

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (Insolvency) No. 163 of 2023
(IA Nos. 33, 532 & 534/2023)

[Arising out of the Impugned Order dated 18.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal Hyderabad Bench-1 in I.A. No. 1384/2022 in CP (IB) No. 35/9/HDB/2021]

In the matter of:

Shubham Corporation Private Limited,
Represented by its Authorized Signatory
Mr. Chinta Madhav, Plot No 379, Road No 10,
Jubilee Hills, Hyderabad, Telangana.

...Appellant

Versus

- 1. Mr. Kotoju Vasudeva Rao,**
Interim Resolution Professional,
M/s Navayuga Infotech Private Limited,
Flat No. 104, Kavuri Supreme Enclave,
Kavuri Hills, Madhapur, Hyderabad-500033.

...Respondent No.1

- 2. Vajra IOT Private Limited,**
(Formerly known as Green Ark Enersol Pvt. Ltd.)
Reg. Office at 2-56/2/19, 4th Floor, Vijaya Towers
100 Feet Road, Madhapur, Hitec City
Hyderabad, Telangana – 500081.

...Respondent No.2

Present :

For Appellant : Mr. Sourav Agarwal, Advocate.

For Mr. Sandeep Kumar Ambalavanan,
Advocate.

For Respondents : Mr. VVSN Raju, Advocate, For R1
Mr. Avinash Krishnan Ravi, Advocate, For R2

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

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

1. The present appeal has been filed against the order dated 18.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench-1) in I.A. No. 1384/2022 in CP (IB) No. 35/9/HDB/2021.

2. An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as '**IBC**') filed by Vajra IOT Private Limited (formerly known as Green Ark Enersol Pvt. Ltd.) (hereinafter referred as '**Operational Creditor**' or '**OC**') against the M/s Navayuga Infotech Private Limited (hereinafter referred as the '**Corporate Debtor**' or '**CD**') was admitted on 16.09.2022 and Corporate Insolvency Resolution Process (hereinafter referred to '**CIRP**') was initiated against the M/s Navayuga Infotech Private Limited. Consequent to admission into CIRP of the Corporate Debtor, Mr. Kotoju Vasudeva Rao was appointed as the Interim Resolution Professional (hereinafter referred to as '**IRP**'). The IRP issued public announcement inviting claims from the Creditors and upon collation

and verification of the claims, constituted the Committee of Creditors (hereinafter referred to **CoC**) on 04.11.2022. In the 1st CoC meeting, the IRP informed that only two claims have been received, one from the Operational Creditor and other from the Deputy Director, Employee's State Insurance.

3. Subsequently on 11.11.2022, the IRP received a claim from Shubham Corporation Private Limited, the Appellant herein. The IRP after verifying the same, approved the claim as Financial Debt, included the Appellant in the List of Financial Creditors and reconstituted the CoC including Appellant as Member and filed IA No. 1384/2022 before the Ld. NCLT, Hyderabad to bring on record the updated summary of claims and the reconstituted CoC. The Operational Creditor/Respondent in the said IA filed counter before the Ld. NCLT seeking directions to the IRP to re-examine the claim of the Appellant and consequential reconstitution of CoC.

4. The Ld. NCLT considered the objections raised by the Operational Creditor that the Appellant herein cannot be included in the list of Financial Creditors. After examining the Debenture Subscription Agreement (hereinafter referred to as **'DSA'**), the Ld. NCLT held that the inclusion of the Appellant herein in the list of Financial Creditors is impermissible under law and consequently the

prayer to receive the revised list of members of CoC is unacceptable and is liable to be rejected. The said IA was dismissed thereby the Appellant was not accepted as Financial Creditor and the revised CoC was not taken on record.

