

**(2024) 02 NCLT CK 0064**

**National Company Law Tribunal, New Delhi Bench Court V**

**Case No:** C.P. No.70/(ND)/2021

PCube Advisors

APPELLANT

Vs

Europa Technosoft Private Limited

RESPONDENT

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**Date of Decision:** Feb. 26, 2024

**Acts Referred:**

- Companies Act, 2013 - Section 2(31), 42, 42(6), 73, 73(3), 73(4)
- Companies (Acceptance of deposits) Rules, 2014 - Rule 2(1)(c)(vii)

**Hon'ble Judges:** P.S.N Prasad, Member (J)

**Bench:** Single Bench

**Final Decision:** Dismissed

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## Judgement

P.S.N Prasad, Member, Judicial

1. The present application has been moved on behalf of M/s.Pcube Advisors („applicant“), a registered partnership firm through its partner Mr. Ravi Kumar Gupta under Section 73(4) of the Companies Act, 2013 against M/s. Europa Technosoft Private Limited („respondent“) inter-alia seeking the following relief(s):-

(i) That M/s. Europa Technosoft private Limited be directed to make repayment of the principal amount of aforesaid Deposits of Rs. 30,00,000/- (Rupees Thirty Lakhs only) along with interest at the rate of 12%o per annum, from 14.II.2017 till date of actual repayment of principal amounts in accordance with the provisions of the Companies Act, 2013;

(ii) That such further orders be issued to the Respondent Company as the National Company Law Tribunal may deem just and proper in the circumstances of case, for causing inconvenience, mental agony and harassment, along with penal rate of

interest at 18% per annum for overdue period, u/r Sec 17 of the Companies (Acceptance of Deposit) Rule 2014;

(iii) That such further orders be passed as the Tribunal deem fit in the circumstances of the case

2. Briefly stated, the facts of the present case as averred by the applicant in the petition are that the Applicant had entered into a share Subscription Agreement dated 4th August, 2017 with the Respondent and as per the terms and conditions of the agreement, the Applicant was to be allotted 261 (Two Hundred Sixty One) number of shares of face value of Rs. 10/- at a premium of Rs. 11484.25/- per Subscription Share, amounting to 1.5% of the shareholding of the Respondent Company, for the total subscription amount of Rs. 30,00,000/- (Rupees Thirty Lakh Only). The Applicant had paid the money to the Respondent for the allotment of shares at a premium through the bank account from 04.09.2017 to 14.09.2017 as per the provisions of Section 42 of the Companies Act, 2013, but even after the expiry of 60 days the shares had not been allotted and hence the same is to be taken as a deposit under the provisions of Section 73 of the Companies Act, 2013.

3. Further, the Applicant submitted that when such subscribed shares were not allotted to the Applicant, the Respondent was liable to repay the share application money to the Petitioner within fifteen days from the expiry of the sixty days period i.e., from 14.11.2017. However, the Respondent did not make any refund of the share subscription money, thereby making such amount a "deposit" in the hands of the Respondent Company, as per the provisions of Rule 2 (vii) (a) of the Companies (Acceptance of Deposit) Rules, 2014. Since the Respondent Company failed to repay the share subscription money with interest to the Applicant, in violation of the provisions of Section 42 (6) and Section 73 (3) of the Act, the Petitioner was constrained to approach this Hon'ble Tribunal under the provisions of Section 73 (4) of the Act, seeking appropriate remedy. Accordingly, the relief(s) sought is prayed to be granted.

4. The Respondent had filed its reply and submitted that the Applicant's partnership firm offers their financial advisory services and consultancy to the Respondent Company for expanding their business, since the Respondent Company was in the need for financial assistance, the Applicant undertake to pay a sum of Rs. 30,00,000/- to the Respondent Company. It is further submitted that the Respondent Company had received a sum of Rs.28,00,000/- against the agreed amount of Rs. 30,00,000/- as an amount of Rs.2,00,000/- was deducted as service charges by the Applicant.

