

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP (IB) 249/MB/2024

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of

Spectrum Trimpex Private Limited,

Having registered office at: - 6W, 6th Floor,
Merchant Chambers, 41, New Marine Lines,
Opp. Patkar Hall, Mumbai-400020.

**..... Applicant/ Financial
Creditor**

Versus

**VPhrase Analytics Solutions Private
Limited,**

Having registered office at: - 301, 3rd Floor,
T-Square, Chandivali, Saki Vihar Road,
Mumbai-400072.

..... Corporate Debtor

Order Delivered on :- 04.10.2024.

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances (in physical mode):

For the Financial Creditor: Counsel Mr. Pulkit Sharma a/w Rohan Agarwal
i/b. Adv. Gaurav Raj Shrawat.

For the Corporate Debtor: Counsel Mr. Amir Arsiwala a/w Vidit Kumat.

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial).

1. This is an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Spectrum Trimpex Private Limited** (hereinafter referred to as "**Financial Creditor**" or "**Petitioner**") praying for initiation of Corporate Insolvency Resolution Process (CIRP) of **VPhrase Analytics Solutions Private Limited** (hereinafter called as "**Corporate Debtor**") as according to the Applicant, the Corporate Debtor has committed a default of INR 1,30,78,880/- (Rupees One Crore, Thirty Lakhs, Seventy-Eight Thousand, Eight Hundred and Eighty Only) in repaying the financial debt to the Financial Creditor.

Facts of the case as pleaded by the Applicant are briefly stated hereinbelow:

2. The Financial Creditor has made an investment in Corporate Debtor in accordance with the provisions of a Share Subscription and Shareholders Agreement dated 24th February, 2016 ('the Shareholders Agreement') entered into between (i) the Corporate Debtor; (ii) the founders of the Corporate

Debtor viz. Mr. Neerav Parekh and Mrs. Naimisha Neerav Parekh; and (iii) the investors viz. (a) Catalyst Investors, (b) Venture Catalysts Private Limited, (c) Innovation Futures Inc. and (d) the Financial Creditor. The above-mentioned parties have also entered into an Addendum dated 16th January, 2017 to the Shareholders Agreement; however, the signed copy of the same is not available and therefore, the Applicant has annexed the unsigned copy of the above-referred Addendum.

3. The Financial Creditor has made a total investment of INR 16,55,700/- in Corporate Debtor and in lieu thereof, the Financial Creditor has been allotted 378 shares aggregating to 2.98% of the Issued, Subscribed and Paid-up Share Capital of the Corporate Debtor. The shares held by the Financial Creditor in the Corporate Debtor were to be compulsorily redeemed.
4. As per Clause 16.1 of the Shareholders Agreement, the Founders would give the investors an exit prior to the Exit Period. As specified in Schedule 1, Part H of the Shareholders Agreement, the Founders would work towards a plan that would give the investors an exit on the 05th anniversary of the closing date, which is known as the exit period. It is further provided in Clause 16.1.3. of the Shareholders Agreement that if the Founders are unable to give an exit to the investors within the exit period, the investors can, after the exit period, through a written notice, cause the Corporate Debtor and/or its Founders to provide them an exit by buying back the shares at a fair value, determined by a mutually agreed independent valuer.
5. Accordingly, upon reaching the exit period, the Financial Creditor issued a notice dated 27th January, 2023 to the Corporate Debtor and its Founders to buy back/acquire the shares of the Corporate Debtor held by the Financial

Creditor. The said notice referred to the audited financial statements for the financial year ending on 31.03.2022, wherein the stock price of the shares of Corporate Debtor was provided as INR 24,814/- per equity share; and therefore, the noticees were called upon to buy back/acquire 378 equity shares of the Corporate Debtor held by the Financial Creditor at a value of Rs. 24,814/- per equity share aggregating to INR 93,79,692/- ($93,79,692=378*24,814/-$). However, the Corporate Debtor and its Founders failed to respond to the aforesaid notice thereby failing to provide an exit option to the Financial Creditor in accordance with the provisions of Clause 16.1.3 of the Shareholders Agreement.

