(2020) 03 NCLT CK 0093

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : (IB) No. 1970/ (ND) Of 2019

Pramod Kumar Sharma APPELLANT

Vs

Karanya Heart Care Private Limited RESPONDENT

Date of Decision : 02-03-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 4, 5, 5(8), 7, 7(5)(a)
Negotiable Instruments Act, 1881 — Section 138
Limitation Act, 1963 — Article 137
Companies Act, 2013 — Section 42, 73(4), 74, 74(3)

Citation : (2020) 03 NCLT CK 0093

Hon'ble Judges : Dr. P.S.N. Prasad, J;Dr. V.K. Subburaj, Member (Technical)

Bench : Division Bench

Advocate : Sunil Singh Parihar, Ajay Garg

Final Decision : Dismissed

Judgement

Dr. P.S.N. Prasad, J

1. This is an application filed by the Applicant Pramod Kumar Sharma, seeking to initiate corporate insolvency resolution process ("CIRP") of the Respondent M/s. Karanya Heart Care Pvt. Ltd. under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code') for the alleged default on the part of the Respondent in clearing the debt of Rs. 1,52,37,000/-. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

i. The Applicant Mr. Pramod Kumar Sharma had a medical shop under his promotership company "Dhruv Medicos Pvt. Ltd." in the premise of hospital run by M/s. Karanya Heart Care Pvt. Ltd. at sector 51 Noida. Whereas, the Respondent M/s. Karanya Heart Care Pvt. Ltd. is engaged in the business of running hospitals and has a hospital unit namely "Ashwini Health Care" which is a multi speciality hospital and hence relationship and mutual trust was developed between the parties.

ii. The applicant claims that the erstwhile directors of Respondent namely, Dr. Krishna Gupta and Smt. Kiran Gupta represented that for the business needs of the respondent company the funds are needed and they requested the applicant to make investment in the share capital of the company and assured that the company is performing good and the investments will yield good returns and thereby applicant was induced to subscribe and make investment in the capital of the company.

iii. The applicant based upon the representations made and the trust he was having on the then directors of the Respondent Company. The applicant agreed to make investment in the share capital of the Respondent and has invested Rs. 1,03,00,000/- during the year 2011-12 and last payment was received by the Respondent on 23.07.2012. The details of money paid is as under:

Date

Amount in Rs.

27.06.2011

5,00,000

06.07.2011

10,00,000.00

29.07.2011

10,00,000.00

12.08.2011

10,00,000.00

26.08.2011

10,00,000.00

05.11.2011

15,00,000.00

23.11.2011

15,00,000.00

13.01.2012

10,00,000.00

10.02.2012

10,00,000.00

22.03.2012

3,00,000.00

23.07.2012

5,00,000.00

Total

1,03,00,000.00

iv. The Applicant claims that the receipt of the said amount of Rs. 1,03,00,000/- (Rs. One Crore Three Lacs) was duly acknowledged by the Dr. S.K. Gupta, the then Director of Respondent as on 26.10.2015, confirming that the money of Rs. 1,03,00,000/- is received by the Respondent in the year 2011-12 in the form of share application money.

v. The applicant submitted that from the bare perusal of the Balance Sheets of the Respondent for the year ended 31st March 2013 to 31st March 2018, shows that the money received from the applicant was recorded as share application money pending allotment and no allotment of shares was made. The applicant further submitted that despite making investment in priority of time, directors of the Respondent have in gross violation of the Companies Act allotted shares to themselves and their relatives whereas, the money invested by the petitioner was kept in the form of Share Application Money in further violation of Companies Act, 2013.

vi. That the erstwhile Directors of the Respondent Dr. S.K. Gupta was allotted 36,90,000 equity shares of Rs. 10 each amounting to Rs. 3,69,00,000/- and Mrs. Kiran Gupta was allotted 3,00,000 equity shares of Rs. 10 each amounting to Rs. 30,00,000/- and at the same time the allotment to the petitioner on his application money was not done.

vii. The applicant submitted that after the Companies Act, 2013 came into force w.e.f. 30th August 2013, the share application money pending allotment was required to be allotted within 60 days from the date of receipt or required to be refunded with interest @12% p.a. within 15 days from the date of completion of 60 days. Whereas, the applicant has made investment in the share capital of the respondent which is kept by the respondent as share application money pending allotment since 23.07.2012 despite several requests made by applicant.

