NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH

C. P. No. (IB)/02/GB/2018
(Diary No.03(006)/2018)

Under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating) Authority) Rules 2016.

In the matter of:

IDBI Bank Limited ... Financial Creditor

-Versus-

Kitply Industries Ltd. ... Corporate Debtor

Coram:

Hon'ble Mr. Justice P K Saikia, Member(J)

For the Financial Creditor : Mr. R Sarkar, Advocate
Mr. A. Singh, Advocate

For the Corporate Debtor : Ms.M. Hazarika, Sr. Advocate,
Ms. S. Khound, Advocate.

ORDER

Date of Order: 1st May, 2018.

This is an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (in short, Code of 2016) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, Rules of 2016), filed by IDBI Bank Ltd. seeking initiation of Corporate Insolvency Resolution Process (in short CIRP) against Kitply Industries Limited.

2. It has been submitted that IDBI Bank Ltd., the Financial Creditor (hereinafter referred to as 'FC') was incorporated on 27.09.2004 and its identification number was given as CIN-L65190MH2004GO1148838.

3. On the other hand, Kitply Industries Limited, the Corporate Debtor (hereinafter referred to as 'CD') is a company registered under the Companies Act with its registered office at Makum Pathar, A.T. Road, Margherita, Tinsukia, Assam and its date of incorporation was 26.08.1982.

4. It may be stated that in 1994, a loan to the tune of Rs.500 lakhs was granted to the CD by the FC in order to felicitate the CD to run its business in a better way. A schedule of repayment was also prepared so that the loan can be repaid within a certain time frame. However, there was default in repayment of the loan. Ultimately, in 2008, a one-time settlement (OTS, in short) was arrived at between the parties.

5. Under such OTS, the CD was to pay Rs.77.56 crores out of which Rs.46.10 crores was to be paid in cash and balance part thereof was to be paid by way of 6% Cumulative Non-Convertible Debentures amounting to Rs.31.55 crores, which would be redeemed in two equal yearly instalments in March, 2013 and March, 2014.

6. In compliance thereof, the CD had paid Rs.46.10 crores in cash and also issued 6% Cumulative Non-Convertible Debentures amounting to Rs.31.55 crores which could be redeemed in two equal yearly instalments, one in March, 2013 and other in March, 2014. However, the CD once again slipped into serious financial doldrums for which it approached the authority concerned for declaring it as a sick industry under the Sick Industrial Companies (Special Provisions) Act, 1985 **(in short, SICA 1985)**.

7. In the meantime, the FC had issued letter to the CD requesting it to repay the loan together with interest accrued thereon. The CD vide its letter dated 14.03.2016, had informed the FC that it has no liability whatsoever to repay the debt aforementioned since it had already repaid the loan aforesaid in respect of which , according to CD, the FC had issued 'No Dues Certificate'. For ready reference, the relevant part of letter is reproduced below: -

"To

IDBI Bank Limited
44, Shakespeare Sarani,
Kolkata – 700 017.

Kind Attention: Mr. Kaushik Bagchi (Dy. General Manager

Dear Sir,

This is with reference to your letter no.IDBI. SCB.No./NMG(KIL) dated February 29,2016.

We are at the outset very surprised to receive your said letter threatening us revocation of "OTS" due to alleged non-adherence. First of all, there was no so called OTS ever entered between us and you. As a matter of fact, in terms of Corporate Debt Restructuring Scheme sanctioned under the aegis of CDR Cell, your entire dues of

Rs.46.01 crores were fully paid off and accordingly, you vide your letter dated July 17, 2008 had issued a No Dues Certificate recording full and final satisfaction of your entire dues.

As part of the CDR Scheme, in terms of Debenture Trust Deed dated March 17, 2008, Non-Convertible Redeemable Debentures were issued to all lenders including as fresh investment. We also understand that since it was a fresh investment, even IDBI opened a separate account for this in its books. Please refer to communication of May 14, 2009 by your large Corporate Branch from Mumbai in this regard confirming the same.

It is further pertinent to mention that as part of CDR Scheme, all lenders including IDBI had specifically given up any right to recompense and therefore there is no question of any alleged OTS being in place or any alleged default thereunder.

Further, as you may be aware, due to mandatory requirement under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, the Company in the year 2012 had made a reference before the Hon'ble Board for Industrial & Financial Reconstruction (BIFR) which is pending and due to financial distress it is not in a position to redeem any debenture and the same can take place only in terms of the rehabilitation scheme to be worked out under the aegis of Hon'ble BIFR.

In view of the aforesaid, we request you to kindly withdraw your erroneous letter dated February 29, 2016 based on wrong factual understanding and the threat made thereunder and bear and cooperate with us to overcome the situation by working out a rehabilitation scheme for the benefit of all stakeholders including IDBI before the Hon'ble BIFR.

Thanking You,
Your faithfully

For Kitply Industries Limited
Sd/-
P.K. Goenka
Chairman & Managing Director"

8. The CD further stated in the aforesaid letter that it is no longer possible on its part to repay the loan in pursuance to the demand, made by the FC stating that since it has already approached the concerned authority to declare it as a sick industry under the Sick Industrial Companies (Special Provisions) Act, 1985, it cannot legally be asked to repay the loan, if any, to the FC.