6. After a considerable lapse of time since the date of notice i.e. 27.01.2023, in order to ascertain the accurate and fair market value of the equity shares of the Corporate Debtor, the Financial Creditor appointed an independent valuer, Mr. Sandeep L. Jain, Chartered Accountant. The above-named valuer has submitted the Valuation Report dated 21st December, 2023 to the board of directors of the Financial Creditor wherein the fair market value of the equity shares of the Corporate Debtor as on 21.12.2023 was determined at INR 34,600/- per equity share. Therefore, the Financial Creditor, through its advocates, issued another notice dated 16th January, 2024 calling upon the Corporate Debtor and its Founders to buy-back/acquire 378 Equity Shares of the Corporate Debtor at the rate of INR 34,600/- per equity share aggregating to INR 1,30,78,800/- ($1,30,78,800=378*34,600$).
7. The Corporate Debtor again failed to respond to the Notice dated 16th January 2024, thus, leading to a default. Hence, the Applicant has filed the above-captioned Petition.

Reply of the Corporate Debtor: The Corporate Debtor has filed its reply on affidavit dated 14.05.2024 sworn by its director named Mr. Neerav Parekh.

The contents of the said reply are briefly stated and summarised hereinbelow:

8. The Deponent above-named states on behalf of the Corporate Debtor that 185 Equity Shares were allotted to the Applicant in the seed funding process at a rate of Rs. 8,940/- per share aggregating to an amount of INR 16,53,900/- in accordance with the Share Subscription and Shareholders Agreement dated 24.02.2016 read with subsequent Addendum to Share Subscription and Shareholders Agreement dated 16.01.2017. Further, 134 Equity Shares were transferred by the Deponent above-named to the Applicant at a consideration of Rs.10/- per share in order to maintain the Applicant's shareholding on non-diluted basis and the same was recorded in the resolution passed at the Board Meeting held on February 17, 2017. Lastly, 59 Equity Shares were allotted to the Applicant by way of rights issue.
9. The Applicant has represented himself as a financial creditor, while the Applicant has always been solely identified as an equity shareholder of the Corporate Debtor right from the date of allotment of equity shares to the Applicant, being 10th October, 2016. It is further pleaded that the equity shareholder's contribution does not meet the criteria for classification as a financial debt u/s 5(8) of the Code. Hence, the Corporate Debtor raises preliminary objection as to the maintainability of this petition.
10. It is submitted that the entire petition proceeds on the basis that the Applicant is a financial creditor of the Corporate Debtor on account of a demand for redemption of the shares pursuant to an exit option. However, firstly, there is no such compulsory right of redemption. Even otherwise, the right to redemption, if it exists, can only be exercised in accordance with what is

provided in the Companies Act, 2013 and the same cannot amount to a “financial debt” by any stretch of imagination. Rather, it is clear that the Petitioner is not a creditor of the Corporate Debtor at all, let alone a financial creditor.

11. The Applicant has referred to the Shareholders’ Agreement of 2016, which has been rendered void ab initio subsequent to the execution of the Shareholders Agreement and Share Subscription Agreement, 2019 (‘Shareholders Agreement, 2019’). The later agreement shall prevail over the former. The exit opportunity was extended to the Applicant through an email correspondence dated February 08, 2019. However, it is pertinent to note that this offer was made prior to the Shareholders Agreement, 2019. Whereas, the Applicant was allotted 59 Equity Shares by way of rights issue having complete knowledge of the Shareholders Agreement, 2019.
12. The Petitioner has not filed this petition with a bona fide intent of resolving the insolvency of the Corporate Debtor, but rather the present petition has been filed only to mount undue pressure upon the Corporate Debtor so that the Corporate Debtor succumbs to the wrongful demands of the Petitioner. Thus, the Petitioner has contravened Section 65 of the Code and hence, the maximum penalty of Rs. 1 crore ought to be imposed upon it.
13. For all the above reasons, it is humbly submitted that the present petition be dismissed with exemplary costs upon the Petitioner.

FINDINGS

14. We have heard the counsel for the parties and have gone through the record.

15. During the course of arguments, Counsel for the Petitioner has argued that as per the Shareholders Agreement dated 24.02.2016, the Financial Creditor invested a sum of INR 16,55,700/- with the Corporate Debtor and under this arrangement, 378 equity shares of the Corporate Debtor were allotted to the Financial Creditor. As per Clause 16 of the Shareholders Agreement, the Corporate Debtor and/or its founders were supposed to give an exit option to the Petitioner by buying back the shares at a fair value to be determined by a mutually agreed independent valuer. The Agreement further provides that the exit period was of five years. According to the Counsel for the Petitioner, the Financial Creditor issued a notice dated 27.01.2023 to the Corporate Debtor requesting it to buy-back/acquire the shares as per the stock price set out in the audited financial statement for the year ending 2021-22. However, the Corporate Debtor did not respond to the said notice. As a result, the Financial Creditor got appointed an independent valuer namely Mr. Sandeep L. Jain, Chartered Accountant, who as per his report dated 21.12.2023, assessed the fair value of INR 34,600/- per share and, therefore, the Corporate Debtor was liable to pay a sum of INR 1,30,78,800/- to the Petitioner. Since the said amount was not paid, this necessitated the filing of the present petition.
16. It has also been argued by the Counsel for the Financial Creditor that the claim of the Petitioner falls within the definition of financial debt, as envisaged u/s 5(8) of the IB Code. In this regard, the Counsel for the Petitioner has relied upon *Sanjay D. Kakade v/s. HDFC Ventures Trustee Co. Ltd & Ors. (CA(AT)(Ins.) No. 481/2023)* whereby the Hon'ble NCLAT has held that investment made in the Corporate Debtor by means of share subscription and shareholders agreement whereby the financial creditor

