

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-I)
KOLKATA

C.P. (IB) No. 147/KB/2023

An Application 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:

Mittson Fille Enterprise

Acting through its Partner, Mrs. Neha Choudhary

... Financial Creditor

-Versus-

Sammaan Ventures Limited

[CIN: U35923BR2010PLC016166]

... Corporate Debtor

Date of Pronouncement: 23 April 2024

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)

Appearances (via hybrid mode)

For the Financial Creditor

- ∴** 1. Mr. Rachit Lakhmani, Advocate
2. Mr. Siddhant Makkar, Advocate

For the Corporate Debtor

- ∴** 1. Mr. Bishwajeet Dubey, Advocate
2. Mr. S. B. Dasgupta, Advocate
3. Mr. Rijoy Bhaumick, Advocate

ORDER

Per Coram

1. The Court convened through hybrid mode.
2. This Petition has been filed by **Mittson Fille Enterprise**, the Financial Creditor represented by its Partner, Mrs. Neha Choudhary under section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Financial Creditor seeks initiation of Corporate Insolvency Resolution Process ("**CIRP**") in respect of **Sammaan Ventures Limited/Corporate Debtor**.
3. The Corporate Debtor was incorporated on 11 October 2010, having CIN: U35923BR2010PLC016166. It's registered office is 2/30, SBI Colony, Khazpura Jagdeo Path, Bailey Road, Patna-800014. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 18 April 2023 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.7,12,38,356.16 (Rupees Seven Crore Twelve Lakh Thirty Eight Thousand Three Hundred and Fifty Six and Sixteen Paise) comprising of principal of Rs.5,00,00,000/- (Rupees Five Crore only) and interest @12% as on 27 March 2023. The date of default has been mentioned as 10 November 2019.

Submission of learned Counsel appearing for the Financial Creditor

5. The learned Counsel submitted that the Corporate Debtor approached the Financial Creditor for an investment in the Corporate Debtor representing the pending issuance of the license of Khadi Online System. The Corporate Debtor agreed to allot equity shares of the Corporate Debtor to the Financial Creditor.
6. The Financial Creditor paid Rs.5,00,00,000/- (Rupees Five Crore only) in two equal disbursements on 09 September 2019 and 11 September 2019 for acquiring shares which were to be issued by the Corporate Debtor.
7. The Corporate Debtor failed to complete the procedure of allotment of shares. The learned Counsel referred to the judgment of Hon'ble NCLAT in **Mr.**

*Kushan Mitra v Mr. Amit Goel*¹ wherein it was held that the Share Application money in case of non-allotment of shares attract the provisions of the Companies Act, 2013, therefore it comes under the ambit of Financial Debt in terms of the provision of section 5(8) of the Code.

8. It is further stated that in the Financial Statements of the Corporate Debtor for the Financial Years 2019-2020, 2020-2021 and 2021-2022, the amount advanced by the Financial Creditor has been treated as “Other Loans & Advances” under the head Short Term Borrowings.
9. The Financial Creditor had issued a notice dated 07 January 2022 to the Corporate Debtor *vide* email and speed post. The Corporate Debtor replied to the said notice on 14 February 2022 wherein the Corporate Debtor raised baseless and irrelevant contentions to escape the liabilities due to the Financial Creditor.
10. It is stated that as per the provisions of the Companies Act, 2013, the amount availed by the Corporate Debtor for allotment of shares to be repaid on or after the expiry of 60 days from the receipt of share application money.
11. The Learned Counsel submitted that the share application money has admittedly not been returned to the Financial Creditor. The Corporate Debtor in its reply to legal notice has contends that the amount given is an interest free loan for ten years. The Corporate Debtor has also undertaken to repay the principal amount paid by the Financial Creditor.
12. The learned Counsel further submitted that Share Application money in the event of non-allotment of shares attracts interest under section 42(6) of the Companies Act, 2013 and falls within the ambit of “Financial Debt” under Code. The learned Counsel led us through section 42(6) of the Companies Act, 2013 *inter alia* reads as follows:

“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 date of completion of sixty days and if the

¹ C.A.(AT)(Ins.) 128 of 2021

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”

