NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1083 of 2024

[Arising out of the Impugned Order dated 08.04.2024 passed by the National Company Law Tribunal, Mumbai Bench in C.P.(IB)/7(MB)/2024]

In the matter of:

Metamorphosis Trading LLP
4th Floor, Paville house, twin Tower Lane,
Off Veer Savarkar Marg, Prabhadevi
Mumbai-400025

... Appellant

Versus

Kumar Motors Private Limited
Gat No. 316, at Kasar-Amboli,
Post Ambedwet,
Pune, Maharashtra-412111

... Respondent

Present:

For Appellant : Mr. Shikhil Suri, Sr. Advocate with Ms. Aastha Mehta, Ms. Prerana Mohapatra, Ms. Wamika Chadha, Ms. Sakshi Arora, Advocates.

For Respondents : Mr. Mrinal Harsh Vardhan, Ms. Rituparna Patra & Mr. Pradhumn Rao, Advocates.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

The present appeal is filed by the Appellant assailing the impugned order dated 08.04.2024 passed by the National Company law Tribunal, Mumbai Bench in CP(IB)/7(MB)/2024 wherein the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'IBC, 2016'**) against

Kumar Motors Private Limited (hereinafter referred to as the **'Corporate Debtor'/'Respondent'**), was dismissed.

2. The brief facts of this case are as under:

i. The Corporate Debtor is a Private Limited company incorporated on 10.02.2004 having registered office in Pune. The company has authorised share capital of Rs. 20.20 crores. The Corporate Debtor is involved in the business of manufacturing, hiring, assembling, dealing, trading, etc. of automobiles, motor vehicles, water ski jets, etc.

ii. A Subscription and Shareholders Agreement (in short **'SSA'**) was entered on 06.09.2021 between Innoventive Industries Limited (identified as "Investor"), Mr. Rajeev Kumar Nair and Ms. Jyothi Rajeev Nair and Ms. Vijaya Nair and Ms. Renu Nair and Shreyas Constructions Private Limited (identified as "Promoters") and Kumar Motors Private Limited (identified as "Company") in the said agreement.

iii. Between 08.09.2011 and 09.05.2012 Innoventive Industries Ltd. paid a sum of Rs. 8,70,03,374/- to the Corporate Debtor out of which Rs. 1 crore was taken back on 11.01.2012, though immediately, within 12 days, it was again made available to the Corporate Debtor.

iv. On 04.03.2013, Innoventive Industries Ltd. wrote letter to the Corporate Debtor that it has not carried out its obligations under the SSA.

v. On 21.03.2013, a reminder notice was sent by Innoventive Industries Ltd. to the Corporate Debtor seeking repayment of the entire amount with 24% interest within 7 days mentioning the amount as "inter-corporate loan".

vi. On 20.06.2013, Innoventive Industries Ltd. filed Company Petition No. 468 of 2013 before the Hon'ble High Court of Bombay under Section 450 of the

Companies Act, 1956 for winding up of the Corporate Debtor (Kumar Motors) and for appointment of the official liquidator to take over the assets of the Corporate Debtor. The said petition was admitted vide order dated 04.08.2015 and the liquidation of the Corporate Debtor was initiated.

vii. In another proceedings liquidation of Innoventive Industries Ltd. (the Investor) was ordered on 08.12.2017 and Mr. Dhinal Shah was appointed as its liquidator.

viii. Subsequently, on 21.07.2021, the Appellant emerged as a successful bidder and entered into a deed of assignment with Mr. Dhinal Shah, liquidator, whereby the assets of Innoventive Industries Ltd. were transferred in favour of the Appellant. The Appellant stepped into the shoes of the Innoventive Industries Ltd. and by way of assignment deed dated 21.07.2017, all the rights vested in the Innoventive Industries Ltd. and all the assets along with right to initiate action have been vested in the Appellant. Though the Appellant is not a party to the SSA, by virtue of being successful bidder and assignee of the assignment deed, it has stepped into the shoes of the Innoventive Industries Ltd., the "investor" as per SSA and has acquired the right to recover the amount of Rs. 8.70 crores approximately due from the Corporate Debtor.

ix. The Appellant then filed IA No. 3648/2022 on 28.09.2021 before the Hon'ble High Court of Bombay seeking transfer of CP No. 468/2013 filed by Innoventive Industries Ltd. for winding up of Corporate Debtor, in accordance with provisions contained in Section 431(1)(c) of the Companies Act, 2013.

x. The CP No. 468/2013 was transferred to NCLT vide order dated 27.07.2022. The Appellant, being granted liberty by the Hon'ble High Court to transfer CP NO. 468/2013 to NCLT, filed transfer petition (IB) 01/2013 on

06.06.2023. This transfer petition was disposed of vide order dated 11.09.2023 by Ld. NCLT with liberty to financial creditor/appellant to file a fresh petition under Section 7 of the IBC, 2016.

xi. The fresh petition under Section 7 of the IBC, 2016 was filed and was numbered as CP(IB)/7(MB)/2024 seeking Corporate Insolvency Resolution Process (hereinafter referred to as the **'CIRP'**) against the Corporate Debtor. In the petition under Section 7, it has been submitted that there is a debt of Rs. 8,70,03,275/-, and the date of default is 21.07.2021. The said petition under Section 7 of the IBC, 2016 has been dismissed by the impugned order dated 08.04.2024.

xii. While dismissing the petition under Section 7 of the IBC, 2016, the Ld. NCLT has held as under:

> *"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."