agreed to subscribe shares and had a pre-emption right in his favour in the event of the promoters of the Corporate Debtor desired to transfer the shares and further that there was a put option contained in the shareholders agreement and the promoters were under an unconditional obligation to buy-back shares at a fair market value, such a transaction would be treated as a financial debt as the transaction has the commercial effect of borrowing. In this very case, a reliance has also been placed on *Kotak Mahindra Bank Ltd. vs. A Balakrishnan & Anr (2022 (9) SCC 186)* whereby also it was held by the Hon'ble Supreme Court of India that raising of the amount by the company through shareholders agreement was a commercial borrowing since the said transaction has direct effect with the business. In the said case also, the Company and the promoters were obliged to purchase all the shares held by non-defaulting shareholders at a price that provides the non-defaulting shareholdings at an internal rate of return of 15% p.a. compounded annually or the fair market value, whichever is higher.

17. The learned Counsel for the Petitioner has further contended that since the Corporate Debtor has committed default by not buying back the shares from the Financial Creditor in accordance with the terms and conditions of the shareholders agreement, which it was otherwise mandatorily obliged to, this constitutes default on the part of the Corporate Debtor and, therefore, the present petition u/s 7 of the Code deserves to be and should be admitted.
18. Per contra, Counsel for the Corporate Debtor has argued that no case is made out for admission of the captioned Petition in this case as the so-called debt in question cannot be said to be a financial debt. It has been further argued by the Counsel for the Corporate Debtor that out of 378 equity shares, the Corporate Debtor had allotted 244 shares only i.e. 185 shares were allotted at

the time of execution of the shareholders agreement and 59 shares were allotted by way of rights issue. So far as the remaining 134 shares are concerned, the same were purchased by the Financial Creditor from one of the directors regarding which there was no such agreement. Therefore, the petition is liable to be dismissed on this ground alone.

19. It has further been argued by the Counsel for the Corporate Debtor that the petition is liable to be dismissed on the ground that the claimed amount falls below the threshold limit u/s 4 of the Code. In this regard, it has been pointed out that initially the Applicant issued a notice dated 27.01.2023 for a sum of INR 93,79,692/- which was also below the threshold limit. However, to cover this up, the Petitioner unilaterally appointed a valuer and obtained a report to the fact that a value of the shares of the Corporate Debtor was INR 34,600/- per share. According to the Counsel for the Corporate Debtor, as per the terms and conditions of the Shareholders Agreement, the valuer could be appointed only by mutual consent of both the parties and the Petitioner had no right to appoint any valuer on its own. Therefore, the report of the valuer cannot be said to be binding upon the Corporate Debtor. Rather, the said report seems to have been obtained only to enhance the claim amount beyond the threshold limit of rupees one crore.
20. It has been further argued by the Counsel for the Corporate Debtor that a shareholder cannot be considered to be a creditor even if the amount claimed to be due towards the redemption of preference shares and further that there is no concept of redemption of ordinary equity shares in the Companies Act, 2013.

21. We have considered the contentions raised by the learned counsel for the parties.

22. So far as the contention raised on behalf of the Corporate Debtor regarding the fact that the money paid to the Corporate Debtor under the Shareholders Agreement cannot be treated as financial debt is concerned, in this regard, it has been unequivocally held by the Hon'ble NCLAT in **Sanjay D. Kakade v/s. HDFC Ventures Trustee Co. Ltd & Ors. (supra)** that raising of amount by the Company through Share Subscription-cum-Shareholders Agreement was a commercial borrowing, since the said transaction has direct effect with business, which was carried out by the corporate debtor. The Hon'ble NCLAT has further held that since the corporate debtor required the money raised from the shareholders for funding its township projects, the said transaction had commercial effect of borrowing; and since there was an exit option provided to the investors with an internal rate of return @ 15% p.a. compounded annually or the Fair Market Value, whichever is higher, the investment made by the shareholders via the Share Subscription-cum-Shareholders Agreement was held to be a disbursement against consideration for time value of money. Therefore, the Hon'ble NCLAT concluded that that raising of amount by the Company through Share Subscription-cum-Shareholders Agreement was a financial debt. In the present case also, on perusal of the Shareholders Agreement, it is clear that the money was raised by the Corporate Debtor from the shareholders through Share Subscription-cum-Shareholders Agreement for operating its business and the shareholders were given an exit option at the end of five years, *inter-alia*, at a value of amount invested plus 24% annualized return or buying back of their shares by the Corporate Debtor at a fair market value which was to be determined by a mutually agreed independent valuer. Therefore, since the transaction has

