

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 128 of 2021

&

I.A. 2340 of 2021 and 2413 of 2021

(Arising out of Order dated 19th January, 2021 passed by National Company Law Tribunal, New Delhi, Bench-III, in C.P. (IB) No.- 1018/ND/2020).

IN THE MATTER OF:

**1. Mr. Kushan Mitra
J-1813 Chitranjan Park,
New Delhi – 110001**

...Appellant No. 1

Versus

**1. Mr. Amit Goel
C-212, Defence Colony
New Delhi – 110024**

...Respondent No. 1

**2. CMYK Printech Limited
Through its Resolution Professional
6 Behind Gulab Bhawan
Bhadur Shah Zafar Marg
New Delhi - 110002**

...Respondent No. 2

**Appellants: Mr. Ramesh Singh, Sr. Advocate with Mr. Mohit D
Ram, Ms. Sunieta Ojha, Advocates**

**Respondents: Mr. Manish Kaushik, Mr. Ajit Singh Joher, Advocates
for R-1
Mr. Shailendra Singh, Mr. Dhruv Goel, Ms. Muskaan
Garg, Advocates for IRP, R-2
Mr. Mirtyunjay Kumar, Advocate
Mr. Kumar Anurag Singh, Ms. Prachi Johri, Advocates
for Intervenor in I.A. No. 2340 of 2021
Mr. Vivek Narayan Sharma, Mr. Tushar Kumar, Mr.
Aditya, Advocates for Intervenor in I.A. 2413/2021
Mr. Mahek Maheshwari, Advocate for Intervenor
Mr Vikas Tomar, for Intervenor Narendra Kumar.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 19th January, 2021 passed by the National Company Law Tribunal, New Delhi, Bench – III in the matter of Mr. Amit Goel Vs. CMYK Printech Limited in IB-1018/ND/2020. Mr. Kushan Mitra, Suspended Shareholder of the 2nd Respondent Company-CMYK Printech Limited (Hereinafter referred as “Corporate Debtor”) preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the ‘Code’). By the Impugned Order, the Adjudicating Authority has admitted the Application by Mr. Amit Goel (hereinafter referred as ‘the first Respondent’), filed under Section 7 of the Code, observing as follows:

“5. The contention of the Applicant/Financial Creditor is also supported by the report of the Independent Auditor as is recorded under para 7 & 8 of the Reply filed by the ‘Corporate Debtor’ i.e., Clause XIV of Annexure-I of the Independent Auditor’s Report provides that during the year 2018 the ‘Corporate Debtor’ has made preferential allotment of 26,00,566 Shares to its Director, Mr. Amit Goel/Financial Creditor. Further, it is stated that the ‘Corporate Debtor’ has allotted those shares in lieu of the outstanding loan of Rs. 79.68 lakhs and after booking and reversal entry in the name of “Prior period expenses” for recognizing the claim of the expenses borne by the Director in the earlier year for a total of Rs. 76.35 Lakhs and against this claim, the ‘Corporate Debtor’ has allotted the Preferential and Equity Shares to the Director (Applicant) during the year.

6. The Applicant has placed on file Form No. PAS-3, which was filed by the ‘Corporate Debtor’ with the Registrar of Companies (hereinafter referred as ‘RoC’) wherein it is stated that the date of allotment is 11.09.2018 and the date of passing shareholders’ resolution is 25.08.2018. The FORM PAS-3 also

provides that there was no agreement or contract executed in writing for allotting securities for consideration other than cash. It also reflects from the Notes to Financial Statement at point 2(i) for the year ending 31st March, 2019 that the Board of Directors, in the meeting convened on 10.05.2019 passed Resolutions declaring the allotment made to the Applicant/Financial Creditor as invalid and void ab initio and authorized jointly/severally the directors Mr. Chandan Mitra and Mr. Kushan Mitra to approach the RoC for cancellation of the PAS-3.

7. It is worthwhile to mention that one of the Directors Mr. Kushan Mitra filed a complaint with the RoC, who (RoC) vide E-Mail dated 08.01.2020 communicated that the matter stands closed. Under Section 42 of the Companies Act, 2013, a complete procedure is provided for allotment of Shares against the Application Money and in case during time period as prescribed, the allotment is not done, the money has to be returned along with the interest to the Investors. Herein is the Financial Creditor whose money amounting to Rs. 79.68 Lakhs was recognised as a loan described as “prior period expenses”.

