

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insol.) No. 30 of 2017

(Arising out of Order dated 12th April, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in Company Petition No. 37 of 2017]

In the matter of :

Palogix Infrastructure Private Limited

... Appellant

Vs.

ICICI Bank Limited

... Respondent

Present : For Appellant : Mr. Arun Kathpalia, Senior Advocate with Mr. Jayant Mehta, Ms. Smita Mukherjee, Ms. Manju Bhuteria, Mr. Rajesh Gupta, Ms. Sonia Dube, Mr. Satadru Chakraborty, Mr. Anurag Singh and Ms. Harshita Verma, Advocates

For Respondent : Mr. Ramji Srinivasan, Senior Advocate with Mr. Anand Shankar Jha, Mr. Mohammad Ali, Mr. Vivek Paul and Ms. Divyani Tripathi, Advocates

Company Appeal (AT)(Insol.) No.37 of 2017

(Arising out of Order dated 12th April, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in Company Petition No. 37 of 2017]

In the matter of :

ICICI Bank Limited

...Appellant

Vs

Palogix Infrastructure Private Limited

...Respondent

Present For Appellant: Mr. Ramji Srinivasan, Senior Advocate with Mr. Anand Shankar Jha, Mr. Mohammad Ali, Mr. Vivek Paul and Ms. Divyani Tripathi, Advocates

For Respondent : Mr. Arun Kathpalia, Senior Advocate with Mr. Jayant Mehta, Ms. Smita Mukherjee, Ms. Manju Bhuteria, Mr. Rajesh Gupta, Ms. Sonia Dube, Mr. Satadru Chakraborty, Mr. Anurag Singh and Ms. Harshita Verma, Advocates

Company Appeal (AT)(Insol.) No.54 of 2017

(Arising out of Order dated 16th May, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P.(I.B.) No. 37/2017]

In the matter of :

Palogix Infrastructure Private Limited

...Appellant

Vs

ICICI Bank Limited

...Respondent

Present : For Appellant : Mr. Arun Kathpalia, Senior Advocate with Mr. Jayant Mehta, Ms. Smita Mukherjee, Ms. Manju Bhuteria, Mr. Rajesh Gupta, Ms. Sonia Dube, Mr. Satadru Chakraborty, Mr. Anurag Singh and Ms. Harshita Verma, Advocates

For Respondent : Mr. Ramji Srinivasan, Senior Advocate with Mr. Anand Shankar Jha, Mr. Mohammad Ali, Mr. Vivek Paul and Ms. Divyani Tripathi, Advocates

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

ICICI Bank Limited (Financial Creditor) filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency

Resolution Process' against 'Palogix Infrastructure Private Limited'- (Corporate Debtor).

2. The case was heard by a Division Bench of the Adjudicating Authority which having noticed that the 'Financial Creditor' preferred the application under section 7 through Power of Attorney Holder, passed two separate orders, one holding the application through Power of Attorney is not maintainable (Member Judicial) and the other (Member Technical) held that the application was maintainable as the Power of Attorney was given in favour of the Legal Manager to initiate proceedings before the National Company Law Tribunal which is the Adjudicating Authority under 'I&B Code'.

3. The case was referred to the Hon'ble President, National Company Law Tribunal exercising power under sub Section (5) of Section 419 of the Companies Act, 2013 for constituting a larger Bench for decision on the following questions: -

"Whether The Constituted Attorney authorised on 20/10/2014 to file suits and/or proceedings against the company for recovery of the amount and also to affirms complaints cum affidavits and other pleadings in any court of India including NCLT can file application for initiation of corporate insolvency process under Section 7 of the Insolvency and Bankruptcy Code 2016 without having specifically authorized to lodge Application/Petition under IBC 2016?"