viii. That the rules framed under the Companies Act, 2013 and various notifications issued under the act and rules, the Corporate Debtor was under legal obligation either to allot share by 1st June 2015 or to return the said amount of share application money received and pending allotment as on 31st March 2015 failing which the Respondent is required to comply with the provisions of companies (Acceptance of Deposit Rules) 2014.

ix. The applicant submitted that after repeated reminders when the money was not returned, a demand notice dated 29.03.2017 was served upon the Respondent and directors asking refund of entire amount with interest pursuant to the express provisions of the law but they neglected and thereby a Company Petition being No. 205 (ND)/ 2017 under section 73(4) was filed for return of entire share application money which has became deposit by virtue of Companies Act, 2013 along with the statutory interest and penal interest as prescribed under the law and rules.

x. The applicant brought to the notice of the Hon'ble Tribunal that the assets of the Respondent are likely to be transferred, the Hon'ble Tribunal passed a restraining order dated 30.08.2017 restraining the Respondent from disposing off its asset.

xi. The applicant submits that after restraint order was passed all the erstwhile directors and the current directors conspired and framed a scheme under which they approached the applicant and offered to refund entire amount with interest without any intention of actually doing so. Based upon such offer and assurances, the applicant agreed to withdraw his petition and made an application dated 11.10.2017 stating that the Respondent has agreed to refund the entire money with interest upto date.

xii. The applicant submitted that when the application for the order of withdrawal of petition was passed on dated 11.10.2017, the Respondent started making excuses and upon continuous follow up the principal amount was repaid in the month of April 2018. For discharge of liability towards interest on such deposit a cheque bearing No. 070259 drawn on Oriental Bank of Commerce dated 27.06.2018 for Rs. 1,52,37,000/-(Rupees One Crore Fifty Two Lacs Thirty Seven Thousand Only) was issued which was prepared by Mr. Vijay Kumar Bhalla, a Chartered Accountant having membership No. 089283, financial advisor to the current management has calculated the interest and filled in the said cheque in his own handwriting and then the said cheque was signed by Mr. Manoj Kumar, the then director in the presence of current directors Mr. Sandeep Mendiratta and Mr. Shiv Ram Sharma.

xiii. The said cheque when presented to the banker of the applicant got dishonored. The applicant time and again asked the Respondent and was given assurances that a fresh cheque will be issued in lieu of dishonored cheque with a request not to initiate proceedings under section 138 of Negotiable Instruments Act.

xiv. The Applicant submitted that the Balance Sheet for the year ended 31st March 2018, did not reported the Investments as deposits and thereby after the claim of deposit amount, the same was not repaid with interest in gross violation of section 74 of the Companies Act, 2013. Even the provisions of Companies (Acceptance of Deposit Rules) 2014 were not followed and the amount was not shown as other deposits clearly showed that the Respondent is managed in fraudulent manner.

xv. The applicant served a demand notice dated 22.04.2019 seeking payment against the outstanding financial debt of Rs. 1,52,37,000/- (Rupees one crore fifty two lacs thirty seven thousand only).

xvi. The applicant submitted that the Respondent has not raised any existence of dispute before the receipt of Demand Notice dated 22.04.2019.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

i. That no cause of action arises in favour of the Applicant and against the Respondent for filling of the petition under section 7 of IBC. That no financial debt is due and payable by the Respondent to the Applicant. That the petition is liable to be dismissed as the Applicant has failed to establish that he is a financial creditor.

ii. The Respondent submitted that the Applicant had filed application dated 11.10.2017 for withdrawal of petition No. 205/(ND)/2017 is false. The order dated 11.10.2017 of the Hon'ble National Company Law Tribunal does not mention about any such application nor any diary number or application number of the alleged application has been provided by the Applicant. The alleged application is neither supported by an affidavit nor it is verified or notarized. The said petition was withdrawn by the counsel of the petitioner unconditionally on the instructions of the Applicant and not on the basis of alleged application dated 11.10.2017. That the Applicant is relying on falsehood in order to make a false case for interest payment.

iii. That the parties had resolved all disputes regarding outstanding share application money of the petitioner amounting to Rs. 1.03 crores (Rupees one crore three lacs only) leading to unconditional withdrawal of the petition by the Applicant. That the respondent company has already paid the full and final amount of Rs. 1.03 crores (Rupees one crore three lacs only) to the Applicant in April, 2018 against the outstanding share application money.