8. The Ld. Counsel for the ‘Corporate Debtor’ submits that the allotment of Equity Shares has been made in the name of the Applicant/Financial and he is a Shareholder. Further, it is submitted that the Petition filed by the Applicant/Financial Creditor under Section 7 of IBC, 2016 is not maintained because he does not come under the category of a Financial Creditor. However, contrary to this, it is recorded in Paras 13,14,& 15 of the Reply filed on behalf of the CD that the allotment in question, is doubtful and the CD did not confirm that any allotment is continuing in favour of the Applicant/Financial Creditor, as claimed by the Counsel for the CD.

9. It is worthwhile to note that the Board Resolution that came to be passed on 11.09.2018 by which the allotment of shares was revoked, is still in existence and has not been superseded by any of the Board Resolutions. Therefore, the submissions of the Ld. Counsel for the ‘Corporate Debtor’ are contrary to

the record maintained by the 'Corporate Debtor' and cannot be relied upon. However, the documents placed on record by the applicant clearly demonstrate that an amount of Rs. 79.35 Lakhs is outstanding as loan against the CD, which the 'Corporate Debtor' failed to pay. In the circumstances, the defence that has been projected by the Ld. Counsel for the 'Corporate Debtor' is nothing but moonshine and a mere bluster. Therefore, the arguments of the CD stand rejected."

2. **Submissions of the Learned Sr. Counsel appearing on behalf of the Appellant:**

- Learned Sr. Counsel appearing for the Appellant submitted that the Adjudicating Authority has wrongly admitted the Section 7 Petition despite recording its satisfaction only to the extent of Rs. 79.35 Lakhs as the claim amount due to the first Respondent. Even if the amount and an interest of 12% due is calculated from 10.11.2018, the claim amount would only be Rs. 97,55,919/- which is below the threshold of Rs. 1 Crore.
- Proceedings under the Code are not recovery proceedings and no debt is payable by the 'Corporate Debtor' to the first Respondent as there exists no loan received by the Company which is evident from the facts mentioned in the Complaint to the 'RoC' on 29.04.2019. The same is also reflected in the Board Resolution Dated 10.05.2019, Complaint to the RoC dated 29.04.2019, Criminal Complaint dated 29.08.2020 and also in the clarification given to the Economic Offences Wing (EOW) dated 04.09.2020. It is submitted that all these Complaints have been made much prior to the filing of Section 7 Petition, which was filed on 08.10.2020.

- The entire transactions relating to Preferential Allotment of Equity Shares was illegally done by the first Respondent. Part-IV of the Application mentions date of default as 10.11.2018, whereas the revocation happened only on 10.05.2019. If the amount due of Rs. 1.56 Crores was converted as Equity Shares of 26,00,566/- by Board Resolution dated 11.09.2018, then the question of any default having occurred prior to revocation of the Allotment made by the Board Resolution Dated 10.05.2019, does not arise.
- The first Respondent did not challenge the Resolution Dated 10.05.2019 and there was also no demand for the refund of the alleged due amount of Rs. 1.56 Crores. The first Respondent took advantage of the illness of one of the Directors-Mr. Chandan Mitra. Their fraudulent acts are subject matter of the Criminal Complaint as well as of the Complaint filed before RoC.
- When the Appellant lodged the Complaint against the first Respondent, who is also the Director of the 'Corporate Debtor' Company before RoC, the first Respondent could have moved the Application under the Companies Act, 2013 or could have satisfied the RoC that the Allotment Shares was legal instead of filing an Application under Section 7 of IBC showing wrong date of default, which shows the fraudulent action on behalf of the first Respondent.
- The cause of action for filing Section 7 IBC Petition is the Board Resolution dated 10.05.2019, by which 26,00,566/- shares have been cancelled. Admittedly, the Resolution of the said Board Meeting is yet

to be approved in the General Meeting of the 'Corporate Debtor'. Hence the Petition under Section 7 is premature as the first Respondent continues to be the shareholder of the 'Corporate Debtor', holding 26,00,566/- shares in the Balance Sheet and the Auditors Report relied on by the first Respondent before the Adjudicating Authority.

