NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1334 of 2024

[Arising out of the Impugned Order dated 22.03.2024 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench-VI in CP (IB) No. 554 of 2023]

In the matter of:

M/s. MURLIDHAR VINCOM PVT. LTD.
18, Acharya Prafulla Chandra Road,
Ground Floor, Calcutta, West Bengal- 700009
Email: murlidhar.vincom@gmail.com

...Appellant

Versus

M/s. SKODA (INDIA) PVT. LTD.
6th Floor, Akashdeep, Barakhamba Road,
New Delhi-110001
Email: dr.pravin111@gmail.com

...Respondent

Present:

For Appellant : Mr. Abhishek Arora, Mr. Ashish Choudhury, Advocates.

For Respondent:

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 22.03.2024 (hereinafter referred to as ('**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-VI)

in CP (IB) No. 554 of 2023. By the impugned order, the Adjudicating Authority has dismissed the Section 7 application filed by the Appellant for admitting M/s Skoda (India) Pvt Ltd-Corporate Debtor into the rigours of Corporate Insolvency Resolution Process (**"CIRP"** in short). Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. Outlining the facts of the case, Shri Abhishek Arora, Ld. Counsel for the Appellant submitted that on the request of the Corporate Debtor, funds were infused by the Appellant-M/s Murlidhar Vincom Pvt Ltd as share application money in the Corporate Debtor during FY-2009-10. In return, the Corporate Debtor had allotted 3000 equity shares for an amount of Rs 6.97 lakhs in the share capital of the Corporate Debtor to the Appellant. Subsequently, during the next two financial years i.e. 2010-11 & 2011-12, another sum of Rs 1.32 Cr. was paid as share application money by the Appellant for allotment of equity shares as share application money. No shares were however allotted by the Corporate Debtor but Rs 40 lakhs was refunded by the Corporate Debtor from the said share application money. The Corporate Debtor was not able to refund the balance amount of Rs 92 lakhs. The Corporate Debtor not being in a position to refund the balance amount of share application money purportedly on account of liquidity crunch, instead agreed to allot shares for the balance amount subject to the Appellant providing additional funds to the Respondent. The Appellant thereafter provided additional funds of Rs 79.60 lakhs which were paid in several instalments from 2012-14. Since neither the shares were allotted nor the share application money was refunded, the Appellant sent a Demand Notice on 07.07.2023 to the Corporate Debtor for repayment of the share application

money with statutory interest of 12% in terms of Section 42(6) of the Companies Act, 2013. Since the Corporate Debtor failed to repay the amount, the Appellant filed a Section 7 application before the Adjudicating Authority on 30.08.2023. The Adjudicating Authority however held that share application money in respect of the shares not allotted cannot be deemed to be a financial debt. The impugned order dated 22.03.2024 further held that the requirements of Section 7 application under the IBC were not fulfilled and therefore rejected the Section 7 application. Assailing the impugned order, the present appeal has been preferred by the Appellant.

3. Making his submissions, the Ld. Counsel of the Appellant adverted attention to Section 42(6) of the Companies Act, 2013 and emphatically asserted that in terms of the Companies Act, shares are to be allotted within 60 days of receipt of share application money and that if shares are not allotted within such period, money is to be refunded within 15 days from the expiry of 60 days. It was also submitted that any delay in the refund of share application money beyond the period of 15 days attracts interest at the rate of 12% per annum. Furthermore, it was pointed out that under Rule 2 of the Companies (Acceptance of deposit) Rules (herein after referred to as **"CADR Rules"**) provides that if shares are not allotted within 60 days of receipt of share application money, the same amount is deemed to be treated as deposit money. Making further submissions, the Ld. Counsel for the Appellant stated that since in the present factual matrix, shares were not allotted within the time-period as prescribed by the Companies Act, 2013 against the share application money provided by the Appellant, the share application money provided by a Financial Creditor to the

Corporate Debtor should have been deemed by the Adjudicating Authority to be deposit money which would have come within the meaning of 'financial debt' under Section 5(8) of the IBC. Placing reliance on the judgment of this Tribunal in the case of ***Kushan Mitra Vs Amit Goel and Ors.*** in ***CA(AT)(Ins) No. 128 of 2021***, it was submitted by the Ld. Counsel for the Appellant that this Tribunal in the ***Kushan Mitra*** judgment supra clearly held that share application money in the event of non-allotment of share attracts interest under Section 42(6) of the Companies Act, 2013 and therefore falls within the ambit of financial debt under Section 5(8) of the IBC. Hence, the Adjudicating Authority ought to have admitted the Section 7 application filed by the Appellant against the Corporate Debtor. It was, therefore, strenuously contended that the impugned order has been passed contrary to law and was liable to be set aside.

