

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No.303
CP(IB)/100(AHM)2022

Order under Section 7 IBC

IN THE MATTER OF:

Deccan Charters Pvt Ltd

V/s

GSEC Monarch & Deccan Aviation Pvt Ltd

.....Applicant

.....Respondent

Order delivered on 12/01/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

CP(IB) No. 100 / NCLT / AHM / 2022

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

IN THE MATTER BETWEEN

Deccan Charters Private Limited

... Applicant

Versus

GSEC Monarch and Deccan Aviation Pvt Ltd ... Respondent

Order pronounced on 12.01.2024

Coram:

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

MEMO OF PARTIES

Deccan Charters Private Limited

Having registered office at

Jakkur Aerodrome, Bellary Road,

Bangalore, Karnataka – 560064

... Financial Creditor

Versus

GSEC Monarch and Deccan Aviation Pvt Ltd

Having registered office at
D/12, Silver Arc, Nr. Ellisbridge Railway Crossing
Ellisbridge, Ahmedabad -380006 ... Corporate Debtor

Appearance:

For the Applicant : Mr. Tanmay Banthia, Adv. a.w
Mr. Anandodaya Mishra, Adv.

For the Corporate Debtor : Mr. Rohan Ved, Adv.

JUDGEMENT

1. Under consideration, is an application filed by the Financial Creditor viz. Deccan Charters Private Limited under Section 7 of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "IBC, 2016") against the Corporate Debtor viz. GSEC Monarch and Deccan Aviation Pvt Ltd seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor.
2. In Part I of the application it is stated that the Financial Creditor is incorporated on 21.05.2007. In Part II of the application it is stated that the Corporate Debtor was incorporated on 20.03.2017 as a Joint Venture between the respondent and the applicant under the Companies Act, 2013 with the Authorised Share capital of

Rs.10,00,00,000/- (Rupees Ten Crores only) and the paid up share capital of Rs.10,00,00,000/- (Rupees Ten Crores only).

3. In Part III of the Application the Financial Creditor has proposed a name of one Mr. Sunil Kumar Kedia as the Interim Resolution Professional, who has also filed his written consent in Form 2.
4. In Part IV of the application the default amount is stated to be Rs.27,88,55,699/- (Rupees Twenty-Seven Crore Eighty-Eight Lakhs Fifty-Five Thousand Six Hundred and Ninety-Nine Only) and date of default is mentioned as 30.11.2018.
5. Applicant submitted that it executed a Business Undertaking Transfer Agreement (“BTA”) with GSEC Monarch and Deccan Aviation Private Limited (CD and Respondent) on 05.03.2019, effective from 30.11.2018. In lieu of the same, the entire business of the applicant was undertaken by the CD in return of payment of consideration of Rs.11,50,00,000/- along with the payment of liabilities of the applicant with regards to the undertaking consisting of current & Non-current liabilities. As per the application the

total amount of debt of Rs.27,88,55,699/- was bifurcated into:

- i) 60,00,000 equity shares @ Rs.10/- each to applicant aggregating Rs.6,00,00,000/-.
- ii) Rs.5,50,00,000/- as debt.
- iii) Rs. 5,00,00,000/- (Non-current liabilities)
- iv) Rs.4,84,51,125/- (Current liabilities)
- v) Rs.6,54,04,574/- (Other current liabilities).

The date of execution of the BTA is stated as 30.11.2018.

6. The applicant stated that after sending various communication and reminders to the respondent (CD) for payment of the outstanding debt vide emails and letters, which were not responded, issued a final reminder to the CD on 12.05.2020. The default date is stated to be 30.11.2018 (date of execution of BTA) and amount of debt is the same as the amount mentioned in the BTA.
7. As per the Part V of the application, there are no securities held, record of default has not been filed with the Information Utility and there are no copies of entries shown as evidence of disbursement of debt. The existence of financial debt is stated to be the business transfer

agreement (BTA) signed on 05.03.2019 by the applicant and the respondent.

8. The applicant has also filed a written statement on 08.11.2023 wherein the following information has been additionally submitted:

- a) The applicant and respondent formed a joint stock company as per the MOU binding Term sheet dated 12.12.2017 and agreed that GSE-Monarch (respondent) will have a 50% of the shareholding in the GMDAPL (equally divided between Shaishav Shah and family and Himanshu Shah and Family) and the applicant will have remaining 50% of the shareholding;
- b) Acquisition of 100% of the business undertaking operation scheduled commuter business of the applicant company by the respondent;
- c) the parties to the JV will infuse funds in the respondent company to sustain its business operations;
- d) the applicant as per the MOU infused a sum of Rs.5 crores to the respondent for funding the JV;
- e) The amount was taken as a loan by the applicant through respondent company Directors owned NBFC

namely M/s. Krone Finstock Pvt Ltd and infused the same in respondent company, with the understanding that the liability of repayment will be transferred to the respondent in lieu of the BTA to be executed. A copy of the bank account statement of the disbursement through the NBFC is enclosed as pursis by the counsel.

- f) The applicant was only seeking payment of the Rs.5 crores which is over and above the amount in BTA in terms of MoU which has not been disputed by the respondent. It is stated by the applicant that this disbursement qualifies him to be a financial creditor under section 5(8) of the IBC 2016. It is further stated in the application that any amount disbursed to improve the financial health of the company and boost its economic prospects, would have commercial effect of borrowing and would qualify as Financial Debt under Sec 5(8)(f) of the IBC 2016. It is further stated that even if an application is filed under Arbitration and Conciliation Act, 1996, the Tribunal has to ascertain whether there is default or not on the basis of evidence furnished by the applicant (Financial Creditor).