- Admittedly, the first Respondent did not disburse the said amount for time value of money and hence does not fall within the definition of 'Financial Debt' under Section 5(8) of the Code. For a debt to become 'Financial Debt', the basic elements are that it ought to be disbursed against 'consideration for time value of money'.
- Admittedly, the first Respondent made a Private Placement dated 08.09.2018 for the allotment of 26,00,566 equity shares with the 2nd Respondent when the shares were allotted to him vide Board Resolutions dated 01.08.2018, 25.08.2018 and 11.09.2018. The first Respondent pledged the entire shareholding with one M/s. Vipin Malik Associates even before the same could be resolved. Hence the shareholder of the Company does not fall within the meaning of 'Financial Creditor' as the amount invested for purchasing shares does not amount to disbursement against consideration for time value of money. The share application money was neither disbursed nor invested for consideration for time value of money, but for purchasing Equity Shares.
- Section 42(6) of the Companies Act, 2013 is not attracted as the said provision deals with application money actually coming in to increase the subscribed capital, whereas the present case is of alleged amount

due being converted into equity, the option which is resorted to tide over the financial difficulty. The scheme under Section 42(6) envisages a designated account and deals with case where there is no allotment at all. In the present case, the allotment took place but subsequently rescinded by the Board Resolution dated 10.05.2019, the confirmation of which in a General Meeting of the 'Corporate Debtor', is yet to take place. Section 42(6) of the Companies Act does not contemplate a situation of cancellation of equity shares.

- The grievance of the first Respondent that the shares allotted to him were illegally revoked by the 2nd Respondent by the Board Resolution dated 10.05.2019, can entitle him to claim the amount of Rs. 1.56 Crores owed by the Company on account of past salaries and expenses incurred by him on behalf of the Company, for which Section 7 Petition, is not maintainable.
- The argument of the first Respondent that withdrawal of Appeal by Mr. Chandan Mitra indicates that grievance against the Impugned Order dated 19.01.2021 has been given up, is incorrect as the withdrawal of the Appeal was without his instruction; that on account of his illness, the said process remained incomplete when he passed away on 02.09.2021; that the Appellant has filed a Complaint before the Bar Council of India against the then Counsel who has withdrawn the Appeal without instructions and even otherwise withdrawal of Appeal by one of the Suspended Directors does not amount to acceptance of the Impugned Order.

- The argument of the first Respondent that subject matter of the Appeal before this Tribunal and before the Supreme Court of India were same is factually incorrect. Company Appeal No. 4666 of 2021 before the Hon'ble Supreme Court of India was filed against the Order dated 03.08.2021 passed by this Tribunal, by which Order, this Tribunal had vacated the 'Stay' granted vide Order dated 22.02.2021, seeking stay of the CoC proceedings. The Hon'ble Supreme Court of India vide Order dated 02.09.2021 directed "We see no reason to interfere with the Order dated 03.10.2021 which is interlocutory in nature. However, we direct NCLAT to decide the Appeal i.e. Company Appeal (AT) Ins. No. 128 of 2021 finally on 05.10.2021 when the matter is listed for hearing".
- The Adjudicating Authority has not addressed or returned any finding on the disputes which were raised prior to the filing of Section 7 Petition.
- The forensic report relied on by the Interveners established that the alleged amount due was fraudulent one.
- Learned Counsel for the Appellant placed reliance on the following Judgments to support his case:
 - *"Radha Exports India Private Limited Vs. K.P. Jayaram, 2020 10 SCC 538"*.
 - *"Sesa Goa Limited and Ors. Vs. State of Maharashtra & Ors., [2009] 151 Comp Cas 358 (Bom)"*.

3. **Submissions of Learned Sr. Counsel appearing on behalf of the first**

Respondent:

- Learned Sr. Counsel appearing for the first Respondent submitted that as per Section 42(6) of the Companies Act, 2013, and the Companies Acceptance of Deposit Rules, 2014 (Rule 2 and Rule 17), share money pending allotment carries statutory interest and it is 'Financial Debt' for time value of the money. The amount of Rs. 1,56,03,396/- was treated as share application money in the books of account of the 'Corporate Debtor'. Form PAS-5 shows that equity shares of Rs. 1.56,03,396/- is signed by Mr. Chandan Mitra, Director of the 'Corporate Debtor' and filed with the Registrar of Companies. Form PAS-4 being the private placement of the equity shares offer letter, the role of the first Respondent is shown as solely editorial and Mr. Chandan Mitra is the Managing Director. The Board Resolution dated 01.08.2018 approved the offer, issue and allotment of equity shares by conversion of unsecured loan into equity certified by Mr. Chandan Mitra as the Managing Director.
- The Appellant himself was instrumental for the cancellation of the shares allotted and as the suspended director of the 'Corporate Debtor' he himself complained to RoC on 29.04.2019 that the shares of issue in favour of the first Respondent should be declared as invalid.
- Learned Counsel placed reliance on paras 3,4,5,6,7,8 and 9 of the Impugned Order to buttress his argument that the Adjudicating Authority has passed a well reasoned order sustainable in law.

