

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**M.A. 2411/2019 IN C.P. 4128/I&B/MB/2018
M.A. 2412/2019 IN C.P. 4129/I&B/MB/2018
M.A. 2413/2019 IN CP 4130/I&B/MB/2018
M.A. 2414/2019 IN CP 4131/I&B/MB/2018**

Under Section 60(5)(c) Of the Insolvency and Bankruptcy Code,
2016

In the matter between

Hubtown Limited

Plaza Panchsheel, A-Wing, 5th Floor, 501 Hughes Road,
Behind Dharam Palace, Grant Road (West),
Mumbai- 400007.

.....Applicant

Vs

GVFL Trustee Company Pvt. Ltd.

1st Floor, Premchand House, Annexe, Behind Popular House,
Near Old High Court, Ashram Road, Ahmedabad- 380009 Gujrat

Respondent

In the matter of

GVFL Trustee Company Pvt. Ltd.

...Financial Creditor

Versus

Hubtown Limited

...Corporate Debtor

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Order pronounce on 29.11.2021

Appearance:

For the Applicant: Mr. Mihir Thakore, Advocate

For the Respondents: Mr. Venkatesh Dhond a/w Mr. Ashish S.
Kamat

Per: Shri Chandra Bhan Singh, Member (Technical)

1. GVFL Trustee Company Pvt Ltd (GVFL) is an Applicant who have filed Section 7 Petition bearing CP No. CP(IB)-4129/2018 against Hubtown Limited for a debt by way of equity investment in shares of Hubtown Bus Terminal (Mehsana) Pvt Ltd for a total amount of Rs.4,30,54,200/- as principal and Rs.9,96,95,800/- as Internal Rate of Return (IRR) calculated at 26% of the principal up to 31.08.2018. As per the Petitioner there is a default under Section 7 of IBC, 2016 as its “put option” was not entertained when the said demand notice dated 02.01.2018 was sent to the Respondent M/s. Hubtown Limited demanding exit by way of “put option”.
2. The Respondent (Corporate Debtor) in the main CP has separately filed the present Miscellaneous Application (MA) No. 2412/2019 raising preliminary issues regarding maintainability of the said Petition. The Applicant in this MA 2412/2019 (Hubtown Limited) was earlier known as Ackruti City Ltd. The Applicant is a shareholder in a Company called Hubtown Bus Terminal (Mehsana) which is a SPV incorporated to inter alia undertake and complete reconstruction and development of commercial and residential property at Mehsana, Gujarat by Hubtown Ltd.
3. There are three other projects for which three Special Purpose Vehicle companies were separately incorporated by Hubtown Ltd. These are the subject matter of CP No. CP(IB)-4128/2018 (HBT Vadodara), CP No. CP(IB)-4130/2018 (HBT Ahmedabad) and CP No. CP(IB)-4131/2018 (HBT Adajan). For these three CPs, maintainability Application has been filed by the original Respondent. These MAs are **MA 2411/2019** in CP(IB)-

4128/2018, **MA 2413/2019** in CP(IB)-4130/2018, **MA 2414/2019** in CP(IB)-4131/2018 respectively. This Bench, during the hearing, as brought out by the Applicant and Respondent noted that the outcome of the maintainability Application in case of HBT Mehsana will also be applicable to other MAs viz. MA 2411/2019, MA 2413/2019 and MA 2414/2019.

BRIEF BACKGROUND OF THE CASE:-

4. A Share Subscription and Shareholders Agreement (SHA) dated 24.09.2010 was signed between IL&FS Trust Company Limited (ILFS), IIRF India Realty XVIII Limited (IIRF) and Hubtown Ltd and two other Promoters of HBT Mehsana. Consequent to this Agreement, IL&FS and IIRF invested in HBT Mehsana by subscribing to Class ‘A’ equity shares, Class ‘B’ equity shares and Class ‘D’ equity shares. Subsequent to this investment the shareholding in HBT Mehsana was as under:-

