

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKT BENCH,
KOLKATA**

C.P (IB) No. 362/KB/2021

In the matter of

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.

And

In the matter of:

Rahul Maroo, having its registered office at 701, Grace Orchid, A.N Road, Prabhadevi, Mumbai- 400025.

... Financial Creditor

Versus

In the matter of:

Bruck Pharma Private Limited, CIN U24239WB1984PTC037865 having its registered office at 180, S.P.Mukherjee Road, Kolkata-700026 .

...Corporate Debtor

Date of hearing : 29/06/2022

Order Pronounced on : 06/07 /2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

- | | |
|--------------------------------|------------------------------|
| 1. Ms. Arati Agarwal, Adv. |] For the Financial Creditor |
| 2. Ms. Rosy Banerjee, Adv. | |
| 1. Mr. Jishnu Chowdhury, Adv. |] For the Corporate Debtor |
| 2. Mr. Sankarsan Sarkar , Adv. | |
| 3. Mr. Durgesh Kumar Jha, PCS. | |
| 4. Mr. M.k.Maroti, CA | |

5. Ms. Swati Kochar, CA

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition 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 has been filed by **Rahul Maroo**, (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **Bruck Pharma Private Limited** , CIN U24239WB1984PTC037865, having its registered office at 180, S.P. Mukherjee Road, Kolkata-700026, a corporate entity (hereinafter referred to as the Corporate Debtor).
3. It is contended by the Financial Creditor that a total sum of Rs. 2,70,00,000/- was paid on various dates i.e. 04.03.2017, 18.03.2017, 03.04.2017, 17.04.2017, 12.05.2017,18.05.2017 and 22.06.2017. It is pertinent to note here that Rs. 10,00,000/- was to be paid on 22.06.2017 but was not paid by Financial Creditor. Hence, total amount paid by Financial Creditor is only Rs. 2.60 Crore towards share application money and unsecured loan. Copy of Bank Statement showing payments made on various dates is annexed as Annexure-A/1.As only Rs.2.60 Crore towards the share application money and unsecured loan.
4. It is further submitted in the petition that vide Memorandum of Understanding dated 15.11.2017, Rs. 2 Crore was admittedly to be invested and utilized for allotment of shares and remaining Rs.60,00,000/- was paid towards unsecured loan.
5. The Financial Creditor has placed on record various documents in support of its case, which are as under:-
 - i. A copy of certificate of Registration of Charge issued by the Registrar of Companies;
 - ii. Copies of entries in a Bankers Book in Accordance with the

Bankers Books Evidence of financial debt, the amount and date of default.

- iii. Copy of Email dated 15.11.2017 – Annexure A/2
- iv. Copy of various mails (with attachment) dated 08.01.2018, 07.02.2018, 13.02.2018, 03.03.2018, 13.03.2018, 19.03.2018 and 05.04.2018.- Annexure A/3
- v. Copy of E-mail dated 08.04.2018 (with attachment) – Annexure –A/4
- vi. Copy of E-mail dated 10.09.2018 (with attachment of ledger account) – Annexure-A/5
- vii. Copy of legal notice dated 02.08.2021 – Annexure A/6
- viii. Copy of reply dated 02.08.2021 –Annexure A/7.

6. In reply to the petition, the corporate Debtor in its affidavit in reply submitted that the application is not maintainable because no financial debt is owed by the Corporate Debtor to the Financial Creditor. It is submitted that a sum of Rs. 2.60 Crore was paid by the Financial Creditor towards share allotment, pursuant to a decision that the Financial Creditor would invest in the business of the Corporate Debtor, whereupon shares would be allotted against the investment. It is further submitted that no shares have been allotted by the Corporate Debtor in favour of the Financial Creditor and the share application money cannot form the basis of financial debt.

7. It is submitted that there is no question of any default having arisen in favour of the Financial Creditor. It is submitted that as per Bank Statement, it is evident that last instalment of the said sum was disbursed on 18th May, 2017. Therefore, the claim of the Financial Creditor is wholly barred by limitation.

8. It is further submitted that the said amount of Rs.2.60 Crores cannot be a financial debt within the definition of section 5(8)(f) of the Code, 2016 as it is not “time value of money”. There is no agreement for repayment of the sum of Rs. 2.60 Crores.