4. By majority judgment, the Adjudicating Authority held that for initiation of 'Corporate Insolvency Resolution Process', there should be specific authorization to the Power of Attorney Holder to initiate the 'Corporate Insolvency Resolution Process'. The 'Financial Creditor'-ICICI Bank having not filed specific authorization to initiate 'Corporate Insolvency Resolution Process', was directed by the order dated 12th April, 2017 to rectify the defects. The said order has been challenged by the 'Corporate Debtor' in Company Appeal (AT) (Insolvency) No. 30 of 2017.

5. The 'Financial Creditor' has also challenged the said order dated 12th April, 2017 in Company Appeal (AT) (Insolvency) No. 37 of 2017 on the ground that no specific authorisation required for initiation of 'Corporate Insolvency Resolution Process'.

6. By subsequent order dated 16th May, 2017, the Adjudicating Authority admitted the application on removal of defects; ordered Moratorium and appointed 'Interim Resolution Professional' who has been directed to convene a meeting of the Committee of Creditors in accordance with 'I&B Code'. The said order has been challenged by 'Corporate Debtor'- Palogix Infrastructure Private Limited in Company Appeal (AT) (Insolvency) No.54 of 2017.

The stand of the 'Financial Creditor'- ICICI Bank

7. According to 'Financial Creditor', the 'Corporate Debtor' has not disputed the existence of the debt and default on their part. They are

opposing the matter on technical ground, which is incorrect and in any case if there was a defect it has been removed.

8. Learned Counsel appearing on behalf of the 'Financial Creditor'- ICICI Bank referred to Section 7 of the 'I&B Code' and Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Adjudicating Authority Rules") and submitted that the 'form and manner' in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of 'Adjudicating Authority Rules'.

9. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the 'Adjudicating Authority Rules' recognize that a 'Financial Creditor' being a juristic person can only act through an "*Authorised Representative*". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "*name and address of the person authorised to submit application on its behalf (Enclose Authorisation)*".

10. The signature block of the aforementioned Form-1 also provides for the authorised person's detail is to be inserted and also includes *inter alia* the position of the authorised person in relation to the 'Financial Creditor'.

Thus, it is clear that an authorised person of the 'Financial Creditor' can make an application under Section 7 of the 'I&B Code'.

11. Learned Counsel for the 'Financial Creditor' referred to Rule 2(6) of the NCLT Rules, 2016 which defines an "authorised representative" to

be a person authorised in writing by a party to present his case before the Tribunal as the representative of such party as provided under Section 432 of the Companies Act, 2013. The said Rule having not been adopted under 'I&B Code' or Rules framed thereunder, we are of the view that no reliance can be placed on Rule 2(6) of NCLT Rules, 2016.

12. Rule 10 of 'Adjudicating Authority Rules' states that till the time rules of procedure for conduct of proceedings under the 'I&B Code' are notified, an application made under section 7(1) shall be filed before the Adjudicating Authority in accordance with Rules 20, 21, 22, 23, 24 and 26 of Part III of NCLT Rules, 2016.

13. Rule 23(1) of NCLT Rules permits an authorised representative to present an application or petition before the Tribunal. Thus, we hold that 'Authorised Representative' can file an application under Section 7 of the 'I&B Code' on behalf of the 'Financial Creditor'.

14. Learned Counsel for the appellant relied on Order III of the Code of Civil Procedure, 1908 which provides for recognized agents and pleaders, but such submission cannot be accepted as the Code of Civil Procedure is not applicable for filing application under 'I&B Code'.

15. Section 179 of Companies Act, 2013 empowers the Board of Directors to do all such acts that a company is authorised to do. A company being a juristic person is capable of initiating and defending legal proceedings and, therefore, the Board of Directors is empowered to exercise such rights on behalf of the Company or may duly empower 'Authorised Representative' to do so on its behalf.

16. Thereby the person authorised by the Board of Directors is duly empowered to initiate or defend any legal proceedings by or against the 'Financial Creditor'/Corporate Debtor' in any Court of law including the matters relating to Insolvency and Bankruptcy proceedings. Thereby, the Board of Directors of a Bank are empowered to delegate powers to any of its officer.