4. Having heard the Ld. Counsel for the Appellant and perused the materials on record carefully, we find that the short point which requires our consideration is whether in the facts of the present case, the share application money which was deposited with the Corporate Debtor by the Appellant fell in the category of Section 5(8) of the IBC.

5. Before we dwell into the facts of the case, we may first note the statutory provisions under the IBC which defines financial debt and for this purpose refer to Section 5(8) of the IBC which is as reproduced under:

> ***Section 5(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;

[Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

From the principal clause of the above statutory construct, it becomes clear that the basic ingredients which are required to be met for a debt to become 'financial

debt' are that there must be a disbursal against the consideration for time value of money. Further sub clauses (a) to (i) of Section 5(8) delineates the various transactions which are included in the ambit of 'financial debt'. Prima-facie, amounts raised by way of share application money is not expressly covered in the transactions covered by sub clauses (a) to (i) of Section 5(8) of the IBC.

6. It is however the contention of the Appellant that in the present case when share application money was advanced by the Appellant but shares were neither allotted nor the share application money refunded, basis the statutory provisions of the Companies Act, 2013 and CADR Rules, 2014, the share application money had assumed the colour of deposit money and acquired the character of financial debt under Section 5(8) of IBC.

7. At this juncture, it may therefore be useful to run through the relevant provisions of the Companies Act, 2013 and the CADR Rules for a holistic appreciation of raising of share application money for subscription of securities on private placement and modalities of repayment of the application money to the subscribers on non-allotment of shares which are as extracted hereunder:

Section 42 of The Companies Act, 2013

42. Offer or invitation for subscription of securities on private placement.—

(1) *Without prejudice to the provisions of section 26, a company may, subject to the provisions of this section, make private placement through issue of a private placement offer letter.*

(2) *Subject to sub-section (1), the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of*

section 62, in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.

Explanation I.—

If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

Explanation II.—

For the purposes of this section, the expression—

(i) "qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 as amended from time to time.

(ii)"private placement" means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section.

***(3)** No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.*

***(4)** Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall be required to be complied with.*

***(5)** All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.*

***(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 date of completion 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.

Rule 2(c) of The Companies (Acceptance of Deposits) Rules, 2014.

***2. Definitions**.- (1) In these rules, unless the context otherwise requires, …..*

***(c) "deposit"** includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include –*

(i) any amount received from the Central Government or a State Government, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature ;

(ii) any amount received from foreign Governments, foreign or international banks, multilateral financial institutions (including, but not limited to, International Finance Corporation, Asian Development Bank, Commonwealth Development Corporation and International Bank for Industrial and Financial Reconstruction), foreign Governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of Foreign Exchange Management Act, 1999 (42 of 1999) and rules and regulations made there under;

(iii) any amount received as a loan or facility from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution notified by the Central Government under section 51 of the Banking Regulation Act, 1949 (10 of 1949), or a corresponding new bank as defined in clause (d) of section 2 of the

Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) or in clause (b) of section (2) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980) , or from a co-operative bank as defined in clause (b-ii) of section 2 of the Reserve Bank of India Act, 1934 (2 of 1934)

(iv) any amount received as a loan or financial assistance from Public Financial Institutions notified by the Central Government in this behalf in consultation with the Reserve Bank of India or any regional financial institutions or Insurance Companies or Scheduled Banks as defined in the Reserve Bank of India Act, 1934 (2 of 1934);

(v) any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

(vi) any amount received by a company from any other company;

(vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

Explanation.- For the purposes of this sub-clause, it is hereby clarified that –
(a) Without prejudice to any other liability or action, if the securities for which application money or advance for such securities was received cannot be allotted within sixty days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within fifteen days from the date of completion of sixty days, such amount shall be treated as a deposit under these rules.

[Provided that unless otherwise required under the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules or regulations made thereunder to allot any share, stock, bond, or debenture within a specified period, if a company receives any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed in the balance sheet for the financial year ending on or

before the 31st March, 2014 against which the allotment is pending on the 31 March, 2015, the company shall, by the 1st June 2015, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules.]

(b) any adjustment of the amount for any other purpose shall not be treated as refund.