5. In its oral and written submissions, the Learned Counsel for the Appellant submitted as under:

- i) The Appellant had advanced unsecured loans to the Corporate Debtor in the period 2012 to 2020. Interest has accrued on these loans from year to year on which tax was deducted and paid to the Income Tax Department but the balance interest was not paid out except for small instalments. The total amount due from the Corporate Debtor was Rs. 110,85,44,776/- after considering the repayment of Rs. 82,50,000/-. Unable to pay the amount to the Appellant, the Corporate Debtor offered to issue Compulsory Convertible Debentures (hereinafter referred to as '**CCD**') carrying 0% interest. The Appellant had agreed to the issuance of CCDs under DSA executed on 02.03.2020 between the parties.
- ii) It was submitted that as per the DSA, debentures were issued which remain as such till conversion to equity shares. The CCDs were to automatically convert into equity shares at the end of 10

years from the date of allotment, if option not exercised earlier by the Appellant.

iii) Debenture certificate was issued to the Appellant and is dated 31.03.2020.

iv) Post execution of the DSA, the subject amount continued to be reflected in final accounts under 'long term borrowings' under the sub-head of CCD, and not in the capital account as share subscription money.

v) As per the 'clean slate principle', on resolution of the Corporate Debtor all liabilities/obligations are wiped clean if the Corporate Debtor is taken over by a resolution applicant and therefore, the Appellant's claim will be as a Financial Creditor.

vi) The said order has been made by Ld. NCLT in an IA filed by the IRP on the objections of the Operational Creditor and no opportunity of hearing was given to the Appellant, which is against the principles of natural justice.

vii) The Appellant was granted only a debenture certificate and no rights of shareholder was granted to it.

viii) The Corporate Debtor has not objected to treatment of CCDs as debt and both the parties to the DSA are *ad idem* as to the status of unmatured CCDs.

- ix) The mode of discharge of a debt/liability does not change the character of the debt/liability. CCDs, like debentures are an acknowledgement of debt, remains a debt/liability till converted into shares and are distinct from shares.
- x) In making these submissions, the Ld. Counsel for the Appellant relied upon the decisions in the case of “*Commissioner of Wealth Tax, Madras v. Spencer & Co. Ltd., reported in (1973) 4 SCC 204*” and “*R D Goyal v. Reliance Industries Ltd. reported in (2003) 1 SCC 81*”.
- xi) As per provisions of Section 5(8)(c)(f) the debentures are financial debt.
- xii) Interest on the debt/liability is not a *sine qua non* or indispensable requirement for the advance to be a ‘financial debt’ under the IBC.
- xiii) The CIRP date is the cut-off date on which the liabilities of a Corporate Debtor are required to be determined. The un-matured CCDs are debt and Appellant has no rights as a shareholder on the date of initiation of CIRP.
- xiv) In conclusion, it was submitted that the Appellant’s un-matured CCDs must be treated as a ‘financial debt’ and RP had rightly admitted its claim as financial debt and had allowed

Financial Creditor with a seat in the CoC, which needs to be restored.

6. In its oral and written submissions, the Learned Counsel for 2nd Respondent submitted as under:

i) The Appellant is only a CCD holder, whose only remedy is redemption of the said CCD as there is no right of repayment in respect of the said CCDs.

ii) The terms of the DSA dated 02.03.2020 clearly show that there is no obligation to repay, that the only option available to the Appellant was to convert the CCD, at any time within the period of 10 years, failing which it shall automatically stand converted to shares.

iii) The mere fact that the date of conversion to equity shares has not arisen, is no reason to change the character of the debentures, considering the fact that it carries with it no obligation of repayment.

iv) The judgments relied by the Appellant, emanate from other statutes and as such, do not answer the issue of whether CCDs are financial debts which issue is directly covered in the following judgments given under IBC:

a) *M/s IFCI Limited vs Sutanu Sinha, Company Appeal (AT) (CH)*

(Ins.) No. 108/2023, para nos. 23, 27, 28, 33.

b) Affirmed in *M/s IFCI Limited vs. Sutanu Sinha, Civil Appeal No. 4929/2023*, para nos. 1, 5, 11, 14, 15, 23, 24, 29-31.

v) In conclusion it was submitted that the judgments cited by the Appellant are clearly distinguishable and the present Appeal is fit to be dismissed.