17. The question arises whether the 'Power of Attorney Holder' given power of attorney prior to enactment of 'I&B Code', is entitled to file an application under Section 7 or 9 or 10 of the 'I&B Code'?

18. Learned counsel for the 'Financial Creditor' submitted that ICICI Bank vide Board's Resolutions dated 3rd May, 2002 and 30th October, 2009 resolved to authorise and execute Power of Attorney in favour of designated officers of the Bank. These resolutions continue to be in force, and authorise officers/Power of Attorney Holders of Bank are entitled to deal with all the legal proceeding for or against the Bank.

19. Reliance has been placed on Hon'ble Supreme Court's decision in **"A.C. Narayanan vs. State of Maharashtra (2014) 11 SCC 790"** wherein the Hon'ble Supreme Court held :

"28. The power-of-attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the

initiation is by the grantor represented by his attorney holder in his personal capacity...”

20. According to Learned Counsel for the ‘Corporate Debtor’, the application under Section 7 of the ‘I&B Code’ if signed and filed by a ‘General Power of Attorney Holder’ without specific authorization is not maintainable. According to him, the procedure prescribed requires specific authorization such as:

- (i) The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules 4 & 10) incorporate by reference procedure prescribed under Rule 23 and 26 of the National Company Law Tribunal Rules 2016.
- (ii) Rule 23 read with Rule 26 of the National Company Law Tribunal Rules, 2016 requires petition/application to be signed and verified by ‘Authorized Representative’ of the petitioner.

21. According to the ‘Corporate Debtor’ the ‘Authorization’ in the case of a company would mean a specific authorization by the Board of Directors of the company by passing a resolution. The reliance has been placed on the Hon’ble Supreme Court’s decision in **“State Bank of Travancore vs. Kingston Computers India Pvt. Ltd. (2011) 11 SCC 524”**.

22. Therefore, according to the ‘Corporate Debtor’, an application under section 7 of the ‘I&B Code’ in absence of any supporting affidavit verifying the petition is not maintainable. It was also contended that

prerequisites under the 'I&B Code' are mandatory and it should be strictly construed and barring specific Power of Attorney, no application can be entertained.

23. Learned counsel for the 'Corporate Debtor' submitted that a Power of Attorney is an authorization by a 'principal' to its 'agent' to do an act. A fortiori, such authorisation can only be of acts which are in the contemplation and knowledge of the 'principal' as on the date when such authorisation is given. If the 'principal' itself is unaware of an eventuality, it cannot authorize its agent for such eventuality. This is more so when 'I&B Code' sets in motion a very serious and irreversible process, therefore, according to the 'Corporate Debtor', the procedural pre-requisites under the 'I&B Code' must be strictly construed.

In this connection, our attention was drawn by referring to judgments relating to winding up under the erstwhile Companies Act, 1956 but we are not referring the same as the decisions under the Companies Act, 1956, has no relevance with the procedure to be followed under 'I&B Code'.

24. It was also contended by learned counsel for the 'Corporate Debtor' that the removal of defect as was ordered by the Adjudicating Authority was not removed by the 'Financial Creditor' within seven days.

25. In reply, Learned Counsel for the 'Financial Creditor' pointed out that during seven days' period there were Saturday, Sunday and other holidays which cannot be counted for the purpose of counting seven

days' period of completion of removal of defect. Otherwise defect was removed within seven days.

26. Having regard to objection regarding the removal of defect, we reject the submission made on behalf of the 'Corporate Debtor, in view of the proviso to sub-section (5) of Section 7 of the 'I&B Code', which reads as follows:-

“Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.”

Similar provision has been made under proviso to sub-section (5) of Section 9 and sub-section (4) of Section 10 of the 'I&B Code'.