Being aggrieved by the dismissal of petition under Section 7, the Appellant has filed the present appeal.

3. In its oral and written submissions, the Ld. Sr. Counsel for the Appellant has argued as under:

i. The NCLT erred in dismissing the Section 7 petition by erroneously concluding that no financial debt exists.

ii. The amounts advanced under Subscription and Shareholders Agreement (in short **'SSA'**) dated 06.09.2011 clearly demonstrate the 'commercial effect of a borrowing' and hence is a "financial debt" under Section 5(8)(f) of the IBC, 2016.

iii. The Ld. Sr. Counsel referred to clause 4A.1 and clause 4A.2 of the SSA which reads as under:

"4A. RIGHTS & DUTIES OF THE INVESTOR

4A.1 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, 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 as stated in above sub-clause (a).

4A.2 The Investor would help the Company in raising a sum of Rs. 700,00,000/-(Rupees Seven Crores only) from banks, financial institutions or any other person for the purpose of its CAPEX Plan. CAPEX Plan means funds required broadly for Paint Shop, Conveyors Tools & Fixtures to enable the Company in achieving the Business Plan of 1000 vehicles per month."

iv. It is argued that the Appellant has helped the company raise funds for its CAPEX plan. The transaction under the SSA had "commercial effect of borrowing" and is covered under Section 5(8)(f) of the IBC, 2016.

v. The sum of Rs. 8.70 crores was paid between 08.09.2011 to 09.05.2012 and Innoventive Industries Ltd., the predecessor of the Appellant, had through notice dated 21.03.2013 explicitly demanded repayment of entire amount with 24% interest.

vi. Section 5(8) (f) is a "catch all" and "residuary" provision which includes as "financial debt" any transaction having the "commercial effect of borrowing" even though it is not a conventional loan.

vii. The Appellant submitted that it is to be determined if the advanced amount of 8.70 crores under the SSA constitutes a "financial debt", particularly considering that the non-allotment of shares within 60 days, as per Section 42(6) of the Companies Act, 2013, transforms such money into a loan, a position further supported by the exit clause 18.12 of the SSA, which provided investor an exit option within 60 months. The amount is shown in "borrowings" in the balance sheet.

viii. It is argued that since no shares were allotted, amount advanced metamorphosed into "financial debt" in light of Section 42(6) of the Companies Act, 2013.

ix. The Ld. Sr. Counsel for the Appellant submitted that courts in the cases of *Global Credit Capital Ltd. & Anr. v. Sach Marketing Pvt. Ltd. & Anr.* reported in *(2024) 9 SCC 482* and in the case of *Sanjay D. Kakade v. HDFC Ventures Trustee Company Ltd. & Ors. in Company Appeal (AT) (Ins.) No. 481 of 2023* have held that character of transaction has to be seen, including, intent and conduct of the parties.

x. A perusal of the agreement of SSA will show that the intent was to participate in the business of Respondent. Clause 8.1 of SSA deals with constitution of board of directors and clause 9.1 states that the company shall obtain prior consent of majority warrant holder, without which the company shall not be able to take any such action on the "fundamental issues". The "fundamental issues" are defined in clause 9.3 and largely relate to conduct of the business, including, corporate governance. The projected fund flow given at page 90 to 92 of the Appeal Paper Book (APB) was drawn from June 2011 to February 2015 thereby showing the intent of the Appellant to finance and guide the business. Similarly, clause 5 of the SSA, protects the business by specifying that promoters will ensure that the directors or KMP (key managerial persons) do not indulge in activities which compete with business of the company. Similarly, in clause 6 of the SSA, restriction on transfer of shares of the promoters and in clause 6.4 the pre-emptive rights protect the ownership of the company.

xi. It is argued that a closer examination of the SSA will show that it was not a simplicitor Share Subscription Agreement but an agreement to finance and assist the business of the Corporate Debtor.