5. The applicant further submit that the share subscription agreement was never acted upon and the parties to the agreement were well aware of the fact that the agreement/ contract did not work out, hence the same were mutually terminated as evident from trailing emails exchanges between the parties. Further, the Respondent have already

refunded a total a sum of INR 24,45,800/- out of the 28,00,0000/- which was transferred by the Applicant's firm which is evident from the ledger account. Accordingly, there is no question of section 73 of the Companies Act being attracted.

6. The Applicant had filed its rejoinder wherein the submissions of the respondents are rebutted and it is submitted that several invoices being raised by the Applicant for the consultancy services provided to the Respondent, hence, the payments to the tune of Rs.21,58,050/-was made by the Respondent to the Applicant towards the consultancy fees. The Applicant further submitted that the Account Ledger presented by the Respondent, showing such payments as refunds of share application money, have been forged and tampered with by the Respondent, as an afterthought upon knowing that the complaint is being filed by the Applicant.

8. Heard the Learned Counsel for the Parties and documents annexed therewith are meticulously perused. At this juncture, it will be relevant to refer the provisions relating to Deposits. Section 2(31) of the Companies Act, 2013 ("the Act") defines "deposit" to include any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the RBI. Further, Rule 2(1)(c) of Companies (Acceptance of Deposit) Rules, 2014 also defines "deposit" to include any receipt of money by way of deposit or loan or in any other form, by a company, but does not include certain transactions (18 transactions, generally referred to as "exempted deposits").

9. The Rule 2(1)(c)(vii) of the Companies (Acceptance of deposits) Rules, 2014, is as follow:-

2(1)(c)- "deposit" includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include –

(i)\*\*\*

(vi)\*\*\*

(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 purpose of this sub-clause, it is hereby clarified that –

- 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.

- any adjustment of the amount for any other purpose shall not be treated as a refund.”

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10. From the above extract, it is evident that n, 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, however, if it shall not be refunded within 60 days from acceptance, it shall be treated as deposits. Therefore, in that scenario the advance received would squarely be treated as deposit.

11. The Hon“ble NCLAT in case Pramod Sharma v/s. Karanaya Heartcare Pvt. Ltd. Comp. App. (AT) (Ins.) No. 426 of 2022 had observed as follows:-

“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 60th day.”

12.Now, coming to the merits of the case before us, the sole and substance of the Respondent"s contention is that the parties had mutually terminated the Share Subscription Agreement and the Respondent had already paid a sum of INR 24,45,800/- out of the Rs. 28,00,0000/-, due to the Applicant. To buttress the contention, the Respondent had relied on the Ledger Account of the Applicant maintained by the Respondent and the trailing mails exchanged between the parties. This Tribunal had meticulously gone through the documents annexed by the Respondent, The Ledger as relied by the Applicant cannot be relied upon as they same are not supported with the Bank statements. Moreover, the e mail trail placed on record does not signify the cancellation of the SSA. Accordingly, the contention of the Respondent is not sustained.

13. Having regard of the conspectus of facts and circumstances, this Tribunal is satisfied that the advance sum disbursed to the Respondent is appropriated for the supply of various categories of home foils in pursuance of which the goods were duly supplied to the Applicant. A mere perusal of e-mail dated 28.11.2015, clearly shows that the advance money is already appropriated towards the Aluminium Foil as mentioned in the e-mail dated 28.11.2018.

14. Hence, the said advance of Rs.30,00,000/- is qualified to be a deposit under Section 2(31) of the Companies Act, 2013 read with Rule 2(1)(c)(vii) of the Companies (Acceptance of deposits) Rules, 2014 and other relevant provisions of the act as the amount has been appropriated within a period of 365 days from the date of receipt of advance. Resultantly, the present Company Petition 70/ND/2021, being devoid of merits stands dismissed. No orders to cost.

15. It is made clear that the Applicant is at liberty to seek remedy before appropriate forum other relevant law.