7. In its Counter Affidavit filed on 01.08.2023, the Learned Counsel for 1st Respondent (IRP/RP) submitted that RP is duty bound to abide by the orders of Adjudicating Authority and this Tribunal.

i) The IRP/RP made the following submissions to update this Tribunal about similar proceedings in the case of other CCD holders stating that *“during the course of pendency of the said Application bearing IA No. 1384/2022, the RP herein has received two more claims, similar to the claim from the Appellant herein arising in relation to Compulsory Convertible Debentures (CCD) in Form C. The claim from one Mr. Manav Morada was received on 20.12.2022 for an amount of Rs.124,41,40,380/- (Rupees one hundred twenty four crores forty one lakhs forty thousand three hundred eighty only), after due verification by the RP, same was admitted on 31.12.2022 and an Application was filed before the Hon'ble NCLT Hyderabad Bench with a prayer to take on record the updated summary of claims and re-constitute the COC*

vide I.A. No. 73/2023. It is humbly submitted that another claim in Form C from one Mr. S.B. Puri, a CCD holder for Rs. 4,73,715 (Rupees Four Lakhs Seventy Three Thousand Seven Hundred and Fifteen only) was received on 07.01.2023, after due verification by RP, same was admitted on 04.02.2023. Accordingly, an Application was filed before Hon'ble NCLT vide IA. No. 290/2023 with a prayer to take on record the updated summary of claims and re-constituted COC. It is humbly submitted that the Hon'ble NCLT, Hyderabad Bench vide order dated 18.04.2023 (Order uploaded on 25.04.2023) in IA No. 1384/2022 has held that the inclusion of Shubham Corporation Pvt Ltd in the list of Financial Creditor is impermissible under law. The Hon'ble NCLT has further held that the prayer to receive the revised list of members of CoC is unacceptable and liable to be rejected and has proceeded with dismissing the said Application bearing IA No. 1384 of 2022. It is further submitted that in compliance with the same, the answering respondent herein/RP has removed all the three CCD holders from COC on 25.04.2023 and re-constituted the COC with immediate effect and an Application bearing IA No. 761 of 2023 was moved before Hon'ble NCLT on 27.04.2023 through e-filing (physically filed on 28.04.2023), inter-alia seeking to take on record the updated summary of claims and reconstituted Committee of Creditors after the Hon'ble

Tribunal's order dated 18.04.2023 in IA No. 1384 of 2022. The Hon'ble NCLT vide its order dated 21.06.2023 (Order copy made available on 26.06.2023) has taken on record reporting reconstituted CoC and accordingly, the said application was disposed of. It is further submitted that in the light of the order passed in IA No. 1384/2022 on 18.04.2023, the RP/answering respondent herein had not insisted for deciding the matters in IA No. 73/2023 and IA No. 290/2023, which were subsequently dismissed by Hon'ble NCLT Hyderabad Bench vide its order dated 24.05.2023”.

8. Finding and decision:

8.1 We have gone through the records of the case with the able assistance of the Learned Counsels for the parties.

8.2 It is an admitted fact that the Appellant herein was a debtor of sum of Rs. 110,85,44,776/- and that the Corporate Debtor had offered to issue Compulsory Convertible Debentures (CCD) carrying 0% interest to the Appellant in lieu of the said debt.

8.3 The said offer was made vide letter dated 03.02.2020 which is available at page 85 of the Appeal Paper Book. The said offer by the Corporate Debtor to the Appellant is reproduced below for reference:

“This is to inform you that Subham Corporation Private Limited ("SCPL") had lent an advance to the Navayuga Infotech Private Limited ("NIPL") for an aggregate amount of

Ra.110,85,44,779/ over a period of time for the purpose of meeting the business expenditure and other corporate purposes. As on the date the outstanding principal amount of the advance is Rs.110,85,44,770/-("Advance Amount"). This is to further inform you that we express our inability to repay the Advance Amount and therefore we propose to offer you issuance of Zero Coupon Compulsory Convertible Debentures (CCDs) for the equivalent amount received as unsecured loan from SCPL. Request you to kindly consider the offer and communicate to us your response in connection with the same."