9. The respondent CD vide affidavit dated 02.08.2022 stated that the promoters of the respondent company who had no expertise in the aviation business entered into a Business Undertaking Transfer Agreement on 05.03.2019 (BTA) with the applicant who had experience and SCATS license under the management of Mr Shaishav Shah and pursuant to the representation and warranties provided by the applicant, considered to acquire the said undertaking as a going concern on slump sale basis from the close of business of 30.11.2018. The undertaking that was sought to be transferred by the applicant in favour of the respondent was defined under Schedule A of the BTA. The essence of the transfer under the BTA was the transfer of Scheduled Commuter Air Transport Services Licence (SCATS) and the consequential rights in the business more particularly the right to carry/operate such business of the Commuter Airline Undertaking.
10. It is submitted by the respondent that contrary to what has been represented by the applicant, it was subsequently discovered by them that the SCATS License was not transferrable and the applicant was involved in serious

irregularities in the business operations which were materially suppressed. Accordingly, for the reasons specified (transfer of licence which was not transferable) the respondent served a notice dated 20.10.2020 declaring the BTA as null and void.

11. The respondent stated that the applicant invoked the Clause 15 of the BTA and referred the dispute of declaration of BTA as null and void to arbitration under notice dated 17.12.2021. Further an application was filed under Sec 11 of the A & C Act, 1996 before the Hon'ble High Court of Gujarat seeking appointment of an Arbitrator. Also the applicant cannot claim the status of financial creditor as there was no disbursement for the time value of money. The agreement being a JV between both the parties, action cannot be initiated under Sec 7 of the code and hence this application is not maintainable.
12. The pursis submitted by the applicant on 07.12.2022 encloses a bank account with Bank of India (Annex B page 4) from where certain transactions as mentioned in Para 2(c) of the written statement of the applicant were transferred between transactions Nos. 85 to 92 of the bank statement

amounting to Rs.2 crores each to the respondent. These funds were transferred to respondent on 24.08.2018 receipt of RTS funds from one, Kronefinstock Pvt ltd on the same dates namely 24.08.2018 after receipt on 23.08.2018 & 24.08.2018. There is no evidence of Rs.5 crores transferred to the respondent and the amount appears to be a funding received of Rs.4 crores from Kronefinstock and transferred to the respondent. The email of 13.12.2018 written by the Legal counsel of the applicant addressed to Mr Shaishav Shah (GSEC Group) Mr Himanshu Shah (Monarch Group) and Krone Finstock Pvt Ltd states that in order to invest an amount of Rs.5 crores into the JV, this amount of Rs.5 crores was borrowed from KroneFinstock an associated company of the addressees. It is further inferred from the email (page 27 of the application) that Krone Finstock should not demand the interest, etc.

13. Further in the Business Undertaking Transfer Agreement on 05.03.2019 there is a mention in page 42 that GSEC (respondent) has agreed and upon execution of this agreement allot 60,00,000 of equity shares of Rs.10/- each at par to DCPL and retain the debt as payable to DCPL.

However there is no mention of the Rs.5 crores as specific debt released. The amount of Rs.5 crores is shown as liability to Krone Finstock Pvt Ltd.

14. The applicant served a notice under Sec 7 of the IBC 2016 on 24.03.2022 on the respondent. The respondent had earlier vide letter dated 20.10.2020 served a notice declaring the Business Transfer Agreement dated 05.03.2019 between the applicant and respondent for various reasons to be null and void.
15. The judgements referred in the matter by the applicant and respondent in support of their arguments are:
 - i) Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd. [Civil Appeal No. 2231 of 2021]
 - ii) Shailesh Sangani vs. Joel Cardoso & Ors. [Company Appeal (AT) (Insolvency) No. 616 of 2018]
 - iii) India Power Corporation Ltd. vs. Meenakshi Energy Ltd. [Company Appeal (AT) (Insolvency) No. 1220 of 2019]
 - iv) LICHL Trustee Company Private Limited vs. Ms JBM Homes Private Limited. [IBA/812/2020]

- v) Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) & Ors. [Civil Appeal No.1070 /2021 @ SLP (C) NO. 8120 OF 2020.]
16. We have heard the Ld. Counsel appearing for the Applicant and the Respondent and perused the averments made in the application and reply filed on behalf of the party.
17. The Hon'ble Supreme Court in the case **Innoventive Industries Limited -Vs- ICICI Bank & Anr., (2018) 1 SCC 407** has held that Tribunal is required to see whether there is a 'debt' which is due and payable under the law and whether the default is more than Rupees One Lakh (now Rupees One Crore). The moment where default amount exceeds rupees one crore, this Tribunal is required to initiate a Corporate Insolvency Resolution Process as against the Corporate Debtor.

Observations:

18. The transactions between the applicant and the respondent were intended to be a Joint Venture Agreement for share of business, expertise as narrated in the Business Transfer Agreement. The intention of investment or debt was for the

purpose of having a joint venture and the debt and its service and its disbursement as evidenced from the documents do not reveal that it was intended to be given as a creditor-debtor arrangement. The nature of transactions and the disbursements do not correctly bring the status of the debt which is in-built in an agreement which is intended to be a joint venture for furthering business interests. The same is whether continued or discontinued and whether any liability is to be paid to the applicant or any other party has become a matter of dispute and reference before the Arbitration Counsel as stated in the application. In view of the same and the documents and submissions made, this application is not to be further considered under the provisions under which the submissions have been made.

19. In this regard the judgment passed by Hon' ble NCLAT in the matter of M/s Jagbasera Infratech Pvt Ltd v Rawal Variety Construction Ltd held that the amount invested in a JV project of a promoter and investor is not a financial debt. In view of the above, the tribunal is passing the following order:

ORDER

The application CP(IB) 100 of 2022 filed under Sec 7 is rejected.

-sd-

-sd-

DR.V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)