9. It is further submitted by the Ld. Counsel for the Corporate Debtor that even if it is admitted that there is any alleged financial assistance provided by the Financial Creditor to the Corporate Debtor, the application is barred under the provisions of the Bengal Money Lender's Act, 1940, in allegedly disbursing such sum and allegedly claiming interest thereon.

10. It is submitted that the application has been filed in gross suppression of material facts and by concealing true nature of transactions between the parties and the Financial Creditor has mislead and misrepresented this Adjudicating Authority with a view to obtain orders and with a view to harass the Corporate Debtor.

11. It is submitted that there is no agreement for financial assistance between the parties, therefore, no question of debt or repayment would arise.

12. The Financial Creditor has also filed an Additional Affidavit on behalf of the Financial Creditor.

13. After going through the petition and the reply affidavit and documents placed on record, it is found that several emails were exchanged between the parties wherein alleged draft agreements had been forwarded. It is evident that there is no concluded agreement between the parties. The aforesaid contentions of the Financial Creditor that Rs.2,00,00,000/-was advanced towards share application money of Rs.60,000/- was advanced towards unsecured loan to the Corporate Debtor is also not be evident from the record before us. Ld. Counsel in its argument contended that in view of section 42(6) of the Companies Act, 2013, as the interest that is statutorily payable after 75 days, is the consideration for the time value of money. However, this argument is not acceptable since the definition of financial debt requires the consideration for the time value of money to be present at the time of disbursement. Admittedly, at the time of disbursement, such consideration does not arise under section 42(6) of the Companies Act, 2013. The consideration arises if shares are not allowed within 75 days or the money is

not repaid.

14. The Financial Creditor further contended that since the Corporate Debtor and the Financial Creditor could not agree on the valuation of the shares to be allotted, they mutually decided to treat the entire investment of Rs. 2.60 Crore as financial assistance, which would be repaid.

15. Upon perusing the petition, it is evident that the Financial Creditor is now treating the entire amount of Rs.2,60 Crore as a financial assistance to the Corporate Debtor and not that of share application money.

16. The next contention of the Financial Creditor is that the said amount of Rs.2.60 Crore is not towards refund of share application money, but is towards refund of financial assistance or unsecured loan, which according to the Financial Creditor was a subsequent arrangement between the parties.

17. The Financial Creditor has relied on an email dated 8th April, 2018 issued by the representative of the Corporate Debtor to the Financial Creditor attaching therewith an agreement wherefrom, it is evident that the alleged sum of Rs.2.60 Crore would be repaid to the Financial Creditor by sale of 'Summit Units /Flats'.

18. The Corporate Debtor in its reply affidavit has submitted that in terms of section 5(8) of the Code, financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. Thus, to constitute a financial debt;

- i. There must be a debt along with interest, if any,
- ii. The disbursement must be against consideration for the time value of money.

Thus, the consideration for time value of money must be present at the time of disbursement.

19. During the course of argument, the Ld. Counsel for the Corporate Debtor placed reliance on judgments of the Hon'ble Supreme Court of India,

wherein it has been held that the disbursement must be against interest or the transaction which has the commercial effect of borrowing. Certain transactions like the ones mentioned in Section 5(8) (a) to (i). are brought into the ambit of financial debt by mentioning in the statute. Though the Financial Creditor has tried to argue that this is a deposit, its case in the petition does not support such argument. In the petition, the Financial Creditor has claimed that it was a loan. The Corporate Debtor in support of his arguments placed reliance on the following judgments:

- i. ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India,(2019) 8 SCC 416;***
- ii. ***Dheeraj Mor Vs. High Court of Delhi (2020) 7 SCC 401;***
- iii. ***New Okhla Industrial Development Authority v. Anand Sonbhadra, 2022 SCC Online SC 631;***
- iv. ***Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd., 2021 SCC Online SC 513.***

20. To counter the arguments of the Financial Creditor, that the sum of Rs. 2.60 crores was given as a share application money, the Corporate Debtor relied on a Three Bench Judgment of the ***Hon'ble NCLAT in Company Appeal (AT) (INS.) No. 426 of 2022 (Pramod Sharma vs-Karanaya Heatcare Pvt. Ltd.)*** wherein it was held that the unpaid share application money cannot have the effect of being the basis of the financial debt.

