

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 620/MB-IV/2023

Under Section 7 of the I&B Code, 2016

In the matter of:

Think Hard India Private Limited

[CIN: U74999MH2019PTC322611]

...Financial Creditor/Applicant

V/s

Whiz Enterprise Private Limited

[CIN: U51909MH2004PTC144418]

...Corporate Debtor

Order Dated: 25.08.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Shyam Kapadia, a/w Mr.
Nishant Rana, Advocate.

For the Corporate Debtor(s) : Mr. Nausher Kohli, Advocate.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an Application being C.P. (IB) No. 620/MB/C-IV/2023 filed on 09-06-2023 by Think Hard India Private Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Whiz Enterprise Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1 The Financial Creditor has filed Board Resolution dated 03.09.2022 in support of authorization in favour of Mr. Chandrakant Narayan Manchekar, Director of the Financial Creditor authorising him to file the present company application on behalf of the Financial Creditor.

1.2 The total amount of debt claimed by the Financial Creditor in the Part 4 of the Company Petition is Rs.447,67,44,307/- (Rupees Four Hundred Forty-Seven Crores Sixty-Seven Lakhs Forty Four Thousand Three Hundred OR and Seven Only) as on 31.05.2023 is due and payable by the Corporate Debtor to the Financial Creditor. The specific date of default is not mentioned in the Part IV of the Application, however, it is stated therein that “the workings for the computation of the outstanding amount alongwith days of default is given in the tabular form as Exhibit C, which provides detail of principal,

interest on principal and default interest for the period of 01.04.2020 till 31.05.2023.

2. In October 2019, Seya Industries Limited, the Borrower, approached Think Hard India Private Limited, the Financial Creditor, seeking financial assistance for the purpose of meeting its business requirements.

2.1 The Financial Creditor issued a Sanction Letter dated 09.10.2019 and agreed to provide financial assistance to the Borrower by way of a business loan facility aggregating to Rs. 152,00,00,000/- (Rupees One hundred and Fifty-Two Crores Only) subject to the terms and conditions contained therein.

2.2 Soon thereafter, a Loan Agreement dated 06.01.2020 was entered into by and between the Financial Creditor and the Borrower, whereunder a business loan facility of Rs. 152,00,00,000/- was granted to the Borrower for a fixed term of 10 years subject to such other and further terms and conditions stated therein.

2.3 The said Facility was secured by various facility documents including Demand Promissory Note dated 06.01.2020 and Mortgage Deed dated 21.01.2020.

2.4 Owing to economic instability caused by the Covid-19 pandemic, there was a drastic fall in the value of the underlying security held by the Financial Creditor with respect to the said Facility and vide the Letter dated 20.07.2020, Financial Creditor communicated to the

Borrower that it would continue with the said Facility subject to additional security by way of personal and corporate guarantees being provided by Borrower group companies/promoters.

2.5 Accordingly, Deeds of Personal Guarantees and Corporate Guarantees, all dated 27.07.2020, were executed by the respective personal and corporate guarantors, including a Deed of Corporate Guarantee dated 27.07.2020 executed by the Corporate Debtor in favour of the Financial Creditor.

2.6 In April 2022, the Borrower started defaulting on its payment obligations against the said Facility as stipulated under the Loan Agreement. Upon the Borrower's failure regularize and/ or clear to the outstanding, due and payable under the said Facility, the Financial Creditor issued an Event of Default And Recall Notice dated 15.09.2022.

2.7 On 15.09.2022, the Financial Creditor by separate notices invoked the personal and corporate guarantees given by the concerned personal and corporate guarantors (including the corporate guarantee given by the corporate debtor in the present case) in its favour, calling upon them, including the Corporate Debtor, to clear the outstanding loan amount of the Borrower in terms of the said guarantee agreements.

3. The Corporate Debtor filed Reply dated 19.07.2023 stating reasons why the petition should be dismissed.

- 3.1 The Board Resolution annexed to the Petition is defective and lacking in material particulars and it cannot be said to be a resolution authorizing the initiation of CIRP and/or permitting the concerned person to appoint an interim resolution professional.
- 3.2 The Corporate Debtor further states that in terms of the sanction letters, the purported loan was to have been secured by a mortgage of certain immovable property, and such mortgage deed was to be entered into with the security trustee, however, neither the mortgage deed nor the security trustee agreement has been placed on record. It is submitted that under the provisions of the Contract Act, if the Creditor / Lender fails to take necessary steps to secure the loan amount for which the surety agreement has been entered which in turn affects the right of the surety to recover the loan amount/guarantee amount, then the surety is discharged of his liability. There is no document placed on record to show that the Principal Borrower has confirmed the statement of accounts / ledger as correct.
- 3.3 It is submitted that the Principal Borrower i.e. Seya Industries was under CIRP from 03.08.2021 to 18.04.2023. It is submitted that vide Order dated 3.8.2021 passed by this Tribunal in CP No. 606 of 2020 the CP was admitted, moratorium was ordered and the CIRP commenced against the Corporate Debtor. Subsequently, the