13. It is evident from the aforesaid provision that the securities must be issued within 60 days from the date of receipt of the application money, failing which the application money shall be returned to the subscribers within 15 days from the date of completion of 60 days, which the Corporate Debtor has admittedly not done. Upon failure to return this money within the said time, the Corporate Debtor would be liable to repay the money with interest at the rate of 12% per annum from the expiry of the 60th day.
14. The Financial Creditor has placed the following documents on record:
 - a. Copy of Bank Statement is annexed and marked as Annexure 6;
 - b. Copies of Audited Balance Sheet for the Financial Year 2019-2020, 2020-2021 and 2021-2022 are annexed collectively and marked as Annexures 9 Colly.
15. The Financial Creditor has proposed the name of **Mr. Surinder Babbar**, registration number IBBI/IPA-001/IP-P-02534/2021-2022/13878, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration.

Submission of learned Counsel appearing for the Corporate Debtor

16. The learned Counsel submitted that the loan advanced by Mittson Fille Enterprise is an interest free loan maturing in 2029 i.e. after 10 years, hence there is no default since the repayment would begin only at the end of the loan tenure.
17. It is further submitted that upon instructions from Mittson Fille Enterprise, the Corporate Debtor entered into a loan agreement with Kellton Wealth Management LLP on 12 September 2019 for Rs.4 Crore to be repaid within 12 months.
18. It is submitted that the present Company Petition is a pressure tactic on the Corporate Debtor who are presently seeking the loan amount advance to Kellton Wealth Management LLP, who is a close aid of Mittson Fille Enterprise.

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19. It is further submitted that the Corporate Debtor had informed Mittson Fille Enterprise that it was not possible to convert the loan amount into shares.
 20. Further, the amount advanced by Mittson Fille Enterprise is not a financial debt. The Learned Counsel placed reliance on the judgment of *Pramod Sharma v Karanaya HeartCare Private Limited*², wherein it was held that the amount given as Share Application Money, under a settlement did not constitute a financial debt under section 5(8) of the Code.
 21. The learned Counsel placed reliance on *Jushya Realty Private Limited v. Ninety Properties Private Limited*³, wherein the Adjudicating Authority examined the nature of the advance payments and the definition of financial debt and concluded that the advance for the purchase of shares did not qualify as a financial debt, as it was not disbursed against the consideration for the time value of money.
 22. In the present Company Petition, there is no agreement to show that the Corporate Debtor received the sum as an advance payment toward the issuance of shares or that such monies would be treated as financial assistance having time value of money.
 23. The learned Counsel further submitted that Mittson Fille Enterprise is a partnership firm and cannot legally become a shareholder in the Corporate Debtor as per the Companies Act, 2013 and the Rules and the Company Law Department Circular No. 4/72 and therefore no shares could be allotted.
 24. The learned Counsel submitted that the judgment relied on by the Financial Creditor i.e. *Kushan Mitra (supra)* has been stayed by the Hon'ble Supreme Court in *Shobori Ganguli v. Amit Goel*, C.A. No. 002661/2022 vide order dated 25 February 2022.

Rejoinder of the learned Counsel appearing on behalf of the Financial Creditor

25. The learned Counsel submitted that the Corporate Debtor has relied on an order dated 25 February 2022 wherein the Hon'ble Supreme Court had stayed the operation of *Kushan Mitra (supra)*. However, the ratio of the judgment continues to bind this Adjudicating Authority, as a stay of a judgment only stays

² C.A. (AT)(Ins.) No. 426 of 2022

³ (2023) ibclaw.in 56 NCLT

its operation and not the proposition of law laid down which continues to operate as a binding precedent. In support of his contention the learned Counsel placed reliance on *Government of Andhra Pradesh v. N Rami Reddy and Ors.*⁴, *Niranjan Chatterjee v. State of West Bengal*⁵, and *Shree Chamundi Mopeds Limited Vs. Church of South India Trust Association*⁶.