21. The Corporate Debtor has further relied on the judgment of the Hon'ble NCLAT passed in Nishit B. Patel, Shareholder of Peacock Construction Pvt. Ltd. vs. Good Value Financial Services Pvt. Ltd. and Ors. MANU/ NL/ 0115/2022, which has the same effect as the above judgment.

22. The Ld. Counsel for the Financial Creditor on the contrary, relied on the two judgments by the ***Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 209 of 2019 (Shakebuddin Irtebatuddin Khan -vs- Qumruddih Faizi & Anr.) and Company Appeal (AT) (Ins.) 128 of 2021 and I.A. No. 2340- of 2021 and 2413 of 2021 (Mr. Kushan Mitra -vs- Amit Goyal in MYK Printech Ltd.)***.

23. Having gone through the record and arguments advanced by both the

parties, in our view the above mentioned judgments are not applicable in the instant case especially when the sum of Rs. 2.60 Crores according to the Financial Creditor was subsequently given as a financial assistance to the Corporate debtor. The fact that consideration for time value of money was required at the time of disbursal was also not noticed in these judgments.

24. Furthermore, in the judgment of Hon'ble NCLAT (supra) there was an existing allotment which was revoked and a case under Section 42 of the Companies Act,2013 had been made out which is absent in the present case. We are not deciding on such issue as it is apparent and admitted fact that the Financial Creditor is now treating the entire amount of Rs.2.60 Crores as the financial assistance to the Corporate Debtor and not as a share application money.

25. Admittedly, there is no concluded agreement between the parties which records that the financial assistance would be treated as a loan or that the financial assistance would be treated as time value for money or that the financial assistance would carry interest or that the alleged financial assistance would be repayable on demand. Reliance has been placed by the Corporate Debtor on the judgments of **Hon'ble Supreme Court of India and NCLAT reported in (2020) 8 SCC 401; Manish Saxena v. Pushpanjali Realms and Infratech Ltd. 2019 SCC Online NCLAT 1348, para 3,4.**

26. Thus, from the above, it can be concluded that, to establish a financial debt under section 7 of the IBC, the necessary pre requisites are as under:

- i. There has to be a concluded agreement.
- ii. There has to be a consideration for time value of money.

27. In the present case, the financial assistance has been given without any agreement and there is no consideration for time value of money for the said amount. It is also evident from the email dated 9th April, 2018 that the Financial Creditor has agreed that the said sum of Rs. 2.60 Crores would be adjusted by sale of Summit Units /Flats. This is a completely different arrangement which has been suppressed by the Financial Creditor in the

company petition. It cannot be said that a sum of Rs.2.60 Crores is still outstanding from the Corporate Debtor to the Financial Creditor. In this summary proceeding, it is not possible for this Tribunal to go on a fact finding roving enquiry. As such, it can easily be presumed that as on this day there is no financial debt within the meaning of Section 5(8) of the IBC, 2016.

28. Under such circumstances, firstly, the financial assistance provided by the Financial Creditor to the Corporate Debtor to the tune of Rs. 2.60 Crores is not a financial debt as it is not time value for money as there is no express agreement for repayment of the sum either with interest or otherwise. Secondly, as per the records, the entire sum of Rs.2.60 Crores had to be adjusted by the Financial Creditor by sale of 'Summit Units' as agreed between the parties.

29. Therefore, we find that the said amount of Rs.2.60 Crores does not fall within the definition of a "financial debt" or a debt along with interest, if any, which is disbursed against the consideration for the time value of money. Furthermore, the Financial Creditor has admitted that the said sum of Rs. 2.60 Crores would be adjusted from sale of 'Summit Units/Flats' . As such, there is no debt due or payable by the Corporate Debtor as on this day.

30. In view of the above circumstances, the instant petition CP(IB) 362/KB/2021 is not maintainable under section 7 of the IB Code,2016 and is dismissed with no order as to costs.

31. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 6th day of July, 2022

PJ