4. The Ld. Counsel for the Respondent in its oral and written submissions argued as under:

i. The Appellant does not qualify as a "financial creditor" under the SSA. The amount paid by Innoventive Industries Ltd. were towards equity participation and subscription of shares and thereafter, payment of warrant subscription price. The SSA did not contain any stipulation for repayment of the invested amount, payment of interest, or assured returns.

ii. There is history of this case wherein the Appellant had filed application before the Hon'ble High Court seeking winding up of the Respondent in which the Hon'ble High Court passed order on 27.07.2022, directing the transfer of pending winding up proceedings to NCLT, Mumbai Bench. While allowing the transfer petition, Hon'ble Bombay High Court recalled its order of admission dated 04.08.2015 and order of winding up dated 08.02.2019 and revoked the winding up proceedings. The Ld. NCLT vide order dated 11.09.2023 disposed of proceedings of winding up petition as not maintainable while granting Appellant liberty to file a fresh petition under Section 7 of the IBC, 2016. The said petition under Section 7 was dismissed vide the impugned order.

iii. The said petition under Section 7 has barred by limitation as the date of default is 09.04.2013, when the statutory notice under Section 433 of the Companies Act, 1956 was issued. It is argued the proceedings before the Hon'ble High Court of Bombay will not extend the period of limitation.

iv. The Appellant is the assignee of Innoventive Industries Ltd. Innoventive Industries Ltd. itself was not a financial creditor and the assignee cannot get a better right.

v. The reading of relevant provisions of SSA dated 06.09.2011, especially clauses 1.1, 2.1(b), 2.2, 3, 4A, 6 & 6.1, 8, 10, 12, 15 and 18.2 clearly indicate that Innoventive Industries Ltd. was engaged in the capacity of an "investor" subscribing to shares and warrants of the Respondent company and there was no contemplation of repayment.

vi. The transaction governed by the SSA contained no stipulation for repayment, interest, maturity or assured returns and lacks any element of time value of money.

vii. A holistic reading of the SSA makes it clear that Innoventive Industries Ltd. assumed the risks of equity investor and not the position of a creditor. The amount advanced towards subscription of shares and equity warrants does not transform into "financial debt".

viii. In the summary jurisdiction under Section 7 of the IBC, 2016, jurisdiction is confined primafacie to determination of "debt" and "default". No further enquiry into contractual dispute is warranted. Since there was no repayment obligation, there was no debt and since there was no obligation for repayment, there was no default.

ix. The alleged breach(es) of contract under the SSA, at best, give rise to civil and arbitral remedies. The arbitration proceedings regarding the said transactions are already going on.

x. The allegation of the Appellant that debt is shown as "long term borrowing" in the balance sheet is incorrect. The audited financial statement shows that

share capital of the company had increased from Rs. 5.50 crores to Rs. 14.20 crores in financial year 2012-13 corresponding to the amount received from the Appellant.

xi. The breach of SSA was committed by Innoventive Industries Ltd. with reference to its contractual obligations under clauses 4A.1 and 4A.2 of the SSA, including violation to adhere to the stipulated subscription time line.

xii. In the arbitration proceedings relating to the said transaction, the Respondent have not only contested the claims but also had filed substantial counter claims to the tune of Rs. 26 crores on account of losses caused by breaches by Innoventive Industries Ltd. In the cross-examination in the arbitration proceedings, the Appellant had admitted that the sole object of amount given to the Respondent was to secure 51% of the shareholding of the Respondent company.

5. Heard. Perused the records.

6. Under the provisions of Section 7 of IBC, 2016, the CIRP against the Corporate Debtor can be initiated by "financial creditor" either by itself or jointly with other financial creditors by filing an application before the Adjudicating Authority (NCLT) when a default has occurred.

6.1 Section 5(7) defines "**financial creditor**" 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.

6.2 The term "**financial debt**" is defines in Section 5(8), which is as under:

> "***5. Definitions***
> .....

> ***(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 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 non-recourse basis;*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing."*

6.3 It is the case of the Appellant that the impugned transaction is covered by the terms "any other transaction" "having the commercial effect of a borrowing".

6.4 The admitted facts in this case are that Innoventive Industries Ltd. had paid an amount of Rs. 8.7 crores to the Corporate Debtor under Subscription and Shareholders Agreement (in short 'SSA') in the period from 08.09.2011 to 09.05.2012. Through the liquidation of Innoventive Industries Ltd., its debts and assets have been assigned to the Appellant-Metamorphosis Trading LLP on 21.07.2021. Being the assignee of the debts and assets, the Appellant stepped into the shoes of the Innoventive Industries Ltd.

6.5 The issue to be decided in this case is whether the amount received by the Respondent-Corporate Debtor under the SSA dated 06.09.2011 constitutes

"financial debt" within the meaning of Section 5(8), specifically under clause (f) of the said section. For proper understanding of this issue, one has to refer to SSA. The relevant portions of the SSA are extracted as under:

> *"This Subscription and Shareholders Agreement Made At Pune This 6th Day of September, 2011 by and between:*
>
> *Innoventive Industries Limited, referred to as The "Investor"*
>
> *AND*
>
> *Mr. Rajeev Kumar Nair, referred to as "Promoter 1"*
>
> *AND*
>
> *Ms. Jyoti Rajeev Nair, referred to as "Promoter 2"*
>
> *AND*
>
> *Ms. Vijaya Nair, referred to as "Promoter 3"*
>
> *AND*
>
> *Ms. Renu Nair, hereinafter referred to as "Promoter 4"*
>
> *AND*
>
> *Shreyas Constructions Private Limited, hereinafter referred to as "Promoter 4"*
>
> *AND*
>
> *Kumar Motors Private Limited, referred to as "Company"*
>
> *(Promoter 1 to Promoter 5 are collectively referred to as the "Promoters")*
>
> *WHEREAS:*
>
> *A. The Investor has, for consideration and on terms and conditions detailed herein, agreed to subscribe to the Investor Shares and the Investor Warrants.*
>
> *……*
>
> *C. Parties hereto have agreed that their respective rights and obligations with regard to the business relationship between them infer se will be interpreted, acted upon and governed solely in accordance with the terms and conditions of this Agreement and the Memorandum and Articles of Association of the Company, which are being modified to conform to this Agreement.*