“

<i>Name of Shareholders</i>	<i>No. of Shares at the fact value Rs.10 each</i>	<i>%</i>
<i>Class A</i>		
<i>Hubtown Limited</i>	<i>50000</i>	<i>50.00</i>
<i>IL & FS Trust Company Limited</i>	<i>1395</i>	<i>1.40</i>
<i>IIRF India Realty XVIII Limited</i>	<i>48605</i>	<i>48.61</i>
<i>Total</i>	<i>100000</i>	<i>100.00</i>
<i>Class B</i>		
<i>IL & FS Trust Company Limited</i>	<i>2790</i>	<i>2.79</i>
<i>IIRF India Realty XVIII Limited</i>	<i>97210</i>	<i>97.21</i>

<i>Total</i>	<i>100000</i>	<i>100.00</i>
<i>Class C</i>		
<i>Hubtown Limited</i>	<i>100000</i>	<i>100</i>
<i>Total</i>	<i>100000</i>	<i>100.00</i>
<i>Class D</i>		
<i>IL & FS Trust Company Limited</i>	<i>1395</i>	<i>2.79</i>
<i>IIRF India Realty XVIII Limited</i>	<i>48605</i>	<i>97.21</i>
<i>Total</i>	<i>50000</i>	<i>100.00</i>

5. On 29.05.2013 a Share Purchase Agreement (SPA) was executed between the Petitioner GVFL in CP No. 4129/2018, the ILFS group, Hubtown Limited and two other Promoters of HBT Mehsana. In terms of this Agreement, GVSL purchased the shares (Class 'D' shares) of HBT Mehsana from the ILFS group for a total amount of Rs.4,30,54,200/-. These shares were reclassified as Class 'E' and Class 'F' equity shares. Pursuant to this purchase of shares by GVFL the shareholding in HBT Mehsana became as under:-

“

<i>Name of Shareholders</i>	<i>No. of Shares at the fact value Rs.10 each</i>	<i>%</i>
<i>Class A</i>		
<i>Hubtown Limited</i>	<i>50000</i>	<i>50.00</i>
<i>IL & FS Trust Company Limited</i>	<i>1395</i>	<i>1.40</i>
<i>IIRF India Realty XVIII Limited</i>	<i>48605</i>	<i>48.60</i>
<i>Total</i>	<i>100000</i>	<i>100.00</i>
<i>Class B</i>		
<i>IL & FS Trust Company Limited</i>	<i>2790</i>	<i>2.79</i>
<i>IIRF India Realty XVIII Limited</i>	<i>97210</i>	<i>97.21</i>
<i>Total</i>	<i>100000</i>	<i>100</i>
<i>Class C</i>		

<i>Hubtown Limited</i>	<i>100000</i>	<i>100</i>
<i>Total</i>	<i>100000</i>	<i>100.00</i>
<i>Class D</i>		
<i>IL & FS Trust Company Limited</i>	<i>1173</i>	<i>2.79</i>
<i>IIRF India Realty XVIII Limited</i>	<i>40854</i>	<i>97.21</i>
<i>Total</i>	<i>42027</i>	<i>100.00</i>
<i>Class E</i>		
<i>GVFL Trustee Company Private Limited</i>	<i>100</i>	<i>100</i>
<i>Total</i>	<i>100</i>	<i>100.00</i>
<i>Class F</i>		
<i>GVFL Trustee Company Private Limited</i>	<i>7873</i>	<i>100</i>
<i>Total</i>	<i>7873</i>	<i>100.00</i>

”

6. Under the SHA, GVFL was provided with Shareholders’ rights like right to nominate one Director on the Board of the Company, right to vote in AGM/ EGM, special veto power etc. Other shareholders right which accrued to GVFL included giving various exit options under SHA which has been enumerated at Clause 13.1 of the SHA which reads as under:-

“13.1. The Investor No.3 shall have the following rights which the Investor No.3 shall be free to exercise at any time in the manner specified in the said clauses:

13.2. Annual Put Option;

13.3. Listing;

13.4. Buy-back of all shares held by the Investors No.3 in the Company;

13.5 Accelerated Put; and

16 – Strategic Sale and Withholding of Sale of Project Assets.”