8. Now that we have noted the relevant statutory provisions of the IBC, the Companies Act and CADR Rules, we now proceed to examine the tenability of the contention of the Appellant that on a conjoint reading of Section 5(8) of the IBC and Section 42(6) of the Companies Act, 2013 read with Rule 2 of the CADR Rules, the share application money in the instant case had become a deposit as shares were not allotted within 60 days of receipt of money and that such deposit fell within the meaning and scope of financial debt as defined under Section 5(8) of the IBC.

9. When we peruse the impugned order, we find that the Adjudicating Authority has noted that the Appellant had sought refund of the share application money issued to the Corporate Debtor with interest in terms of Section 42 of the Companies Act, 2013 and that on the failure of the return of the said amount, the said amount will become a deposit and a financial debt. The Adjudicating Authority in the impugned order after considering the above contention of the Appellant has however held that share application cannot be deemed to be a financial debt and the reasoning adopted by the Adjudicating Authority in the impugned order is as extracted below:

*"5. At this juncture it is pertinent to note that in **PROMOD SHARMA VS M/S KARANAYA HEARTCARE PRIVATE LIMITED (Comp. App. (AT) (Ins.) No. 426 of 2022)**, the Hon'ble NCLAT held that -*

> *"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."*

It was observed in the aforesaid precedent that Share Application Money does not come under the ambit of a Financial Debt in accordance with Section 7 of the IBC 2016.

....

8. It can be concluded that the requirements of section 7 of the Code are not fulfilled. Therefore, this Adjudicating Authority dismisses the Petition filed by the Petitioner."

10. Assailing the impugned order, the Appellant has contended that the Adjudicating Authority had erred by relying upon the judgment of this Tribunal in the case of ***Promod Sharma Vs M/s Karanaya Heart Care Pvt. Ltd.*** in ***CA(AT)(Ins) No. 426 of 2022*** as it was based on distinguishable facts as in that case the principal amount had already been refunded and Section 7 application was filed only on the outstanding interest amount. The Ld. Counsel for the Appellant has also contended that since neither any share was allotted nor the share application money was returned, the sum advanced became a deposit. This deposit therefore assumed the character of financial debt and hence application under Section 7 was maintainable. It is further the contention of the Appellant that in terms of ***Kushan Mitra*** judgment supra, the share application money in case of non-allotment of shares attracts the provisions of the Companies Act, 2013 and CADR Rules and therefore comes under the ambit of financial debt in terms of Section 5(8) of the IBC.

11. When we look at Rule 2(c)(vii) of the CADR Rules, 2014 and the explanatory clause appended thereto, it becomes clear that it refers to any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money. It flows therefrom that for the aforementioned CADR Rules to be attracted in respect of share application money, there has to be a clear nexus to show that the share application money amount was advanced in conformity with the relevant provisions of the Companies Act, 2013. When we look at Section 42 of the Companies Act, 2013 it is clear that several statutory compliances are required to be met prior to issue of shares on private placement basis. Section 42(2) of the Companies Act stipulates the requirement of issue of private placement offer letter in such cases. From the records available on file, we do not find that the Corporate Debtor had issued any such private placement offer letter to the Appellant. There is no evidence of any valid concluded agreement between the two parties with respect to allotment of shares. Hence, the amount which was advanced by the Appellant cannot be treated to be amount in response to the private placement offer. Rule 2 of CADR Rules envisages that only if any amount is received pursuant to any private placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a deposit. When no proof of any private placement offer made in accordance with the provisions of the Companies Act, 2013 has been placed on record by the Appellant, the CADR Rules cannot be held to be applicable. Since the amount advanced cannot

be related to Section 42 of the Companies Act, the applicability of Section 42(6) cannot be pressed as is being sought by the Appellant in the present case.

12. We would also like to add here that the ***Kushan Mitra*** judgment supra cannot come to the aid of the Appellant since the above judgment of this Tribunal was challenged before the Hon'ble Supreme Court of India in ***Shobori Ganguly Vs Amit Goel and Ors.*** in ***Civil Appeal No. 4333 of 2022*** and a stay has been put on this judgment. On the other hand, the Adjudicating Authority has relied on the precedent laid down in a subsequent three-bench judgment of this Tribunal in ***Promod Sharma*** judgment supra wherein it has been held that the amount given as share application money did not constitute a financial debt under Section 5(8) of the IBC.

13. In sum, we do not find any infirmity in the order of the Adjudicating Authority rejecting the Section 7 application of the Appellant. It shall however remain open to the Appellant to seek refund/recovery of the share application money in appropriate proceedings before an appropriate forum in accordance with law. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 26.11.2024
Abdul/ Harleen