1. DEFINITIONS & INTERPRETATIONS

1.1. In this Agreement, except to the extent that the context otherwise requires, the following words and expressions shall have the following meanings:

……

"Fundamental Issues" means the matters set out in Clause 9.3 which relate to the Company;

"Investor" means Innoventive Industries Limited.

"Investor Shares" mean the Shares to be allotted in favour of the Investor by the Company in accordance with Clause 2.1(a) of this Agreement;

"Investor Share Subscription Amount" shall mean a sum of Rs. 100/- towards issue & allotment of 10 Equity Shares by the Company;

"Investor Subscription Amount" means the aggregate of the Investor Share Subscription Amount and the Warrant Subscription Amount;

"Majority Warrant holder" means at any point of time, a Person holding at least 66.67% of the number of Warrants (whether held in the form of Warrants, or in case of conversion and issue of Warrant Shares as per the terms hereof, including the Warrants represented by the Warrant Shares);

……

"Shareholding Pattern" means the percentage of Shareholding (%) held by the Shareholders of Kumar Motors Private Limited which is as follows:

Sr.No.	*Name Of Shareholders*	*Percentage of Shareholdings (%)*
1.	*Rajeev Kumar Nair*	*26*
2.	*Vijaya Nair*	*7*
3.	*Jyothi Nair*	*28*
4.	*Renu Nair*	*6*
5.	*Shreyas Construction Pvt. Ltd.*	*33*
	TOTAL	*100*

……
"Warrant(s)" means warrants of face value of Rs. 800,000/- (Rupees Eight Lacs only) to be issued by the Company to the Investor in

accordance with this Agreement, each such warrant being convertible into Shares subject to adjustment at the time of actual conversion for (i) any bonus issue of Shares; or (ii) consolidation or sub- division of Shares (including share split); or (iii) issue of Shares on rights basis or (iv) any other dilution or consolidation events that may have occurred prior to such conversion;

*"**Warrantholder**" in relation to a Warrant at any point of time, means the owner of such Warrant;*

*"**Warrant Exercise Price**" means a sum of Rs. 800,00,000/- (Rupees Eight Hundred Lacs only) payable by the Investor to the Company;*

*"**Warrant Shares**" means the Shares issued to the Warrant holder upon conversion in the manner provided in this Agreement;*

*"**Warrant Shareholder**" means the holder of the Warrant Shares;*

*"**Warrant Subscription Price**" means a price of Rs. 1000/- per Warrant.*

.....

2. SUBSCRIPTION TO SHARES AND WARRANTS

2.1. Upon the terms and conditions of this Agreement, in exchange for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual rights and obligations of the Parties:

(a) The Investor agrees to subscribe to, and the Company agrees to issue, allot and deliver to the Investor, free and clear of all Encumbrances, 10 (Ten) Investor Shares at a price of Rs. 10/- per Investor Share aggregating to Rs. 100/- (Rupees One Hundred only) ("the Investor Share Subscription Amount"). The Investor Shares shall be fully paid up, rank pari passu with, and be identical in all respects to the Shares.
(b) The Investor agrees to subscribe to, and the Company agrees to issue, allot and deliver to the Investor, free and clear of all Encumbrances, 100 (One hundred) Warrants to the Investor. The Warrant Subscription Price in respect of all the Warrants (the "Warrant Subscription Amount") shall be payable upfront at the time of allotment of the Warrants. Upon payment of the Warrant Exercise Price, each Warrant shall confer upon the Warrant holder the right to subscribe to such number of Shares as set out in this Agreement.
(c) The Warrant Subscription Price per Warrant paid upon allotment of the Warrants shall be adjusted against the Warrants Exercise Price payable at the time of conversion of the Warrants.

2.2 All Parties acknowledge that the subscription by the Investor of the Investor Shares and the Warrants is based on the integral

condition that the Investor Subscription Amount and the Warrant Exercise Price received upon conversion of the Warrants shall be utilized exclusively for the purpose of the Business of the Company.