27. The seven days for rectification of defects is to be counted not from the date of the order passed by the Adjudicating Authority but from the date of **“receipt of such notice from the Adjudicating Authority to rectify the defects in the application.”** The 'Corporate Debtor', though raised objection that the defects were not removed within seven days, but not given the date on which the notice for correction of defect was served by the Adjudicating Authority on the 'Financial Creditor'-ICICI Bank. In absence of such specific pleadings stand taken by the 'Corporate Debtor' that objection that defect was not removed within seven days cannot be accepted. This apart, we accept

the stand taken by the 'Financial Creditor' that for the purpose of counting the period of seven days, apart from the date of receipt of the order for removal of defects, the holidays such as Saturdays, Sundays and other holidays of the Tribunal to be excluded.

28. For determination of question relating to Power of Attorney, as raised in this appeal, it is desirable to refer Section 2 of Power of Attorney Act, 1882 which reads as follows:-

"2. Execution under Power-of-Attorney: The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force."

29. In **"T.C. Mathai and Another Vs. District & Sessions Judge, Thiruvananthapuram, Kerala, (1999) 3 SCC 614"** the Hon'ble Supreme Court held that "Section 2 of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a party-in-person."

30. I&B Code, 2016 is a complete Code in itself. The Hon'ble Supreme Court in ***"M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. 2017 SCC OnLine SC 1025"*** held:

"59. The Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, inter alia of corporate persons. Insofar as corporate persons are concerned, amendments are made to the following enactments by Sections 249 to 252 and 255....."

The Hon'ble Supreme Court further held: -

"60. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein....."

The Hon'ble Supreme Court further proceeded to held: -

"63. There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as under:

"9. Bankruptcy and insolvency"

31. As per Section 7 of the 'I&B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by

'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "*Authorised Representative*". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "*name and address of the person authorised to submit application on its behalf*". The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes *inter alia* the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

32. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

34. At this stage, it is desirable to refer Section 65 of 'I&B Code' which relates to *'fraudulent and malicious initiation of proceedings'*, by a person who initiates the Insolvency Resolution Process or Liquidation proceeding fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be. In such case, the Adjudicating Authority is empowered under subsection (2) of Section 65 to impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

35. In a case where it is noticed that the Insolvency Resolution proceeding has been initiated by a person fraudulently or with malicious intention for personal act on the part of an individual, can a Power of Attorney Holder be punished? This is one of the reasons we have noticed to hold that a 'Power of Attorney holder' cannot file any application under Section 7 or Section 9 or Section 10 of 'I&B Code'.

36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor' / 'Operational

Creditor’/’Corporate Applicant’, mere use of word ‘Power of Attorney’ while delegating such power will not take away the authority of such officer and ‘for all purposes it is to be treated as an ‘authorization’ by the ‘Financial Creditor’/’Operational Creditor’/’Corporate Applicant’ in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the ‘Authorized Representative’ for the purpose of filing any application under section 7 or Section 9 or Section 10 of ‘I&B Code’.

37. As per Entry 5 & 6 (Part I) of Form No.1, ‘Authorised Representative’ is required to write his name and address and position in relation to the ‘Financial Creditor’/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days’ time to produce the Board Resolution and remove the defect.

38. This apart, if an officer, such as senior Manager of a Bank has been authorised to grant loan, for recovery of loan or to initiate a proceeding for ‘Corporate Insolvency Resolution Process’ against the person who have taken loan, in such case the ‘Corporate Debtor’ cannot plead that the officer has power to sanction loan, but such officer has no power to recover the loan amount or to initiate ‘Corporate Insolvency Resolution Process’, in spite of default of debt.

39. If a plea is taken by the authorised officer that he was authorised to sanction loan and had done so, the application under section 7

cannot be rejected on the ground that no separate specific authorization letter has been issued by the 'Financial Creditor' in favour of such officer designate.

40. In view of reasons as recorded above, while we hold that a 'Power of Attorney Holder' is not empowered to file application under section 7 of the 'I&B Code', we further hold that an authorised person has power to do so.

41. For the reasons aforesaid, we find no ground to interfere with the impugned order(s). All the appeals are dismissed, the order of admission of application under section 7 is affirmed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

20th September, 2017

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