7. Here it may be noted that these options are part of a shareholder's right. The claim of GVFL is that the payments by GVFL was to purchase shareholding in HBT Mehsana. The GVFL has sought to exercise its right under the "Put" option for the first time in December 2013 and this Petition was filed by them in November 2018 purportedly for a debt amount of Rs.4,30,54,200/- along with return calculated at IRR of 26% till 31.08.2018.

FINDINGS

8. The issue before the Bench is whether GVFL is a Financial Creditor and whether the debt claimed in the Petition is a Financial Debt as per the IBC 2016. The relevant definition under the IBC 2016 of the Financial Creditor and Financial Debt are as under:-

“ financial creditor under Section 5 (7), means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

financial debt under Section 5 (8) 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 nonrecourse basis;*

- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (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;”*

9. This Bench, therefore, has to see whether the claim of GVFL as a Shareholder of HBT Mehsana in exercise of its ‘put option’ tantamount to a financial debt. The Bench is of the view that a shareholder is different from a lender. The shareholder undertakes the risk by investing in shares and derives its return by way of profits in the form of dividends and appreciation in the value of shareholding, i.e., capital gains. In contrast, the Lender gives loans for which the payment is by way of Interest.

10. The Bench notes that as per the SHA, GVFL invested in HBT Mehsana by purchasing the shares of ILFS group. This cannot be termed as an investment of GVFL by way of a loan. The money paid by GVFL to acquire the share of HBT Mehsana cannot be construed as a consideration for time value of money and it was solely for the purchase of shares of HBT Mehsana held by ILFS group to become a shareholder in the Company. The Bench also notes that as per shareholder of HBT Mehsana, GVFL had acquired various rights including that of appointing a Director,

exercising votes in AGM/ EGM and exercising veto votes. It is abundantly clear to the Bench that no voting rights ever accrues to a Financial Creditor in any AGM/ EGM. Therefore, the rights enjoyed by GVFL in HBT Mehsana like exercising votes in the AGM/ EGM are typically the rights of a Shareholder and not a Financial Creditor. This is because, Equity is not a debt and as such any contract for acquisition of shareholding in a body corporate can never result in the formation of a debt. The SPA and SHA are both contracts in relation to GVFL acquisition of equity shareholding in HBT Mehsana.

11. The Bench is of the view that share purchase in HBT Mehsana by GVFL with exit option of *inter alia* “Annual Put Option” cannot be considered as a debt which is disbursed against consideration of time value for money. The Bench also notes that Internal Rate of Return (IRR) cannot be equated with interest payments. The relevance of IRR for an investor in shares is in relation to expected profit and dividend pay out and capital appreciation of the shares which is totally different to the interest which is return for any investment by way of loan.

12. The Bench is of the view that the GVFL may be entitled to this claim under the SHA as a Shareholder of HBT Mehsana. However, the Bench has no doubt that the claim of GVFL cannot be termed as a Financial Debt as contemplated under IBC. Therefore, the MA 2412/2019 regarding maintainability of CP(IB)-4129/2018 is “**Allowed**” and CP No. CP(IB)-4129/2018 is not maintainable under Section 7 of IBC and therefore is “**dismissed**”.

13. Similarly, based on the above other MAs viz. MA 2411/2019 in CP 4128/2018, MA 2413/2019 in CP 4130/2018 and MA 2414/2019 in CP 4131/2018 regarding maintainability of Company Petition are also “**Allowed**” and the Company Petitions No. CP(IB)-4128/2018, CP(IB)-4130/2018 and CP(IB)-4131/2018 filed u/s 7 of the IBC are “**dismissed**” as not maintainable.

Sd/-

Chandra Bhan Singh
Member (Technical)

Sd/-

H V Subba Rao
Member (Judicial)