2.3 Conversion of Warrants

Any time between March 31, 2012 to March 31, 2015, any Warrantholder may choose to convert all or any of the Warrants in his possession by giving 7 (seven) days prior written notice to the Company ("Warrant Exercise Notice") specifying therein (i) the date on which the Warrantholder intends to exercise the Warrants ("Warrant Exercise Date") and; (ii) the number of Warrants proposed to be exercised ("Exercise Warrants");

2.4. On the Warrant Exercise Date, all (but not only some) of the following shall take place:

(a) The Warrantholder shall pay the Warrant Exercise Price (as reduced by the Warrant Subscription Price) for each Exercise Warrant to the Company in such manner as Majority Warrantholder may decide;
(b) the Promoters shall cause a meeting of the Board or its duly authorized committee to be held and allot the Warrant Shares arising upon conversion of the Warrants specified in the Warrant Exercise Notice in favour of the Warrantholder in accordance with this Agreement, issue certificates in respect of such Warrant Shares and shall make the necessary entries in its register of members for the allotment of such Shares in favour of the Investor or, as the case may be, the Warrantholder;
……..

2.5. Warrant Shares

In the event, Warrantholder opts to convert all 100 Warrants into Shares, Promoters and the Company expressly agree in writing to issue & allot such number of Warrant Shares which would entitle Warrantholder to hold not less than 51% of total paid-up equity share capital of the Company, on a fully diluted basis, at the time of such conversion.

(a) In the event, Warrantholder opts to convert some of the Warrants into Shares, Promoters and the Company expressly agree in writing to issue & allot proportionate number of Warrant Shares for e.g. if 50 Warrants are being converted, number of Warrant Shares which would entitle Warrantholder to hold not less than 25.5% of total paid-up equity share capital of the Company would be issued, on a fully diluted basis, at the time of such conversion.
2.6. The Promoters shall ensure that on or before September 30, 2011 the Company's authorized share capital is such that the conversion of the Warrants in the manner envisaged under this Agreement is permissible.

3. CLOSING

3.1 Closing shall take place simultaneously at any place and time as may be mutually agreed upon by the Parties immediately upon the satisfaction by the Company or waiver in writing by the Investor, in its sole discretion, of the conditions set forth in Clause 4 herein.

3.2. At Closing, all (but not only some) of the following shall take place:

(a). The Investor shall subscribe to the Investor Shares and the Warrants and shall pay the Investor Subscription Amount to the Company in a manner Majority Warrantholder may decide;

(b). The Board shall issue and allot to the Investor, duly stamped share certificates and warrant certificates in respect of the Investor Shares and the Warrants respectively;

(C). The Company and the Promoters shall ensure that the Company hold a meeting of the Board or its duly authorized committee for passing the following resolutions (certified copies of which resolutions shall be in Agreed Form and shall be delivered to the Investor):

i. The issue and allotment of the Investor Shares and the Warrants tothe Investor;
ii. Convening an extraordinary general meeting of the Company for considering the resolutions set out in Sub-clause (d) below.

(d) . The Company shall hold an extraordinary general meeting at which the following resolutions shall be passed in the Agreed Form:

i. Adopting the Memorandum of Association and the Articles of Association in the Agreed Form, in order to reflect the relevant provisions of this Agreement;

(e) All requisite forms and returns including, without limitation, the return of allotment to be filed in respect of the allotment of the Investor Shares and the Warrants shall be prepared and signed on behalf of the Company and filed with the appropriate authorities;

(f). All corporate, secretarial and statutory filings and entries in statutory registers required to be done for the Closing shall be carried out to the satisfaction of the Investor.

4. CONDITIONS PRECEDENT

…….

4.7. The Company shall have completed the conversion of the Shares into dematerialized form.

…….

4.9. Increasing Company's authorized share capital so that the conversion of the Warrants in the manner envisaged under this Agreement is permissible.

4A. RIGHTS & DUTIES OF THE INVESTOR

4A.1 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, 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 as stated in above sub-clause (a).

……

4A.6 …… in ***Schedule 1*** *which forms an integral part of this*

Agreement. Any failure on the part of Company and/or Promoters to achieve

performance as per Business Plan would empower the Majority Warrantholder to

revise Warrant Exercise Price in such manner as he may deem fit & appropriate.

5. NON-COMPETE AGREEMENT

5.1 The Promoters shall undertake that they will not initiate any new activities or expansions related to the Company's existing or proposed future line of business through any vehicle, including other companies/affiliates where promoters have an interest, direct or indirect. Such initiatives if undertaken it shall be only under the Company or 100% subsidiary of the Company.

……

5.3 Promoters will ensure that any Director or Key Managerial Person of the Company is not indulged in any activity which results in competing with the business of the Company either directly or indirectly.

6. SHARE AND WARRANT TRANSFER PROVISIONS

*For the purpose of this Clause 6, unless specified otherwise, the term "**Promoter Shares**" shall mean and include any Shares held by the Promoters or any of their Affiliates in the Company.*

Transfer restrictions - General

6.1. 100% of shares held in the Company by the Promoters cannot be transferred to any third party either directly or indirectly, in any manner whatsoever, and shall stand locked in from the date of issue and allotment thereof. However with the prior written Consent, Promoters may transfer such number of Equity Shares as approved by the Investor subject to fulfillment of such terms & conditions as Investor may deem fit & appropriate.