- The amount of Rs. 1.56 Crores is above the threshold limit and is a 'Financial Debt' as the interest amount payable under Section 42(6) is 'consideration for time value of money'.
- This Tribunal in *Uniexcel Developers Pvt. Ltd. Vs. Uniexcel Ltd.*, Company Appeal (AT) Ins. No. 962 of 2019 upheld the conclusion that in case of non-refund of share application money within 60 days of the receipt of the money under Section 42 of the Companies Act, the share application money will be treated as deposit and has to be returned at the rate of 12 % per annum from the expiry of the 60th day and therefore non-refund of amount is a 'Loan'.
- The Learned Counsel also placed reliance on the Judgment of this Tribunal in the case of "*Mr. Shakebuddin Irtebatuddin Khan Vs. Qamruddin Faizi, Company Appeal (AT) Ins. No. 209 of 2019*".
- The Appellant had approached the Hon'ble Supreme Court of India seeking stay of the Constitution of CoC and the Hon'ble Supreme Court of India declined to interfere and the Civil Appeal was dismissed. Further, the Order of withdrawal dated 22.06.2021 passed by this Tribunal in connected Appeal filed by *Mr. Chandan Mitra Vs. Amit Goel and Anr.*, Company Appeal (AT) (Ins.) No. 262 of 2021, goes to show that the Appellant herein had accepted the Order of the Adjudicating Authority.
- The Learned Counsel in support of this argument that no interest bearing loan could also be treated as 'Financial Debt' under Section 5(8) of the Code relied on ratio of the Judgement of the Hon'ble Supreme

Court of India in “*M/s. Orator Marketing Pvt. Ltd. Vs. M/s. Samtex Disinz Pvt. Ltd., Civil Appeal No. 2231/2021*”.

- The Resolution Professional-2nd Respondent filed a status report that Committee of Creditors was constituted on 22.02.2021 and the IRP has verified the claims received from the Creditors of the ‘Corporate Debtor’ and is ensuring that the ‘Corporate Debtor’ remains a Going Concern as per Order of this Tribunal dated 22.02.2021.

4. **I.A. No. 2413 of 2021:**

- Mr. Narendra Kumar Printer and Publisher of the ‘Corporate Debtor’ Company preferred this Application. Learned Counsel appearing for the Applicant submitted that the Applicant came to know about the forensic audit report and then filed this instant Application to bring to the notice of this Tribunal that there has been a fraud of almost 800 Crores and misappropriation.
- The first Respondent is not a ‘Financial Creditor’ as shareholder of the Company does not come within the meaning of Financial Creditor. The amount invested for purchasing shares does not amount to disbursement against consideration for time value of money.
- On revocation of shares, a shareholder may claim for the amount but does not become a Financial Creditor. IRP has the authority to appoint and conduct the forensic audit and the Petition filed under Section 7 is only an eyewash to avoid Criminal Prosecution.
- It is prayed to set aside the Impugned Order, which otherwise would cause injustice to hundreds of Vendors, Business Associates etc. and

also to direct the IRP to provide the complete forensic audit report to the Applicant to initiate necessary legal action.

5. **I.A. No. 2340 of 2021:**

- M/s. Opinion Express Communications & Entertainment Pvt. Ltd. through its Directors Mr. Prashant Tewari filed this Application seeking impleadment as a Respondent.
- Learned Counsel for the Applicant prayed that this Tribunal direct the Serious Fraud Investigation Office to probe into the affairs of the Company especially in the role played by the Board of Directors and set aside the Impugned Order passed by the Adjudicating Authority.
- To take on record the copy of the Forensic Audit Report conducted by the Chartered Accountant.
- It is also prayed to impose penalty on the first Respondent as per provisions of Section 75 of the Code as an Application under Section 7 was moved with malicious intent and not for resolution or liquidation.