Sl. No.

Payment Date

Cheque/ RTGS Details

Amount (Rupees)

1

09.04.2018

RTGS-OW/ORBCH18099043521

25,00,000

2

26.04.2018

Cheque No. 70246

78,00,000

Total

1,03,00,000

iv. The Respondent submitted that the petitioner did not challenge the validity of the settlement and order passed by the Hon'ble NCLT nor any application was filed as all the legitimate dues of the petitioner were duly paid by the Respondent company and no further amount, including any interest amount, was payable under the settlement. That even otherwise the Companies Act, 1956 did not provide for interest payment on outstanding share application money.

v. The Respondent further submitted that Mr. Shiv Ram Sharma, erstwhile director of Respondent Company had lodged a police complaint for lost Cheque No. 070259 of Oriental Bank of Commerce signed by Mr. Manoj Kumar also erstwhile director of Respondent Company, at Police Station, Ecotech-3, Greater Noida on 02.07.2018 to avoid any misuse of the said cheque and also informed the Oriental Bank Of Commerce on 09.07.2018 for stopping payment of the said cheque. That it has now come to light that the applicant had misused the said cheque and presented it to the bank in order to extort an amount of Rs. 1,52,37,000/-from the Respondent Company in the Garb of Interest.

vi. That the Applicant has chosen to file the present petition after more than one year and eight months of the settlement which shows that the petitioner is trying to resile from the settlement after there was a change in Management of the Respondent Company as 'old management' of the Respondent Company had exited sometime in January, 2019 and the 'new management' took control of Respondent Company in January, 2019.

vii. That the Respondent Company never accepted any deposit from the Applicant and did not enter into any agreement with him for receipt of any money towards the depositor to pay any interest or to issue any receipt for payment of the money. As the Respondent Company never took any loan from the Applicant, his name nowhere appears in the annual accounts either as a creditor or depositor. The Respondent company did not issue any receipts in accordance with the Companies (Acceptance of Deposits) Rules, 1975, and never accepted any deposits nor offered any interest in favour of the petitioner. The petitioner himself admitted to the fact that money was invested by him in the Share Capital of the Respondent Company.

viii. The Respondent submitted that the Applicant had paid the money for the purpose of Share application and not as deposit or loan. That no interest was payable on share application money, further, there is no agreement between the Applicant and the Respondent to substantiate that money was paid as a financial debt or that the money was borrowed against the payment of interest. The Applicant has himself not disclosed any financial contract or interest rate in his petition or any calculation of interest amount being claimed.

ix. That the present petition is not complete as stipulated in section 7(5)(a) of the Insolvency and Bankruptcy Code, 2016 and is liable to be rejected.

x. That the applicant has falsely mentioned in notice of motion that no reply to demand notice has been received from Respondent, while the applicant has himself placed on record reply to notice sent by the Respondent.

3. The Applicant has filed written submissions in which he has reiterated the certain points raised by him in the petition and they are as follows:

i. That since, there was no clarity regarding treatment of share application money accepted by a company under the old companies act of 1956, the central Government has by amendment to the Companies (Acceptance of Deposit) Rule 2014 vide gazette Notification No. G.S.R. 241(E) dated 31.03.2015 provided that:

"provided that unless otherwise required under the Companies Act, 1955(of 1956) or the Securities and Exchange Board Of India Act, 1992 (15 of 1992) or rules or regulations made there under to allot my share, stock, bond, or debenture within a specified period, if a company had received any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed it in the Balance sheet for the financial year ending on or before the 31st March, 2014 against which allotment is pending on the 31st March, 2015, the company shall, by the 1st June, 2015 either return such amounts to the person from whom these were received or allot shares, stock, bonds or debentures or comply with these

ii. That the Respondent in its Balance Sheet for the year ended 31st March 2015, has shown that the amount of investment by Applicant as share application money against which allotment ids pending since 2012-13. The Respondent failed to comply with the aforesaid rules and has not allotted any shares against the said money by 1st June 2015 and therefore entire money was required to be treated as "Deposit" and the companies Acceptance of Deposit Rules 2014 was required to be followed.

iii. That the question whether a suit for recovery of mere interest is maintainable was considered by full bench of Gauhati High Court in Assam State Electricity Board and Ors. V. Shanti Conductors Pvt. Ltd. and another (2005) 13 SCC 19. The Hon'ble Court observed as under:

"The amount due from the buyer, together with the amount of interest can only mean that the principal sum due from the buyer as well as or along with the amount of interest calculated under the provision of the act, are recoverable. The word 'together' here would mean 'as well as' or 'along with'. This cannot mean that the principal sum must be due on the date of the filing of the suits. The suits are maintainable for recovery of the outstanding, principal amount, if any, along with the amount of interest on the delayed payments as calculated under section 4 and 5 of the Act. We are unable to agree with that if the principal sum is not due, no suit would lie for the recovery of the interest on the delayed payments, which might have already accrued. If such an interpretation is given the very object of enacting the act would be frustrated. The Hon'ble Supreme Court in M/s. Modern Industries vs. M/s. Steel Authority of India (2010) 5 SCC 44 affirmed the view of Hon'ble High Court.

IV. That the section 74(3) of the Companies Act, 2013 provides that "if Company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by time specified in sub-section (1) ir such further time as may be allowed by the Tribunal under sub- section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable........"

4. The Respondent has filed written submissions in which he has reiterated the certain points raised by him in the reply and they are as follows:

i. That the present petition is barred by limitation. The date of default has been mentioned as the date when the allotment was not done as per law. The right to apply accrued on 16.03.2013 to the applicant. Therefore, time begins to run on 16.03.2013 as a result of which the petition filed under section 7 is clearly beyond a period of 3 years as per the provisions of Article 137 of the Limitation Act, 1963. The Respondent is relying upon the following judgements of the Hon'ble Supreme Court on the issue of Limitation:

a. B.K. Educational Services Private Limited Vs. Parag Gupta and Associates:

b. Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd. and Ors.: .

ii. That there is no agreement between the Applicant and the Respondent to substantiate that money was paid as a financial debt or that the money was paid as financial debt or that the money was borrowed against the payment of interest. The applicant has himself not disclosed any financial contract or interest rate in his petition or any working /calculation of interest amount claimed by him. There is no existence of default by the Respondent, further the Applicant is not a financial Creditor under the Insolvency and Bankruptcy Code, 2016 as the Applicant himself has admitted that money was invested by him for equity share capital of the Respondent Company. The Share application money is shown in the balance sheet under shareholders fund and not under loans and advances. The Respondent has relied upon the Judgement of Hon'ble National Company Law Tribunal Mumbai Bench in Jagdambey International Vs. Visa Powertech Pvt. Ltd. (CP (IB)4023/I$BP/MB/2018). THE Respondent also mentioned the Companies (Acceptance of Deposits) Rules, 1975, clause 2(b) (vii) wherein share application money pending allotment is not included in the definition of Deposits.

5. We have heard the arguments made by both parties and gone through the pleadings. The Respondent's first contention that he has already paid the full and final amount of Rs. 1.03 Crore (Rupees one crore three lacs only) pursuant to

amicable settlement of dispute as recorded in order dated 11th October, 2017 of the Hon'ble National Company Law Tribunal passed in CP No. 205(ND)/2017, the Applicant has accepted the fact that the said amount has been duly received by him but argued that the interest on that amount has not been paid. On our perusal of provisions of section 42 of Companies Act, 2013 and Companies (Acceptance of Deposit) Rules, 2014 as well as of the definition of financial debt under the Code we find that the definition of 'Deposit' under Companies (Acceptance of Deposit) 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:

(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.

6. The Applicant's contention that while returning the principal amount the cheque bearing No. 070259 dated 26.06.2018 for Rs. 1,52,37,000/- was given as interest which was dishonoured whereas, the Respondent argued that the respondent company had lodged a police complaint for lost cheque No. 070259 and the Applicant misused that cheque. The Tribunal is of the view that National Company Law Tribunal is not the correct authority to adjudicate in the matters related to the negotiable Instruments.

7. The matter between both the parties was amicably settled as recorded in order dated 11th October, 2017 of the Hon'ble National Company Law Tribunal passed in CP No. 205(ND)/2017, between the parties along with that the Respondent failed to show any agreement to substantiate the fact that money was paid as a financial debt or that the money was paid against the payment of interest. Therefore, we find that the share application money does not fall under any of the clauses of Section 5(8) of the Code and it cannot be said to fall under the definition "a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money" since no debt was disbursed by the Applicant to the Respondent and no time value has been attached with the share application money. Thus, since the claim is not a financial debt the present application under Section 7 of the Code is not maintainable and is dismissed with no costs.

