

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

**CP (IB) 4100/MB/2019**

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*

**Prakash Ambure & Ors.**

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

**Versus**

**Invent Bio-Med Private Limited**

**..... Corporate Debtor**

**Order Delivered on :- 04.08.2023**

**Coram:**

**Shyam Babu Gautam**

**Member (Technical)**

**Kuldip Kumar Kareer**

**Member (Judicial)**

*Appearances:*

**For the Financial Creditor: Mr. Rubin Patil, Advocate**

**For the Corporate Debtor: Mr. Rohit Gupta, Advocate**

## ORDER

### *Per:- Coram*

1. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against Invent Bio-Med Private Limited, (“**the Respondent**”) alleging default in payment of a Financial Debt.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of total outstanding financial Debt of Rs. 55,00,000/-/- (Rupees Fifty-Five Lakhs Only) together with interest @ of 18% p.a. from 01.11.2017 till payment or realization. The date of default by the Corporate Debtor occurred on 31.10.2017.
3. In January, 2015, the then Managing Director of the Corporate Debtor approached one of the Financial Creditors (the Applicant No.1 herein) with a request to invest certain monies in the Corporate Debtor Company as the Corporate Debtor Company was facing financial stress. Accordingly, the Financial Creditor between February 2015 and June 2015 advanced sums in total amounting to Rs. 55,00,000/- (Rupees Fifty-Five Lakhs Only) to the Corporate Debtor by way of investment in the Corporate Debtor. The same is corroborated vide the Bank Statements for the period of 01.04.2014 to 01.09.2015 vide RTGS entries. The receipt of the said amount was also acknowledged by the Corporate Debtor vide email dated 08.06.2015 addressed to the

Applicant No. 1. The Corporate Debtor issued receipt in favour of the Financial Creditor. (for ref :- Not in a form of mail but on a letter head)

4. The Corporate Debtor was to issue shares of the Corporate Debtor against the investment made by the Financial Creditor. The Corporate Debtor vide email dated 09.09.2015 called upon the financial creditors to provide them mandate letter duly signed by individual for the two groups as they were going to allocate the issue of equity shares to the key people of two groups separately. The said email is annexed to the petition. Accordingly, the Financial Creditors sent mandate letters to the Corporate Debtor. despite of the same, the Corporate Debtor failed to issue equity shares in favour of the Financial Creditors. The Financial Creditor also addressed letter dated 21.12.2016 thereby requesting the Corporate Debtor to refund the deposits made by the Financial Creditor. However, despite request the Corporate Debtor has not repaid the same.
5. The Corporate Debtor has duly admitted and acknowledged its liability to refund the said amount in its trial balance as on 31.03.2018. The said trial balance also reflects the deposits received from the Financial Creditors.
6. The Financial Creditor states that it is not disputed that the Corporate Debtor was to issue Equity Shares in favour of the Financial Creditors and also that no equity shares of the Corporate Debtor were issued to the Financial Creditor. It is the contended by the Financial Creditor that the amount initially advanced as share allotment money was subsequently converted into a deposit.

7. The Financial Creditor has relied upon section 42 of the Companies Act, 2013 wherein the issuance of shares on a private placement basis is done. Any Company making an offer or invitation in accordance with the said provision is required to issue securities to such persons who have accepted the offer within a period of 60 days from the receipt of allotment money. If the company fails to do so, the Companies Act mandates to repay/refund the allotment monies within a period of 15 days from the expiry of the 60-day period failing which company is to pay such allotment money with interest @ 12% from the expiry of the 60<sup>th</sup> day.
8. The allotment monies received from the subscribers does not qualify as a deposit. It is only upon the failure on the part of the company to allot securities that such monies upon the expiry of 75 days change their nature to deposit. The Corporate Debtor was to issue equity shares within 60 days between April 2015 and August 2015, which the Corporate Debtor failed to refund/repay.

**Reply filed by the Corporate Debtor**

9. The Corporate Debtor filed its Reply dated 21.01.2020 in their defence. The Corporate Debtor has raised the issue of limitation and maintainability. The Corporate Debtor states that the Petitioner has filed the present petition claiming to be share application money and submits that the same is not a financial debt. The Corporate Debtor states that the Financial Creditor has relied upon *Kushan Mitra v/s Amit Goel & Ors. [Company Appeal (AT) (Insolvency) No. 128 of 2021]*, In the said Judgment, question had arisen before the Hon'ble NCLAT as to whether the amounts advanced towards subscription of shares

upon default falls within the purview of a deposit and within the definition of a 'financial debt' as per the provisions of Section 5 (8) of the Code. The Hon'ble NCLAT held that "*it is clear from a reading of Section 42 of the Act and the Deposit Rules that if the shares are not allotted within 60 days of the receipt of the money the share application money has to be refunded and if the refund does not take place within 15 days from the expiry of the 60 days time limit, then the share application money will be treated as a deposit. On the non-allotment of shares, after the expiry of the time limit of 75 (60+15) days the share application money will be a deposit advanced to the company, which has to be returned by the company at the rate of 12% p.a. from the expiry of the 60<sup>th</sup> day. The person applying for the shares will get compensation for the time value of the share application money given by him to the company, which makes the company advanced a financial debt to be repaid by the company. Thus, the Respondents plea that the nature of the money given will not change into a loan does not stand as the Act itself allows such re-categorization. In the present case the money was transmitted in 2008 and the allotment has not been made till date, thus the money transmitted is a deposit and can be treated as a financial debt.*"

10. However, the Hon'ble Supreme Court in ***Shobori Ganguli v/s. Amit Goel & Ors. Civil Appeal Diary No(s). 4333/2022*** vide Order dated 25.02.2022 stayed the Order and also the Judgement passed by the Hon'ble NCLAT. Further, the Hon'ble NCLAT in ***Pramod Sharma v/s. Karanaya Heartcare Pvt. Ltd. Comp.App. (AT) (Ins.) No. 426 of 2022*** held that the amount will not constitute a financial debt. Hence, the Corporate Debtor states that as there being a judgement from a larger bench then the earlier constitution being of two judges and the earlier bench order being stayed, hence, there is no reason the earlier order

should be relied and therefore the present petition is liable to be dismissed as it not a financial debt.