Corporate Debtor settled the dispute with the Petitioner in the said CP, the IRP appointed in the said proceedings filed IA No. 1853 of 2021 u/s 12A of the IBC, 2016 and by an order dated 18/4/2023 passed therein, this Hon'ble Tribunal was pleased to close the proceedings in CP No.606 of 2021 and the Corporate Debtor was thus taken out of CIRP on 18/4/2023. It is submitted that the Financial Creditor appears to have recalled the loan during CIRP period, which could not have been done in view of the moratorium order, and thus the same is invalid. Consequently, the invocation of the Guarantee during the said period is also invalid.

- 3.4 The Corporate Debtor submitted that there is no clear date of default mentioned in the Form, however, from the NESL record of default, it appears that the date of default is 30/4/2023, which on the face of it appears to be incorrect and, in any case, for the reasons as set out above, the said date of default cannot be said to be valid.
- 3.5 The Corporate Debtor submitted that the Financial Creditor has failed to appreciate that the proceedings under IBC code are not recovery proceedings. Furthermore, proceedings under the IBC Code can be commenced and/or continued only upon satisfaction of the various provisions and requirements set out under the IBC code, which inter alia require that there should be in existence a legal, valid and subsisting financial debt.

- 3.6 The Corporate Debtor submitted that the present case involves and requires adjudication as the issues before the appropriate forum by way of appropriate civil proceedings including trial of disputed questions of facts which cannot be decided in the present proceedings which are summary in nature and thus the proceedings are liable to be dismissed on this ground as well.
4. We have perused the documents and pleadings available on record and considered the arguments of both the sides.
- 4.1 This matter was listed on 20.07.2023 and the Ld. Counsel for the Financial Creditor submitted that the Corporate Debtor is a guarantor to the Credit facilities extended to Seya Industries Limited, and a petition u/s 7 in the matter of principal borrower is already reserved for orders by Bench-5 of the Tribunal. Since as the facts in this matter arises from a default of a principal borrower, which has already been argued by both parties, there are no further submission to be made by Financial Creditor.
- 4.2 This Bench finds that the resolution passed by the Board of Directors of the Financial Creditor dated 03.09.2022 clearly authorize “*Mr. Chandrakant Mancheka, Director of the company is hereby authorised to affirm, make, present, submit and file all necessary complaints, petitions, and applications, amongst others*” in connection with any suit(s) or proceeding(s)

filed by or against the company before any court of law or any tribunal or any quasi-judicial or statutory or administrative authority". We don't find any merit in the contention of the Corporate Debtor that the resolution passed by the Financial Creditor is not in accordance with law and lacks sufficient authorisation to file the present petition. We therefore hold that the argument advanced by the Corporate Debtor in this regard is without substance and cannot be considered as a ground to dismiss the present petition.

- 4.3 The submission of the Corporate Debtor that the Financial Creditor having recalled the loan during CIRP period could not have been done in view of the moratorium order, cannot hold good. Clause 5.2 of the Loan Agreement dated 06.01.2020 relating to the payment of interest clearly stipulates the payment of interest on the outstanding loan *on monthly basis and the said accrued Interest amount is to be paid by the Borrower to the Lender on or before 15 day of every month. In event the Borrower fails to make timely payment of accrued Interest amount, the Borrower shall be liable to payment of default interest @ 2% per month on the outstanding Loan Amount over and above the Interest rate of 24% p.a.* In other words, the interest on the outstanding loan amount is payable in each month and the Corporate Debtor paid only a sum of Rs. 21,65,27,008/- out of total interest due amounting to Rs. 216,43,08,205/- for the period from 01.04.2020 to 31.04.2023 decides the default interest of Rs.

70,64,77,463/-. Clause 6.2 of the Loan Agreement also provides that “*The payment such made by the Borrower shall be first adjusted towards the outstanding Default Interest Amount, if any, accrued Interest Amount and thereafter towards the repayment of outstanding Principal Loan Amount*”.

4.3.1 The submission of the Corporate Debtor that it was in CIRP during the period from 03.08.2021 to 18.04.2023, and no proceedings could have lied against it during the moratorium period. This Bench notices that the present petition was filed on 09.06.2023 and the moratorium came to an end on 18.04.2023. Interest for the period from 19.04.2023 to 30.04.2023 itself aggregates to more than 1 crore which became due on 15.05.2023 for payment, hence, this Bench does not find any substance in this contention even without going into the details of default.