6. It is seen from the record that the Appeal before this Tribunal challenges the impugned Order dated 19.01.2021 passed against the Order dated 03.08.2021 passed by this Tribunal vacating the stay granted vide Order dated 22.02.2021, wherein stay of CoC proceedings was prayed for. Hon'ble Supreme Court vide order dated 02.09.2021 observed that there was no reason to interfere with the Order dated 03.10.2021 which is interlocutory in nature and directed NCLAT to decide the Appeal finally on 05.10.2021 when the matter was listed for hearing. The said order is reproduced as hereunder:

“The Appellant is a suspended Director of Respondent No.2, Corporate Debtor which is engaged in the publication of a leading Newspaper. Another Director (Respondent No.1) filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) on account of alleged default of ‘financial debt’ which was admitted by the NCLT. Aggrieved thereby, the appellant filed an appeal before the NCLAT. On 22.02.2021, after recording the submission made on behalf of the Interim Resolution Professional that the Committee of Creditors (‘CoC’) has not been constituted, the NCLAT kept the constitution of CoC on hold. The interim order was vacated on 03.08.2021, when the NCLAT came to know that the CoC was already constituted.

Mr. P.S. Patwalia, learned senior counsel submitted that the appeal is listed on 05.10.2021 under the heading “After Notice”. He submitted that the proceedings before the CoC require to be stayed as the Corporate Debtor is a renowned newspaper in business for a long period of time.

We see no reason to interfere with the order dated 03.08.2021, which is interlocutory in nature. However, we direct the NCLAT to decide the appeal, i.e. Company Appeal (AT) (Insolvency) No.128 of 2021 finally on 05.10.2021 when the matter is listed for hearing.

The appeal is disposed of accordingly. Pending application(s), if any, shall stand disposed of.”

As the Learned Counsel for the Appellant was not present on 05.10.2021, Learned Proxy Counsel informed that some efforts are being made to settle the matter between the parties which was denied by the Learned Counsel for the Respondent and the matter was adjourned to 08.10.2021 directing the parties to file their written-submissions. Subsequently on 21.10.2021. “M/s. Opinion Express Communications & Entertainment Pvt. Ltd.” and Mr. Narendra Kumar Printer and Publisher of the Corporate Debtor proposed to intervene and the matter was posted once again to 12.11.2021. The status report filed by IRP was taken on record. The matter was partly heard and was posted for Orders on 23.11.2021 for

hearing the interveners. The parties were heard at length and orders were reserved as on that date.

7. **Assessment**

- Whether ‘Share Application Money’ in the event of non-allotment of shares, be treated as ‘Loan/Debt’ and whether such an amount falls under the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code.
- Whether Statutory accrual of interest under Section 42(6) of the Companies Act, 2013, be construed as ‘consideration for time value of money’, to qualify the requirement of “Financial Debt” as defined under the Code.

For better understanding of the case, we find it relevant to reproduce the definition of ‘Debt’ as defined under Section 3(11) of the Code, the definition of ‘Financial Creditor’ as defined under Section 5(7) of the Code and also the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code which read as hereunder:-

“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;”*

“Section 5

(7) *financial creditor means any person to whom a ‘Financial Debt’ is owed and includes a person to whom such debt has been legally assigned or transferred to;*

(8) *‘Financial Debt’ means a debt along with 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;"

(Emphasis Supplied)

8. It is the main case of the Appellant that Section 42 (6) of the Companies Act, 2013 is not attracted as such provisions deal with Share Application Money actually coming in to increase the subscribed capital; that Section 42(6) of the Act deals with a case where there is no allotment at all; that the decision of the Board to cancel the allotment under the Board Resolution Dated 10.05.2019 does not change the character of the said amount, which is only deemed to be Share Application Money.