8.4 The said offer for issuance of Zero Coupon CCDs was accepted by the Appellant vide letter dated 14.02.2020 which is at page 86 of the Appeal Paper Book. The acceptance of the said offer is reproduced below for ready reference:

"This is to inform you that we have considered the offer made by your Company for issuance of Zero Coupon Compulsory Convertible Debentures (CCDs) as against the outstanding principal amount of the advance Re 110.85,44,770/-("Advance Amount") made by us. We hereby inform you that we accept the offer made by you in your Request letter Dated 3 February, 2020 for issuance of Zero Coupon Compulsory Convertible Debentures (CCDs) for the equivalent amount provided as unsecured loan from us."

8.5 Thereafter, on 02.03.2020, the Corporate Debtor and the Appellant entered into Debenture Subscription Agreement (DSA).

The portions of the DSA which are relevant to the issue in this case are reproduced below for ready reference:

"1. DEFINITIONS AND PRINCIPLES OF INTERPRETATION

1.1 Definitions

.....

"CCD" shall mean and refer to the issued and paid-up debenture of the Company having the face value of INRs. 10/- (Indian Rupees Ten only), which is compulsorily and mandatorily convertible Into Equity Shares of the Company, in accordance with the terms and conditions mentioned in Annexure A;

"Conversion Date" shall have the meaning ascribed to such term in clause 2.1 of Annexure A of this Agreement;

"Debenture Certificate" shall mean a certificate issued by the Company to SCPL evidencing the title of SCPL to CCDs issued by the Company;

2. SUBSCRIPTION TO THE CCDS

2.1 Subscription to the CCDs

SCPL had agreed and subscribed to the CCDs for Rs.110,85,44,770 consisting of 11,08,54,477 CCDs of Rs.10/- each and the Company shall issue and allot CCDs which shall be governed by the terms and conditions as mentioned in Annexure A.

(Emphasis Supplied)

3 COMPLETION

3.1 The Company shall issue and allot the CCDs to SCPL in accordance with Clause 2.1 and agrees to register SCPL as the registered holder of CCDs in its books and to issue debenture certificate for such CCDs to SCPL

3.2 Post Completion

The Company shall make all filings and reporting, if any, required to be made with the appropriate authorities under applicable laws with respect to the transactions at Completion.

4. REPRESENTATIONS AND WARRANTIES

.....

4.3 *this Agreement constitutes the legal, valid and binding obligations of such Party, enforceable against such Party in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, re-organisation, moratorium or similar laws affecting creditors' rights generally; and*

6. TERM AND TERMINATION

6.1 *This Agreement shall come into effect from the Agreement Date and shall remain valid till the issue and allotment of such CCDs.*

8.6 The terms and conditions of the CCDs are defined in Annexure A available at page 99 of the Appeal Paper Book, according to which CCDs shall be of face value of Rs. 10/- and shall be freely transferable. The CCDs can be converted into equity shares at any time before the expiry of 10 years from the date of allotment of CCDs and if no such option is exercised, such CCDs will automatically be converted to equity shares as per conversion formula given in clause 2.3 of the Annexure. The equity shares allotted on conversion of the CCDs shall carry the right to receive all dividends and other distributions and shall rank *pari passu* with the existing equity

shares of the Company. On conversion of CCDs into equity shares, the Appellant will be eligible for rights proportional to its shareholding and as mutually agreed with the Company. The relevant clause 2.1 of Annexure A is reproduced below for reference:

“2. Conversion of the CCDs

2.1 Option to convert CCDs into Equity

- (a) Subject to other conditions of this Annexure A, SCPL shall have right or option to exercise its right of conversion into equity shares at any time before the expiry of 10 years from the date of allotment of CCDs.*
- (b) If SCPL has not exercised its option to convert such CCDs into equity shares, such CCDs shall automatically converted into equity shares as per conversion formula arrived under Clause 2.3 of the Annexure to this agreement.”*

8.7 In compliance to the DSA which was signed by the Appellant and the Corporate Debtor on 02.03.2020, debentures certificate with registered folio no. FCD04 for 11,08,54,477 debentures of face value of Rs. 10/- each with debenture no. 78499524-189354001 were issued by the Corporate Debtor on 31.03.2020.

8.8 The terms and conditions given at the back of the said debenture certificate are as follows:

- “1. Zero Coupon Compulsory Convertible Debentures (CCDs) are convertible into equity shares not later than Five Years.*
- 2. Upon conversion one (1) equity shares will be issued for One (1) CCD.*

3. Interest: Zero Coupon”

8.9 It is seen that while conditions No. 2 and 3 are similar to prescription in the DSA, in condition No. 1 the maximum prescribed period of compulsory conversion to equity shares has been reduced from 10 years to 5 years. The DSA had given this option of reducing maximum prescribed period for conversion to the Appellant in 2.1(a) of Annexure A of the DSA.

8.10 The perusal of the relevant clauses of the DSA, Annexure A of the DSA and the Debenture Certificate clearly shows that the only obligation of the Corporate Debtor was to issue shares in exchange of the said debentures. These debentures are not interest bearing and are Zero Coupon CCDs. As per the DSA, the debentures have to be compulsorily converted into shares and do not carry any obligation towards repayment of the original debt. The Appellant, through the DSA dated 02.03.2020 and issue of CCD Certificate dated 31.03.2020, had voluntarily and contractually given up any right whatsoever to receive repayment of principal or interest. It is now entitled only to receive shares at end of tenure, or earlier, if it so opts. The Corporate Debtor was admitted into CIRP on 16.09.2022, much after the extinguishment of right of repayment of the Appellant under

DSA dated 02.03.2020 and issue of Debenture Certificate on 31.03.2020.

8.11 The issue to be decided in this case, therefore, is whether the Compulsorily Convertible Debentures which do not carry any obligation to repay should be treated as debt or as equity, while admitting the claim under IBC.

8.12 The Appellant had cited a number of judgments which are not very relevant for the issue involved in this case, as these judgments were not rendered under IBC. Similar issue was examined by this Tribunal in the case of *M/s IFCI Limited vs Sutanu Sinha, Company Appeal (AT) (CH) (Ins.) No. 108/2023* vide order dated 05.06.2023. The said judgment has been upheld by the Hon'ble Supreme Court of India in *Civil Appeal No. 4929/2023* vide judgment dated 09.11.2023. Since this is the latest judgment under IBC by the Hon'ble Apex Court, we shall be guided by it in our decision. While delivering the said judgment the Hon'ble Supreme Court has noted as under:

“1. Commerce has evolved. The documents forming the base of commerce have also evolved and created a hybrid nature of documents. Thus, what was earlier labelled as a debenture, now has hybrid versions such as partly convertible debentures, optionally convertible debentures and Compulsorily Convertible Debentures (CCDs). We may note that traditionally debentures were treated as a

floating security with a covenant for payment on a specified date.”

8.12.2 In the aforesaid case, the Appellant IFCI had filed claim as a debtor before the RP who had rejected the claim on the grounds that as per DSA dated 14.10.2011, the compulsorily convertible debentures are to be treated as equity shares and that consortium had approved the treatment of CCDs as equity and no approval for conversion to debt was sought from NHAI.