the commercial effect of borrowing and there was a disbursement of money against the consideration for time value of money, we hold that the money was raised by the Corporate Debtor from the shareholders through Share Subscription-cum-Shareholders Agreement is a financial debt, as defined u/s 5(8) of the Code, and accordingly, we reject the contention of the learned Counsel for the Corporate Debtor that the money raised by the Corporate Debtor from the Petitioner is not a financial debt.

23. Now the question arises whether the Corporate Debtor has committed a default in respect of the financial debt created in favour of the Petitioner by way of a Share Subscription-cum-Shareholders Agreement dated 24.02.2016 or not. In this context, it would be pertinent to point out that admittedly on 27.01.2023, the Petitioner issued a notice to the Respondent as per Clause 16.1.3 of the Shareholders Agreement calling upon it to buy back/acquire the shares as per the stock price set out in the audited financial statements of the Corporate Debtor for the financial year ending on 31.03.2022 for a sum of INR 93,79,692/-. The Corporate Debtor did not respond to the said notice. In any case, no proceedings u/s 7 of the Code could have been initiated by the Petitioner on account of the non-compliance of the notice dated 27.01.2023 as the amount involved was less than the threshold limit of Rs. 1 crore. Subsequent to this, the Petitioner unilaterally appointed Mr. Sandeep L. Jain, Chartered Accountant, as a valuer, who assessed the value of the equity shares of the Corporate Debtor as on 21.12.2023 at Rs. 34,600/- per equity share. However, to our mind, this act on behalf of the Petitioner was clearly in defiance of the terms and conditions of the Shareholders Agreement. Clause 16.1.3 of the said agreement clearly provides that if the Founders are not able to give an exit to the investors within the exit period, the investors after the exit period can, through written notice, cause the

company and/or the Founders to provide them exit by buying-back the shares at a fair value, determined by a mutually agreed independent valuer. Therefore, it is evident from the Agreement itself that for the valuation of the shares, the valuer had to be appointed with the mutual consent of both the parties; whereas the Petitioner in this case obtained the valuation report from Mr. Sandeep L. Jain, unilaterally and at the back of the Corporate Debtor and the act of the Petitioner has been contrary to the terms and conditions of the contract between the parties. Therefore, the very appointment of the valuer is questionable and under such circumstances, the Corporate Debtor cannot be held to be bound by the valuation report nor on the basis of the said report, can it be claimed by the Petitioner that the value of the shares in question was INR 34,600/- per equity share at the given time. It appears that as per the notice dated 27.01.2023, issued by the Petitioner, the value of the claim was INR 93,79,692/- was less than the threshold limit of rupees one crore which must have incapacitated the Petitioner to proceed u/s 7 of the Code against the Corporate Debtor and to overcome the said hardship, the Petitioner unilaterally obtained the valuation report.

24. If the Valuation Report dated 21.12.2023 is not taken into consideration, then at the most, the Petitioner can fall back upon the notice dated 27.01.2023 which describes the value of the shares in question at INR 93,79,692/- which is less than rupees one crore. The said calculation is based upon the audited financial statements of the Corporate Debtor for the FY 2021-22. The Petitioner has not relied upon any audited financial statement of the subsequent year to prove the value of the shares in question. Even in the valuation report dated 21.12.2023, the audited financial statements for the year FY 2022-23 has not been annexed. Therefore, there is no clinching evidence with regard to the exact value of the shares in question as on the

date of filing the instant petition. That being so, it cannot be said with conviction that the present petition meets the threshold prescribed u/s 4 of the Code. In our considered view, the petition is liable to be rejected on this ground alone.

25. As an upshot of the foregoing discussion, we hold that the Petitioner has failed to make out a case for admission of the above-captioned Petition u/s 7 of the Code and therefore, **CP(IB) No. 249/MB/2024 is hereby dismissed** leaving the parties to bear their own costs. Let the file be closed and consigned to records.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)