11. The Corporate Debtor further contends that the petition is time barred. Even if it is a financial debt as governed by Section 42(6) of the Companies Act, 2013 which reads as follows ;

*“42(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.*

The said provision clearly provides if the shares are not allotted, the company is then required to return the amount within a period of 15 days from the expiry of 60 days. Therefore, the money is to be returned within a period of 75 days of receipt of the money. Hence, the default

happens within 75 days of the money received. In the present case, the money is received in the month of January 2015 and June 2015. Therefore, default occurred within 75 days from January 2015. Hence, the first default occurred in April 2015 and second in July 2015 whereas the present petition is filed in September 2019 which is not within 3 years from the date of default. Hence the petition is barred by law of limitation. The date of default mentioned in Part IV of the petition is 31.10.2017. There is no justification on the part of the Petitioner as to how date of default can be treated as 31.10.2017.

12. The Financial Creditor have relied upon the trial balance sheet which is not tenable as it is not a balance sheet. It is not an acknowledgement of debt. The Financial Creditor claims that the advance is to be treated as share application and whereas the trial balance reflects it as a trade deposit.
13. The Financial Creditor have failed to prove the debt and default through any document. They have failed to produce financial records, financial documents or any record of default with information utility etc. the books of accounts of the Financial Creditors have also not been produced and there appears nothing on record that the Financial Creditors have maintained the accounts.
14. Further, the Petition is filed by individuals and individuals cannot authorize any other person to file a petition. The use of Power of attorney is not recognized under the Code. The Power of attorney is only recognized in case of corporate entity where it is treated as letter of authority. The petition is signed only by one petitioner who has signed on behalf of other petitioners.

15. The Financial Creditors claims to have filed the petition for share application money but from the very letter dated 28.03.2015 as produced by the Financial Creditors it was to be treated as deposit in which interest was to be paid with annual interval. Further, letter produced by the Financial Creditors in the petition provides that the money was paid as an investment and not as a share application money. Therefore, there are no documents on record to prove that the said money is towards the share application money. In various documents it is under different nomenclature which fails to prove the factum of debt as well as default. In view of the said petition is liable to be dismissed as pleaded by the Corporate Debtor.

**Rejoinder filed by the Financial Creditor**

16. The Financial Creditor have rebutted in its rejoinder that none of the contentions of the Corporate Debtor are relevant. The Petition is not barred by limitation as it is a well settled that the limitation act is applicable to petition filed under section 7 and 9 of the code. In this regard, Article 137 of the Limitation Act would be attracted. By virtue of this, the Financial Creditor has a period of 3 years to institute the present petition. As before the expiry of three year, a copy of trial balance ledger as on 31.03.2018 is on record wherein the Corporate Debtor has acknowledged the advance received from the Financial Creditors, which extends the period of limitation in respect of the said amounts for an additional period of three years from the date of acknowledgement i.e. 31.03.2018 and the petition is filed in September, 2019.

17. As regards the objection taken by the Corporate Debtor that the petition has been filed by one of the financial creditor with a specific power of attorney from the other individual financial creditors, the Financial

Creditors have further relied on *Rajendra Narottamdas Sheth & Anr. v/s Chandra Prakash Jain & Anr. [Civil Appeal No. 4222 of 2020]* wherein it is held that power of attorney holder for a financial creditor can file an application. Hence, the Financial Creditor pleads to initiate Insolvency proceedings against the Corporate Debtor.

### **FINDINGS**

18. We have heard the submissions of the Counsel appearing for the Financial Creditor and Counsel appearing for the Corporate Debtor and have perused the documents on record.
  
19. It is observed that the Financial Creditors have taken plea as to the claim being a Financial Debt as governed by Section 42(6) of the Companies Act. The said provision clearly states that in the event if the shares are not allotted, then the company is required to return the amount within a period of 15 days from the expiry of 60 days, hence the money has to go back within a period of 75 days. In the present case, the money was received in the month of January, 2015, February, 2015 and June, 2015. Therefore, the first default if any, occurred in April, 2015 and then in July, 2015 and the Financial Creditors filed the petition in 2019, which is not within 3 years from the date of default. As also noticed in Part V of the Petition, the Financial Creditors were required to state the particulars of financial debt with documents and evidence but there appears to be nothing stated at any place anything about the so called acknowledgement. Further, the date of default stated in the Petition is 31.10.2017 and it has not been explained with any proof or evidence as to how the date of default took place on 31.10.2017. Further, it is well settled that entries in Balance Sheet only

can be treated to be an acknowledgement of debt for the purpose of Section 18 of the Limitation Act. The Financial Creditors have relied upon the trial balance annexed to the rejoinder which cannot be treated as an acknowledgment as the same cannot be treated as an authentic document. There is no evidence to show that the entries showing in the trial balance were subsequently reflected in the audited Balance Sheet of the Corporate Debtor or not. Therefore, the same cannot be treated as valid acknowledgment of debt on the part of the Corporate Debtor that being the claim cannot be treated to have been filed within the period of limitation.

20. In view of the above discussion, the Application filed by the Financial Creditors under Section 7 of the Code seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor is hereby rejected being barred by limitation.

21. Hence, **CP No. 4100 of 2019 is hereby dismissed.**

**Sd/-**  
**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

**Sd/-**  
**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**