26. It is further submitted that the Corporate Debtor contends that non return of share application money does not amount to being a financial debt under Code and placed reliance on the judgment of the learned NCLT, Mumbai Bench in *Jushya Realty Private Limited v. Ninety Properties Private Limited*. The Learned Counsel submitted that the said judgment is of no significance as the position of law is already settled by Hon'ble NCLAT as stated above. The learned Counsel appearing on behalf of the Corporate Debtor also relied on *Pramod Sharma v. Karanaya Heartcare Private Limited*, the learned Counsel submitted that the said judgment is completely different on facts, wherein admittedly there was a settlement between the parties and the principal amount was refunded to the Financial Creditor.
27. It is submitted that in terms of the aforesaid section 42(6) of the Companies Act, the interest would not be payable if the share application money is refunded, as was refunded in the facts of that case. That apart, the judgment in *Pramod Sharma (supra)* does not lay down any ratio upon considering the provisions of law but is only a non-speaking order whereby the appeal was dismissed in the peculiar facts of the given case. Neither does the said judgment apply to the instant case, nor can the same be a binding precedent for the proposition that share application money when not refunded does not amount to financial debt under Code.
28. The Corporate Debtor in it's reply affidavit has contended that it could not issue shares to the Financial Creditor because a partnership firm cannot be a shareholder. Learned Counsel for the Financial Creditor submitted that a partnership firm is essentially a name used to define the partners collectively. The partners of the Financial Creditor could have been joint shareholders of the

⁴ AIR 2001 AP 226

⁵ (2007) 3 CHN 683

⁶ AIR 1992 SC 1439

Corporate Debtor and such shares could have been the firm's (i.e. Financial Creditor's property).

Analysis and Findings

29. Heard the learned Counsel appearing on behalf of the Financial Creditor and the learned Counsel appearing on behalf of the Corporate Debtor and perused the records.
30. There is no dispute that the amount disbursed was given in consideration for allotment of shares. The issue for consideration is whether "Share Application Money" on which no share was allotted will constitute a financial debt within the meaning of section 5 (8) of the Code.
31. Learned Counsel appearing for Financial Creditor contended that Share Application Money advanced to the Corporate Debtor will constitute a Financial Debt and therefore section 7 Petition is maintainable.
32. While placing the above plea, Learned Counsel for Financial Creditor has placed reliance on a judgment passed by the Bench comprising of two Hon'ble Members of the Hon'ble NCLAT in ***Mr. Kushan Mitra v Mr. Amit Goel***⁷. He has also placed reliance on section 42 (6) of Companies Act, 2013 and submitted that Share Application Money in the event non-allotment of shares attracts interest under section 42 (6) of Companies Act, 2013 and thus falls within the ambit of definition of Financial Debt under Code.
33. Whereas, while controverting the argument made on behalf of Financial Creditor, the Learned Counsel for Corporate Debtor has placed reliance on order dated 21 April 2022 passed by Hon'ble NCLAT comprising of a Bench with three Hon'ble Members headed by the Hon'ble Chairperson in Comp. App. (AT) (Ins.) No. 426 of 2022 in the matter of ***Pramod Sharma v. Karanaya HeartCare Pvt. Ltd*** at Paragraph 5 which is reproduced herein below:

"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

⁷ C.A.(AT)(Ins.) 128 of 2021

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.”

34. Ld. Counsel appearing on behalf of the Corporate Debtor has also placed reliance on an order passed by Coordinate Bench of Mumbai NCLT dated 3rd February, 2023 at paragraph 7 which is reproduced herein below:

“7. From the reading of above definition we find that amount of advance paid for purchase of shares of the Corporate Debtor does not fall under the definition of Financial Debt as it was not disbursed against the consideration for the time value of money. It is further noted that such advance also does not fall within the inclusive definition part as contained in clause (a) to (i).”

35. Ld. Counsel appearing on behalf of the Corporate Debtor has also placed on record a copy of order dated 25 February 2022, passed by Hon’ble Supreme Court of India whereby the order of Hon’ble NCLAT relied upon by Financial Creditor dated 16 December 2021 has been stayed.

36. Following the law laid down by the larger Bench of the Hon’ble NCLAT, we are of the view the amount of default is not a Financial Debt and therefore petition under Section 7 is not maintainable. **CP (IB) No. 147/KB/2023** is hereby rejected.

37. The dismissal of this petition shall not be construed in any manner as expression of opinion on the claim of the petitioner and the Petitioner is at liberty to pursue any other remedy that may be available under any other law.

38. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is signed on the 23rd day of April, 2024.

GGRB_LRA/SSG_Steno