4.4 We also don't find any merit in the contention that the present case involves and requires adjudication as the issues before the appropriate forum by way of appropriate civil proceedings, because the terms of payment of interest and repayment of principal are clearly borne out from the agreement. The fact of disbursement is not in dispute. The Deed of Guarantee executed on 27.07.2020 by the Corporate Debtor, clearly stipulates that “*In the event of any*

default on the part of the Borrower to comply with or perform any of the term, conditions and covenants in the loan agreement and/ or any other connected documents including but not limited to the default on the part of the Borrower in payment / repayment of any of the moneys referred to in the loan agreement or of any default, the Guarantor shall upon demand, forthwith pay to the Lender without demur or protest all the amounts payable by the borrower under the loan agreement and/or any other connected documents.” It further provides that “A notice of demand issued by the Lender or on its behalf stating that any of the sums in terms of the annexed Loan Agreement have become receivable and that Seya Industries Ltd. have failed or neglected in its payment of said sums or any part thereof or any interest thereon as agreed, shall be conclusive and binding on the Guarantor as to that fact and without any further proof. The Guarantor shall make payment hereunder to the Lender without any demur or default or without any recourse or reference to Seya Industries Ltd. as the case may be.”

4.4.1 The Financial Creditor has issued notice dated 15.09.2022 invoking Corporate Guarantee dated 27.07.2020 requiring the Corporate Debtor to pay amount of Rs. 352,09,72,067/- within 15 days from the date of notice. There is no dispute that the said notice was not received by the Corporate Debtor, accordingly, the date of default would fall in the first week of October, 2022.

- 4.5 The irregularity or infirmity in the security document securing the financial debt is not a relevant factor at this moment because Section 7 of the Code only mandates existence of debt, whether secured or not, and default of more than Rupees one crore in repayment thereof.
- 4.6 Though the Part IV of the Application does not specify the date of default, yet it can be determined on a prima facie perusal of Exhibit C forming part of the perusal which demonstrates the monthly defaults in payment of interest. Hence, this Bench is of the considered view that the present petition does not deserve to be dismissed on this technical ground as long as the date of default can be ascertained from the pleadings and the exhibits annexed to the petition. Nonetheless, the Corporate Debtor has itself admitted that from the NESL record of default, it appears that the date of default is 30/4/2023, which on the face of it appears to be incorrect. We have already given our finding in Para 4.3.1 and 4.4.1 in this relation.
- 4.7 We do not find any force in the contention that the present petition is in realm of recovery proceedings because there have been consistent defaults in the payment of interest every month barring few and the Corporate Debtor was already admitted into CIRP in another petition which later on came to be settled. These facts

clearly indicate that the Corporate Debtor needs resolution of its defaults.

5. In view of the above, this Bench is of the considered view that there exists a “financial debt” within the meaning of Sec. 5(8) of the Code and the default in repayment of such debt thereof. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant and there is default by the Corporate Debtor in payment of debt amount. We do not have any other objection on record against the application filed for initiation of CIRP against the Corporate Debtor.
6. In view of the above, we find that the present petition is fit for admission under Section 7 of the Code for initiation of CIRP against the Corporate Debtor.
7. The Applicant has proposed the name of Mr. Raghunath Sabanna Bhandari, a registered insolvency resolution professional having Registration Number [IBBI/IPA-002/IP-N01023/2020-2021/13276] and Email Id.- raghunathsb @yahoo.com; and has submitted her consent letter dated 11.12.2020 u/s. 7 (3)(b) of the Insolvency And Bankruptcy Code, 2016 to carry out the functions as mentioned under Insolvency and Bankruptcy Code, 2016.

ORDER

This Application being C.P. (IB) No. 620/NCLT/MB/C-IV/2023 filed under Section 7 of I&B Code, 2016, filed by Think Hard India Private Limited, Financial Creditor/ Applicant against Whiz Enterprise Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
 - a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of

Operational Assets and Enforcement of Security Interest Act,
2002;

d) the recovery of any property by an owner or lessor where such
property is occupied by or in possession of the corporate debtor.

II. That the supply of essential goods or services to the corporate debtor,
if continuing, shall not be terminated or suspended or interrupted
during the moratorium period.

III. That the provisions of sub-section (1) of Section 14 of I&B Code shall
not apply to

a. such transactions as may be notified by the Central
Government in consultation with any Operational sector
regulator;

b. a surety in a contract of guarantee to a Corporate Debtor.

IV. That the order of moratorium shall have effect from the date of this
order till the completion of the corporate insolvency resolution
process or until this Bench approves the resolution plan under sub-
section (1) of section 31 of I&B Code or passes an order for the
liquidation of the corporate debtor under section 33 of I&B Code, as
the case may be.

- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench hereby appoints Mr. Raghunath Sabanna Bhandari, a registered insolvency resolution professional having Registration Number [IBBI/IPA-002/IP-N01023/2020-2021/13276] and Email Id.- raghunathsb @yahoo.com; as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- VII. The Financial Creditor shall deposit a sum of Rs. 5,00,000/- (Rupees Five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

IX. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Prabhat Kumar
Member (Technical)

//LRA-Akshata Shah//

Sd/-

Kishore Vemulapalli
Member (Judicial)