Pre-emptive Rights

6.4 With the prior written approval of the Investor, and subject to what is provided elsewhere in this Agreement, the Company may raise funds by way of issue of Equity Shares or instruments convertible in to Equity Shares, from other investors or issue Shares to any other person (hereinafter together referred to as "the New Investor/s").

6.5 The Promoters and the Company undertake that in case of any issue of Equity Shares or other instruments convertible into Equity Shares to New Investor/s, the Investor shall have an independent right to subscribe to additional Equity Shares or Warrants or any other instruments convertible in to Equity Shares, at their own discretion, at the same price and terms at which the New Investor/s has/ve agreed to invest, so as to enable the Investor to maintain its stake in the Company.

Transfer of Warrants and Warrant Shares

6.6. Subject to Applicable Law, the Warrantholder shall always be entitled to freely Transfer the Warrants and/or Warrant Shares to any Person at its own discretion and at such price as it may deem fit provided right of first refusal is being granted to the Promoters.

.....

8 . BOARD REPRESENTATION

*For the purpose of this Clause 8, unless specified otherwise, the term "**Board**" or "**Board of Directors**" shall mean and include the Board of Directors of the Company including any committee of such "Board of Directors" and the term "Director" shall be construed accordingly.*

8.1. CONSTITUTION OF BOARD OF DIRECTORS

a) The Board of Directors of the Company shall comprise of not more than six (6) Directors.

b) The Majority Warrantholder shall be entitled to nominate 50% of the Directors i.e. 3 (three) directors (the Nominee Directors) on the Board of Directors of the Company.
c) The remaining members of the Board of Directors shall be nominated by the Promoters.

9. FUNDAMENTAL ISSUES

For the purpose of this Clause 9, the terms "Board" or "Board of Directors" shall mean the Board of Directors of the Company and shall include any committee of the Board.

9.1. If the Company or the shareholders of the Company, as the case may be wish to take any action with respect to the Fundamental Issues at any meeting of the Board or at any general meeting of shareholders (if such issue requires the approval of the shareholders in general meeting), as the case may be, the Company shall obtain the prior written consent of the Majority Warrantholder without which the Company shall not be able to take any such action.

…….

14.4. AUTHORIZED SHARE CAPITAL AND RIGHTS ISSUE OF SHARES

Notwithstanding anything contained herein, the Promoters and the Company agree that in order to protect the investment made by the Investor under this Agreement, on and from the date of Closing (i) any resolution placed before the shareholders of the Company to increase the authorized share capital of the Company shall be required to be passed by a special resolution and (ii) Company shall not issue any further Shares or instruments convertible at any future date into Shares of Company, whether such further issuances are on rights basis or otherwise, unless such further issuance has been approved by the shareholders of Company by way of a special resolution.

14.5. DEMATERIALISATION OF SHARES

The Company undertakes and confirms that it shall ensure that the shares of the Company are dematerialised within 30 (thirty) days from the date of issue of the Warrants hereunder.

15. TERMINATION

15.1 This Agreement may be terminated at any time by mutual written agreement of the Parties;

15.2 In the event of a material breach by the Promoters or the Company ("Defaulting Party") of any of their respective representations, Warranties, covenants, undertakings or obligations herein, the Investor and the Majority Warrantholder shall, if such breach is not cured by the Defaulting Party within 15 days of receipt

of a written notice to that effect from the Investor or the Majority Warrantholder, have the right to forthwith terminate this Agreement.

.....

18. MISCELLANEOUS

.....

18.3 BINDING EFFECT

Subject to the terms and conditions hereof, this Agreement is binding upon the Parties and their respective successors and permitted assigns.

.....

18.11 EXERCISE OF VOTING RIGHT

The Promoters undertake to ensure that they, their representatives, proxies and agents representing them at general meetings of the shareholders of the Company shall at all- time exercise their votes and to the extent permitted by Applicable Law, act in such manner, so as to comply with, and to fully and effectually implement, the spirit, intent and specific provisions of this Agreement.

Notwithstanding anything contained herein, Promoters and the Company have agreed that Investor and Majority Warrantholder (collectively) would be effectively entitled to exercise 51% of the total voting power in the Company from the date of execution of this Agreement till all Warrants are converted into Warrant Shares in the manner set out herein.

18.12 EXIT OPTION

Notwithstanding anything contained herein this Agreement, Investor shall be free to liquidate its Warrants and/or Warrant Shares in the Company in a form and fashion consistent with the Investors' objectives and at the option of the Investor. The Promoters and the Company undertake to provide an exit to the Investors within 60 months from the date of investment, which shall include IPO, Strategic Sale/Merger.

.....

20. SUN-SET CLAUSE

Rights of the Investor and Majority Warrantholder will cease to be valid once the Company is listed on Stock Exchange.

21. SURVIVAL OF PROVISIONS

Notwithstanding anything contained herein, the provisions of Clause 5 (Non- Compete), Clause 7 (Confidential Information), Clause 12 (Indemnity), Clause 16 (Dispute Resolution), Clause 17 (Governing Law), Clause 18.1 (Representative of the Promoters) and Clause 19

(Notices) shall survive extinguishment of rights and obligations pursuant to Clause 15 or termination of this Agreement."

