [LLPIN : AAX-2069], the Financial Creditor, under section 7 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Kumar Motors Private Limited** [CIN: U34102PN2004PTC018890], the Corporate Debtor, is disposed of as **dismissed**.
31. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

32. Ordered accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

MK

Sd/-

Justice V. G. Bisht (Retd.)
Member (Judicial)