

# PLIGHT OF A POWER OF ATTORNEY HOLDER VIS-A-VIS INSOLVENCY PROCEEDINGS

[-Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd](#)

- **Richa Saraf**

**Editor's Note:** Delegation of power to act on one's behalf is a very common phenomena in every strata. Such delegation can be by way of a "Power of Attorney"; "Letter of Authority" and "Authorization via Board Resolution" in case of companies. However, maligned use of such power is very likely. Hence, in order to avoid fraudulent initiation of corporate insolvency, the Hon'ble National Company Law Appellate Tribunal, very interestingly held that Power of Attorney Holders are not authorised to present an Insolvency Application under IBC. Below we discuss and analyse the the said ruling of the Appellate Tribunal.

The Hon'ble NCLAT has held that 'Power of Attorney' holders are not authorized to present Insolvency Application under Section 7, 9 and 10 of the Code. It is only authorized representatives, duly authorized by Board Resolution, who are authorized to present the same. The same is based on a simple rationale that company being juristic person only acts through its Board of Directors, who can exercise all powers which company is entitled to and they may vide resolution authorize any person to present application. Further, officers authorized by Board cannot give Power of Attorney to any other person. Below, we discuss the ruling.

## Facts of the Case:

ICICI Bank Ltd. (Financial Creditor) filed an application under section 7 of IBC for initiation of 'Corporate Insolvency Resolution Process' against Palogix Infrastructure Pvt. Ltd. (Corporate Debtor).

The case was first heard by a Division Bench of the Adjudicating Authority, which having noticed that the Financial Creditor preferred the application 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 (NCLT), which is the Adjudicating Authority under IBC.

The case was then referred to the Hon'ble President, NCLT exercising power under Section 419(5) of the Companies Act, 2013 for constituting a larger Bench for decision, wherein by majority judgment, the Adjudicating Authority held that there should be specific authorization to the Power of Attorney Holder to initiate the corporate insolvency resolution process. The Financial Creditor having not filed such specific authorization was directed to rectify the defects.

The Financial Creditor challenged the said order on the ground that no specific authorisation required for initiation of corporate insolvency resolution process.

**Issue for Determination:**

Whether the constituted attorney authorised to file suits and/ or proceedings against the company for recovery of the amount and also to affirm 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 IBC?

**Discussion of Law:**

Rule 2(6) of the NCLT Rules, 2016 defines an “authorised representative” to be a person authorised in writing by a party to present his case, before the NCLT, as the representative of such party, as provided under Section 432 of the Companies Act, 2013. The said rule having not been adopted under IBC or rules framed thereunder, therefore, the Hon’ble NCLAT was of the view that no reliance can be placed on such rule.

Order III of the Code of Civil Procedure, 1908 provides for recognized agents and pleaders, but Code of Civil Procedure is not applicable for filing application under IBC.

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 an authorised representative to do so on its behalf. Thereby the person authorised by the Board of Directors is duly empowered to initiate or defend any legal proceedings by or against the Corporate Debtor in any Court of law, including the matters relating to Insolvency and Bankruptcy proceedings.

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 IBC sets in motion a very serious and irreversible process, therefore, the procedural pre-requisites under IBC must be strictly construed. For instance, in situations where the Financial Creditor executed the power of attorney, but he could not have visualised even remotely that the donee would be required one day to initiate a corporate insolvency proceeding under section 7, the donee cannot initiate the corporate debt resolution proceedings as he lacks the requisite authority.

For determination of question relating to Power of Attorney, it is desirable to refer Section 2 of Power of Attorney Act, 1882 which reads as follows:

*“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*

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*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."*

The Apex Court in *A. C. Narayanan v. State of Maharashtra*<sup>85</sup> 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."*

However, in the case of *T.C. Mathal v. District & Sessions Judge, Thiruvananthapuram, Kerala*<sup>86</sup>, the Hon'ble Supreme Court held-

*"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."*

On the question whether following the enactment of IBC, the situations have gone sea change as regards insolvency of corporate debtor or liquidation thereof, insolvency and bankruptcy of individual and partnership firm, it was held that a complete new regime is put in place. IBC is a complete Code in itself. The Hon'ble Supreme Court in *M/s. Innoventive Industries Ltd. v. ICICI Bank*<sup>87</sup> held-