6.6 A perusal of the SSA dated 06.09.2011, the relevant portions of which are extracted above, shows that Innoventive Industries Ltd. wanted to invest in the Corporate Debtor so as to become majority shareholder. Clause 2.5 reproduced *(supra)* states that if the warrant holder opts to convert warrants into shares, it would be entitled to hold not less than 51% of total paid up equity share capital of the company.

6.7 In essence the agreement entails that against the amount invested as also bought in through associates, the "investor" shall gain control over the majority voting rights (equity shareholding) as also the composition of the board of directors. Clause 8.1 of the SSA *(supra)* states that board of directors of the company shall comprise of not more than 6 directors wherein majority warrant holder shall be entitled to nominate at least 3 directors. The remaining 3 directors shall be nominated by the promoters. Clause 9 of the SSA *(supra)* states that action on fundamental issues, which are listed in clause 9.3, and which cover almost all major decisions pertaining to operations of company, can be taken only after prior written consent of the majority warrant holder. For brevity, this list running from sub clause (a) to sub clause (u) has not been reproduced above, but it includes amendment to constitutional documents, mergers and acquisitions, finalisation of the business plan, purchase of real estate, change in the name of the company, increase or decrease in size of board of directors, change in accounting methods, etc. which are the major critical decisions in governance of a company. Thus, had the agreement been fully implemented, the

majority warrant bolder/investor would have acquired majority shareholding, majority position in board of directors and control over running of the company.

6.8 The SSA prescribes issue of shares and conversion of warrants into shares on receipt of payment from "investor". There is no clause which deals with repayment of the amount. The SSA, as per clause 15 *(supra)*, can be terminated by mutual written agreement of the parties. As per clause 18.12 *(supra)*, investor will have an exit option within 60 months of the date of investment. However, if the investor exercises such option, the exit shall be provided through issue of IPO, strategic sale/merger. The clause 20 *(supra)*, titled as "sun-set clause" states that the rights of the investor and majority warrantholder will cease to be valid once the company is listed on stock exchange. The SSA does not contain any provision for repayment to the investor, and only consideration in exchange is 51% of the equity shareholding and voting rights as given in part 18.11 *(supra)*, and if the investor becomes the majority warrantholder, it gets right to nominate 50% of the directors on the board and gets to control the company.

6.9 It is apparent that the SSA is an agreement through which the "investor" was to become the majority shareholder of the Corporate Debtor, and was to exercise attendant rights on becoming majority shareholder.

6.10 It is admitted position that the SSA was not fully implemented.

6.11 The equity shares and warrants were not allotted to the Appellant. It is the submission of the Appellant that if no allotment is made against the amount paid for allotment of shares, the said amount partakes the character of a deposit/loan as per the provisions of sub-Section (6) of Section 42 of the Companies Act, 2013, which is as under:

"***SECTION 42: Issue of shares on private placement basis.***

> *(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:*
> *Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than-*
>
> *(a) for adjustment against allotment of securities; or*
>
> *(b) for the repayment of monies where the company is unable to allot securities."*

6.12 We find even this objection of the Appellant is not maintainable as the said provision under Section 42 has been introduced in the Companies Act, 2013 and no parallel or equivalent provision existed in the Companies Act, 1956. It is the admitted fact that the SSA was executed on 06.09.2011, when the provisions of Companies Act, 1956 were prevalent. Further, as no private placement of shares is made, Section 42 of Companies Act, 2013 is not, even otherwise, applicable, as held by this Tribunal in *M/s Murlidhar Vincom Pvt. Ltd. v. M/s Skoda (India) Pvt. Ltd. in Company Appeal (AT) (Ins.) No. 1334 of 2024.*

6.13 We note that both sides have conflicting submissions regarding reflection of the transaction in the balance sheet of Corporate Debtor. It is the submission of the Appellant that the amount is shown in 'borrowings' whereas the Respondent disputed it and states that amount is shown in the "share capital". We note that this issue was not raised before the Ld. NCLT and has not been adjudicated upon. We further note that the Hon'ble Supreme Court in the case

of *IL & FS Financial Services Ltd. v. Adhunik Meghalaya Steels Pvt. Ltd. in Civil Appeal No. 5787 of 2025* has noted that whether a certain document in a given case constitutes a valid acknowledgement would depend on the facts and circumstances of each case and that balance sheet is prepared in the statutory format which did not provide the specific name of every secured and unsecured creditor. In the present case, both the amount "borrowings" and "share capital" have gone up and from the mere perusal of the balance sheet one is not able to make out whether the amount is treated as share capital or as borrowings. The Ld. Counsel for the Respondent has explained that the increase in share capital corresponds to the exact amount of money taken from the Appellant. In any case, character of the transaction is determined by the SSA under which the amount was advanced, which we have already analysed above to state that amount was given with aim to acquire 51% shareholding of the Corporate Debtor.