8.12.3 The Hon’ble Supreme Court extracted the following paragraph in the IFCI judgment from the judgment in the case of *Narendra Kumar Maheshwari v. Union of India & Ors.* [(1990) Suppl. SCC 440]:

“A Compulsory Convertible Debenture does not postulate any repayment of the principal. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principal only in the unlikely event of winding up. Therefore, it does not constitute a ‘debenture’ in its classic sense. Even a debenture, which is only convertible at option has been regarded as a ‘hybrid’ debenture. Any instrument which is compulsorily convertible into shares is regarded as an “equity” and not a loan or debt.” (emphasis supplied)”

8.12.4 The Hon’ble Supreme Court noted that the very substratum of the submissions of the Appellant is that it has been left high and dry. If it’s investment is to be treated as equity, under

the waterfall principle nothing will come its way. Thus, while other creditors benefit, the Appellant will not get anything.

8.12.5 The Hon'ble Supreme Court noted that DSA provides for automatic conversion into equity shares. In para 21, 22 and 23 of the aforesaid judgment, the Hon'ble Supreme Court held as under:

“21. We must note that the complexities of commercial documents depending on the nature of business. These are not layman's agreements but agreements vetted by experts and thus each of the parties knows its obligations and the benefits which can arise from the agreement. We thus find it difficult to read into or add to what the document says about a CCD.

22. Suffice for us to say that the aspect of interpretation of commercial documents was in extenso analyzed in Nabha Private Limited Vs. Punjab State Power Corporation Limited. In respect of the factual scenario before us, it would suffice to extract para 72 as under:

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contract is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the

collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

23. The effect of the aforesaid is that a contract means as it reads. It is not advisable for a Court to supplement it or add to it. It is an unfortunate scenario where the appellant is being left high and dry as there is nothing which it can recover from the sponsor company, there being no assets and funds. While in the ICTL it is being treated as a shareholder and thus, does not benefit as none of the shareholders i.e. original investors and the appellant get any benefit under the scheme which has been approved.....”

8.12.6 It was further held as under:-

“24. A reading of the impugned judgment, specifically the rationale from para 19 onwards shows that the issue has been correctly crystallized as to whether CCDs could be treated as a debt instead of an equity instrument. In that sense, it was observed that treating them as a debt would tantamount to breach of the concessional agreement and the common loan agreement. The investment was clearly in the nature of debentures which were compulsorily convertible into equity and nowhere is it stipulated that these CCDs would partake the character of financial debt on the happening of a particular event.”

8.12.7 In conclusion, the Hon’ble Supreme Court in the said judgment of IFCI cited supra, upheld the decision of NCLT and NCLAT for treatment of CCD as equity.

8.13 The term debt is defined in clause 11 of Section 3 which is reproduced below:

“Section 3

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

8.14 The salient clauses of the DSA have been reproduced earlier. An examination of the DSA shows that the debentures issued to the Appellant were compulsorily convertible into equity and the only option to the Appellant was to get it converted to shares even prior to the stipulated period of 10 years, failing which the CCDs were to automatically convert into equity shares at the end of 10 years. There was no liability or obligation to repay the debt.

8.15 We have noted the guidance approved by the Hon’ble Supreme Court in stating in para 23 of the IFCI judgment cited *supra* that it is not advisable for court to supplement or add to commercial contract. The DSA between the Appellant and the Corporate Debtor clearly had no clause regarding repayment and no clause regarding any option other than conversion of the debentures into shares. A convertible debenture can be regarded as “debt” or “equity” based on the test of liability for repayment. If the terms of convertible debentures provide for repayment of borrower’s principal amount at any time, it can be

treated as a debt instrument but if it does not contemplate repayment of the principal amount at any time, that is, if it compulsorily leads to conversion into equity shares, it is nothing but an equity instrument. Respectfully following the judgment of the Hon'ble Supreme Court in the case of *M/s IFCI Limited vs. Sutanu Sinha & Ors.*, cited *supra*, we hold that the compulsorily convertible debentures held by the Appellant are equity instrument and accordingly, we do not find any reason or justification to interfere in the impugned order of the Adjudicating Authority. In the result, the Appeal is dismissed. All related IAs pending, if any, are closed. No order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 22.05.2024
Ram N.