9. It is the case of the Respondent that the 'Corporate Debtor' after passing the Board Resolution dated 10.05.2019, revoking the allotment of shares, defaulted in not returning the Share Application Money amounting to 1,56,03,396/- along with 12% per annum to the first Respondent as provided for under Section 42(6) of the Companies Act, 2013. Learned Sr. Counsel vehemently contended that the 'Corporate Debtor' itself treats the money as pending allotment of shares allotted on preferential basis under private placement and is doubtful about the validity of the allotment and that in case of non-refund of Share Application Money within 60 days of the receipt of the money, under Section 42 of the Companies Act, 2013, the Share Application Money will be treated as Deposit and has to be returned at the rate of 12 percent from the expiry of the 60th day. In support of his submissions, the Learned Counsel relied upon the Judgment of this Tribunal in "*Uniexcel Developers Pvt. Ltd.*" (*Supra*). The Learned Counsel strenuously contended that the ratio of the Hon'ble Supreme Court in "*M/s. Orator Marketing Pvt. Ltd.*" (*Supra*) is applicable to the facts of this case as the Supreme Court of India has held as follows:

22. The NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. “Financial Debt” means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a ‘Financial Debt’. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof “Financial Debt” includes any amount raised under any other transaction, having the commercial effect of borrowing.

23. Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.”

‘Financial Debt’ means outstanding principal due in respect of Loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only outstanding principal would qualify as ‘Financial Debt’. Furthermore, sub-clause (a) (i) of sub-Section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive.

10. Share Application Money is the amount of advance received from a prospective shareholder which is later transferred to share capital account on the issue of shares or refunded in case the issue falls to take place.

11. **Refund of Application money for private companies:**

- For private placements, invitation to subscribe should be given to less than 50 people (excluding Qualified Institutional Buyers and employers under ESOP)
- Fresh allotments should not be made until allotments under earlier offers are completed or withdrawn.

- Subscriptions should be collected only in modes other than cash.
- Shares should be allotted within 60 days of completion of subscription period, else all money collected should be refunded within 15 days from that date. (with an interest of 12 % p.a. from the date of expiry of 60 days)
- Share Application monies should be deposited in a separate bank account, the balance of which would remain unutilised until allotment.
- Violation of provisions under section 42 shall make the private placement to be deemed as a public offer, and SEBI regulations would apply.
- Penalty on default – the amount involved in offer or 2 Crores whichever is higher. (to promoters/directors).

When the Company fails to refund the Application money as stipulated within the time limit of 60 days such balance shall be treated as 'Deposit' under Companies (Acceptance of Deposit) Rules, 2014.

12. **For Private Placement and Preferential Allotment:**

At this juncture, we find it relevant to reproduce Section 42(6) of the Companies Act, 2013 which reads as follows:

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

(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 expiry 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.”

(Emphasis Supplied)

13. Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 reads as follows:

“For the purposes of clause (c) of sub-section (1) of section 62, if authorized by a special resolution passed in a general meeting, shares may be issued by any company in any manner whatsoever including by way of a preferential offer, to any persons whether or not those persons include the persons referred to in clause (a) or clause (b) of sub-section (1) of section 62 and such issue on preferential basis should also comply with conditions laid down in section 42 of the Act.”

Rule 13 makes it clear that all provisions of Section 42 (Private Placement) are also applicable to issue of shares under Section 62(1)(c) (Preferential Allotment).

14. Rule 2(1)(c) of Companies (Acceptance of Deposit) Rules 2014 reads as follows:

(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

(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.

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

(Emphasis Supplied)

15. The Hon’ble Supreme Court of India in “*Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Limited and Ors.*” (2020) 8 SCC 401 in para 46, 50 and 50.1 has held as under:

“The essentials for financial debt and financial creditor

46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursement, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursement against consideration for the time value of money

50. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons* (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could

be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

50.1 Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

As can be seen from Section 5(8) of the Code and also the aforementioned principals laid down in “Anuj Jain” (*supra*), consideration for time value of money is an essential element for the amount to fall within the ambit of Financial Debt. The debt may be of any nature but a part of it is always

required to be carrying, or corresponding to, or at least having some traces for disbursal against consideration for time value of money.

16. The Key Feature of a Financial Transaction as contemplated under Section 5(8) is 'consideration for time value of money'. In other words, the legislature has included such financial transactions in the definition of 'Financial Debt' which are usually for sum of money received today to be paid over a period of time in a single or series of payments in the future. In Black's Law Dictionary the expression 'Time Value' has been defined '*as the price associated with the length of time that an investor must wait until an investment matures or the related income is earned*'.