6.14 At this stage, we look for judicial guidelines and precedence regarding maintainability of a petition under Section 7 of the IBC, 2016 for the amounts advanced for the purchase of equity shares or the share application money.

i. The Hon'ble Supreme Court in *EPC Constructions India Ltd. v. M/s Matix Fertilizers and Chemicals Ltd., CA No. 11077 of 2025* held as under:

> *"46. Another important Section in the IBC to be noticed is Section 5(8) which prescribes that to be a financial debt there needs to be disbursal against consideration for the time value of money. Section 5(8)(c) does not talk of preference shares while it talks of note purchase facility, bonds, notes, debentures, loan stock, or any other similar instrument to the categories mentioned thereunder. The omission is significant. As demonstrated above,*

the paid up money on shares being "share capital" they do not constitute debt.

47. As far as 5(8)(f) is concerned before we deal with the term commercial effect of borrowing the opening clause of 5(8) cannot be lost sight of. It has to be first a debt and such debt would be a financial debt if it is raised under any other transaction including any forward sale or purchase agreement having the commercial effect of borrowing. As already explained the paid up amounts towards shares do not have the character of debt. The further argument that redemption was due, is also not meritorious. As required under Section 55 of the Companies Act, 2013, the shares could be redeemed only out of the profits or with any amount kept apart for dividends which is not the situation in the present case."

(Emphasis supplied)

ii. This Tribunal in *Prakash Ambure v. Invest Bio Med Private Ltd., CA(AT)(Ins.) No. 582 of 2024* has held as under:

"8. Per contra, relying on the ratio in Pramod Sharma Vs Karanaya Healthcare Pvt. Ltd., [C.A. (AT)(Ins) 426 of 2022], dated 21.04.2022 which was relied on in M/s Muralidhar Vincom Pvt. Ltd., Vs M/s Skoda (India) Pvt. Ltd., [C.A.(AT)(Ins) 1334 of 2024], dated 26.11.2024, the learned counsel for the respondent submitted that the appellant had merely made investment to purchase shares in the respondent when it was under the erstwhile management and an investment for purchase of shares does not constitute a financial debt within the meaning of Sec.5(8) of the Code and hence a proceeding under sec.7 of the IBC can neither be maintained nor sustained. The learned counsel then proceeded to adopt the stands of the respondent vis-à-vis the point of limitation which it adopted before the Adjudicating Authority.

9. .....

10. Very evidently, the appellant aims at a rear-guard action, but it is not without its fallacies. Is there a subsequent change of character of the money which the appellant had paid the respondent as to bring it within the definition of a financial debt? If the appellant's payment were to be treated as share subscription money, he straight away is driven beyond the IBC zone. If he were to give it a colour of deposit, then it would stand excluded in terms of Rule 2(c)(vii) of the Companies (Acceptance of Deposits) Rules, 2014. The point is how far the trial balance of the respondent referred to earlier will be of use to the appellant? It is true, the respondent goes silent on it in its pleading, but it may have least impact since it will still stand excluded from the definition of deposit in terms of Rule 2(c)(vii) of the Companies (Acceptance of Deposits) Rules, which positively excludes share subscription amount from the definition of deposit. See: Muralidhar Vincom case [C.A.(AT)(Ins) 1334 of 2024]. Therefore, even if there is no pointed finding of the Adjudicating Authority as to the existence of a financial debt, we have little hesitation in holding that there exists no financial debt which may enable the appellant to invoke IBC."

(Emphasis supplied)

iii. This Tribunal in the case of *Pramod Sharma v. Karayana HeatCare Pvt. Ltd. in Company Appeal (AT) (Ins.) No. 426 of 2022* has held as under:

"5. Admittedly, the amount was given, as per the case of the Appellant, as a Share Application Money on which no share was allotted. Under some settlement, the principal amount was refunded and thereafter, the Application under Section 7 was filed by the Appellant. We are of the view that the Adjudicating Authority rightly took the view that the amount which was given by the Appellant as Share Application Money cannot be treated to be a financial debt so as to enable the Appellant to trigger the Insolvency Process under Section 7 of the Code."

The above judgments lay down that any amount paid towards acquisition of share capital does not constitute a "financial debt".

6.15 On the basis of analysis of the facts of this case, in the background of SSA and judicial guidelines provided by the courts, we are of the opinion that the amount advanced by Innoventive Industries Ltd., subsequently assigned to the Appellant, does not amount to "financial debt". There is no clear-cut clause for repayment in SSA and as the amount advanced was towards purchase of equity/convertible warrants, it is not a financial debt. The Ld. NCLT has rightly rejected the petition under Section 7 of the IBC, 2016.

6.16 In view of the aforesaid, there is no merit in the present appeal and hence the same is dismissed. We, however, clarify that the present order will not, in any way, reflect on the rights available to the Appellant to take up its case before other judicial forum. Pending application(s), if any, are closed. No order as to costs.

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 01.07.2026
Ram N.