*59. IBC 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.*

*\*\* 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.*

*\*\* 63. There can be no doubt, therefore, that the Code 4 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 '9. Bankruptcy and Insolvency'.*

Also, in *Shantilal Khusaldas and Bors Pvt. Ltd v. Smt Chandanbala Sughir Shah*<sup>88</sup> and in *Coromandel International Ltd. v. Chemcel Biotech Ltd.*<sup>89</sup>, it was held that it is a settled principle of law that the power of attorney needs to be interpreted strictly, reason behind such principle being that the powers given are not abused by agent or the actions are restricted within an only to the extent the power is indicated or given. In the aforesaid cases, it was further held that when the donor of a power of attorney had authorised the donee to initiate suits, the donee, being armed with such a power of attorney, cannot initiate a winding up proceeding since a winding up proceeding under the

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<sup>85</sup> (2014) 11 SCC 790

<sup>86</sup> (1999) 3 SCC 614

<sup>87</sup> 2017 SCC OnLine SC 1025

<sup>88</sup> (1993) 77 Comp Cas 253

<sup>89</sup> (2011) 166 Comp Cas 676

company law can never be equated with a suit. The relevant part of *Coromandel International Ltd (supra)* is reproduced below:

*"A suit for recovery of money is essentially a suit between the parties where no third party can seek any indulgence or impleadment. The proceedings under the Companies Act for winding up are entirely different, a special remedy provided for and the idea is not to restrict the proceedings to the parties alone and its range is widened and all steps taken in winding up proceedings are in public interest. Sometimes the relief for winding up is denied when it is against public interest. "*

*One of the reasons why the Hon'ble NCLAT has held that a 'Power of Attorney holder' cannot file any application under Section 7 or Section 9 or Section 10 of IBC was because there may be cases where the Insolvency Resolution proceeding has been initiated by such person fraudulently or with malicious intention for personal act on the part of an individual*

This apart, authorization in the case of a company would mean a specific authorization by the Board of Directors of the company by passing a resolution<sup>90</sup>. Therefore, the application under Section 7 if signed and filed by a 'General Power of Attorney Holder' without specific authorization is not maintainable. Also, the pre-requisites under IBC are mandatory and it should be strictly construed and barring specific Power of Attorney, no application can be entertained. In this regard, Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 states that till the time rules of procedure for conduct of proceedings under the IBC 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. Rule 23(1) permits an authorised representative to present an application or petition before the Tribunal. The form and manner in which an application under section 7 is to be filed by a Financial Creditor is provided in Form No. 1 of such Adjudicating Authority Rules. Upon perusal of the aforesaid rules and Form-1, it may be duly noted that the IBC, and the rules thereunder, recognizes that a Financial Creditor being a juristic person can only act through an "Authorised Representative". Entry 5 and 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" and requires the authorisation to be enclosed. Further, the signature block of Form No. 1 requires the authorised person's detail 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 and 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. 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.

<sup>90</sup>*State Bank of Travancore v. Kingston Computers India Fyi. Ltd.* (2011) 11 SCC 524

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**Comments**

One of the reasons why the Hon'ble NCLAT has held that a 'Power of Attorney holder' cannot file any application under Section 7 or Section 9 or Section 10 of IBC was because there may be cases where the Insolvency Resolution proceeding has been initiated by such person fraudulently or with malicious intention for personal act on the part of an individual. However, proceedings made under Section 7 of IBC does not necessarily lead to liquidation of the Corporate Debtor. Under Section 20(1), the Interim Resolution Professional shall make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern. It may lead to liquidation or winding up, in case no viable Insolvency Resolution Plan could be evolved in consultation with the Committee of Creditors.

Also, in the instant case, the power of attorney clearly mentions that the legal manager is empowered to initiate proceedings under the NCLT which automatically includes its role as an Adjudicating Authority under IBC and pursuant to the judgment of the Hon'ble NCLAT, every petition under the IBC, involving a Financial Creditor, must be filed on the basis of a specific power of attorney on a Board's Resolution, which will defeat the very purpose of the IBC, viz. speedy resolution of insolvency cases.

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