17. In the instant case, allotment of equity shares on preferential basis by Private Placement Offer was done and subsequently revoked. The allotment of shares is evident under Form PAS-5, Form PAS-4, the Board Resolution dated 01.08.2018, the Special Resolution dated 25.08.2018 and the Board Resolution dated 11.09.2018. Subsequently vide a Board Resolution dated 10.05.2019, the allotment made in favour of First Respondent was declared as invalid and void *ab initio*. Therefore, we are of the considered view that the money given by the First Respondent indeed falls within the definition of Share Application Money.

18. To understand the nature of transaction involving a Share Application Money it is necessary to see how Section 42(6) of the Act and the Companies (Acceptance of Deposits) Rules, 2014 treat the Share Application Money. The relevant parts of the Act and the Deposit Rules have been reproduced in Paragraphs 12 to 15 above. It is clear from the reading of Section 42 of the Companies Act, 2013 and the Deposit Rules that if the Shares are not allotted

within 60 days of receiving the Share Application Money, and if the refund does not take place within 15 days from the expiry of 60 days time limit, then this amount will be treated as a 'Deposit', advanced to the Company, which has to be returned by the Company at the rate of 12 percent per annum from the expiry of the 60th day. Thus the concerned person would get compensation for the time value of money given by him to the Company which changes the nature and character of the money so given. Although the amount was initially paid towards Shares, since the allotment was revoked, the equity did not materialise. Thereafter, by operation of law, Section 42(6) of the Companies Act, 2013, the amount has statutorily been given the character of loan with interest. Same is the case of amounts paid as optionally convertible debentures. They may initially be seen as Debt and later, upon conversion the same amount becomes equity. Hence, when under law, the amount has been treated as a loan, we hold that refund of Share Application Money, in the event of non-allotment of shares attracts interest as provided for under Section 42(6) of the Act and therefore qualifies the essential ingredients of Section 5(8) of the Code in terms of consideration paid for time value of money and therefore falls within definition of the ambit of 'Financial Debt' as defined under Section 5(8) of the Code. Therefore, we hold that the Debt is a 'Financial Debt' and hence we are of the considered view that the ratio of "*Radha Exports India Private Limited*" (*supra*) and "*Sesa Goa Limited and Ors. (Supra)*" is not applicable to the facts of this case. Further, a three Judge Bench of this Tribunal in *Uniexcel Developers Pvt. Ltd. Vs. Uniexcel Ltd.*, Company Appeal (AT) Ins. No. 962 of 2019 has concurred with the finding of the Adjudicating Authority and held that in case of non-refund of Share Application Money

within 60 days of receipt of the money, the money will be treated as Deposit and would change its character to fall within the definition of 'Financial Debt'.

19. The contention of the Learned Counsel for the Appellant that the Criminal Complaint dated 29.08.2020, Complaint to the RoC dated 29.04.2019 and clarification given to the Economic Offences Wing (EOW) dated 04.09.2020 is much prior to filing of the Section 7 Application which the Adjudicating Authority has erroneously not addressed to these issues, is untenable, especially keeping in view the ratio of the Hon'ble Supreme Court of India in '*M/s. Innoventive Industries Ltd.*' Vs. '*ICICI Bank & Anr.*', reported in 2018(1) SCC 407 wherein the Hon'ble Supreme Court of India has observed as follows:-

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of

Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

Keeping in view the ratio of Hon’ble Supreme Court in ‘*M/s. Innoventive Industries Ltd.*’ Vs. ‘*ICICI Bank & Anr.*’ (supra), all that we need is to see under this Code is whether there is a ‘Debt’ payable under law and if there is a ‘Default’. We find that I.As bearing No. I.A. 2340 of 2021 and 2413 of 2021 have been filed by the proposed Intervenors alleging fraud and seeking a forensic audit. At this juncture, we do not see any substantial grounds in allowing these I.As.

20. For all the aforementioned reasons, we are of the considered view that Share Application Money in the event of non-allotment of shares, attracts interest under Section 42(6) of the Companies Act, 2013 and therefore falls within the

ambit of definition of 'Financial Debt' as defined under Section 5(8) of the Code.

21. For all the aforementioned reasons, this Appeal is dismissed accordingly. The Intervention Applications are also dismissed as non-maintainable. No order as to Costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
16th December, 2021

Basant

Company Appeal (AT) Ins. No. 128 of 2021
&
I.A. No. 2340 of 2021 and 2413 of 2021