9. It may be stated here that Section 4 (b) of the SICA, 2003 stood amended in the following manner vide Eighth Schedule to the IBC, 2016. For ready reference, the Eighth Schedule incorporated in the IBC, 2016 is reproduced below:

"THE EIGHTH SCHEDULE

(See Section 252)

AMEDMENT TO THE SICK INDUSTRIAL CMPANIES (SPECIAL PROVISIONS)

REPEAL ACT, 2003

(1 of 2004)

In Section 4, for sub-clause (b), the following sub-clause shall be submitted, namely—

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority

or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated.

"Provided that a company in respect of which such appeal or reference or inquiry stands abated under the clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 within One Hundred and Eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provision of the Insolvency and Bankruptcy Code, 2016.

"Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under the clause."

10. However, despite knowing well the amended provision in the SICA, 2003 which allows a company, getting the benefit of the SICA, 1985, to approach the jurisdictional NCLT within 180 days from the commencement of the IBC in accordance of the provisions of IBC, 2016. However, the CD never approached concerned NCLT Bench within the time fixed by the statute seeking protection from any legal proceeding which may be initiated for realization of the debt in respect of the default that has already occurred. Therefore, as on date of preferring the application under consideration, there was no bar on the part of FC in initiating present proceeding seeking initiation of CIRP against the CD.

11. According to the FC, as on 31.10.17, the CD owed the FC a debt to the tune of Rs.53,87,09,011.75, out of which, Rs.31,55,10,000 was payable towards the principal amount whereas the remaining amount, same being Rs.22,31,99011.75, was payable towards the interest accrued on the principal amount till 31.10.2017. Since there was debt due from CD and since there was clear default in repayment of such loan, the FC has validly initiated the proceeding under Section 7 of the Code of 2016.

12. It has also been contended that the application has been filed in accordance with the prescription of law and the Rules framed there-under. However, the Registry of this Authority had notified some defects therein which were duly rectified and the rectified application has also been filed with this Authority, copy of which was also served to the CD after presentation of the rectified application before this Authority.

13. Though the CD has raised some objections against the IRP, so named by the FC in the application, questioning his impartiality alleging that such IRP has a close nexus with the FC and, therefore, the CD apprehends that the IRP, so named by the FC, cannot be expected to act impartially in the dispute between the parties in the event the application under consideration is admitted. However, according to the FC, such apprehension was wholly unfounded and in trying to dispel such doubt in the mind of the CD, it also offered an explanation in its rejoinder.

14. It has also been submitted by the learned Advocate for the FC that the application is complete in all respects and, therefore, same needs to be admitted. The CD entered appearance on being so required and contested the proceeding having raised several objections against the proceeding under consideration. In the first place, it was alleged that the person who is authorized to file the present application did not have the requisite authority to file the application on behalf of the FC.

15. In support of such contention, it has been pointed out that the person who executed the Power of Attorney (donor) had, in fact, appointed the same person (donee) as his Attorney to do various acts and deeds, mentioned therein which included the presenting an application under Section 7 of the Code of 2016 before this Authority. In other words, the 'donor' and 'donee' of the power of attorney become the same person which is unheard of.

16. Further, the power of attorney did not bear the signature of the executor meaning thereby that the power of attorney is incomplete and therefore, unsustainable in law. Being so, no reliance whatsoever can be placed on such a very defective power of attorney. The defects, aforementioned, in their cumulative effect unmistakably demonstrate that the power of attorney, on the basis of which the present application is filed, cannot have any legal validity whatsoever.

17. The defects in the power of attorney assume tremendous proportion since in the application under section 7 of the Code of 2016, it has clearly been stated that the said application has been filed by Shri Dattaraya Bapurao Sawangikar, General Manager, on the basis of authority which was conferred on him by the power of attorney dated 29.11.2017. Since the officer, who was authorized to present the application before this Authority, relied entirely on the power of attorney aforesaid and since such power of attorney is turned out to be enormously defective, it becomes well evident that Shri Sawangikar, did not have requisite authority to present the application seeking initiation of CIRP **against the CD**.

18. It has also been contended that the Board of Directors of the Bank concerned by its resolution dated 23-06-2017 had authorized all Executive Directors, all Chief General Managers (Grade F), and all General Managers (Grade E) to do various acts which included the power to file application under Section 7 of the Code of 2016. As per the said Board resolution dated 14.08.2017, when the Bank's exposure is less than Rs. 100 crores, the authority to file claim has been delegated to the jurisdictional Deputy General Manager.

19. However, when the Bank's exposure is Rs 100 crores or above, the power to file claim has been delegated to the concerned General Manager. In the present case, the total amount of claim to be in default including interest is calculated at Rs 53,87,09,1011.75 (Fifty-Three Crores Eighty-Seven Lakhs, Nine Thousand and Eleven Rupees Seventy-Five Paisa). Being

so, in terms of the arrangements, made in the aforesaid Board resolutions, the power to file present application was conferred only on the jurisdictional Deputy General Manager.

20. But surprisingly enough, the application under consideration was filed by Shri Dattaraya Bapurao Sawangikar who is the General Manager of the applicant bank. Since in terms of resolution dated 14-08-2017, Shri Sawangikar , General Manager, did not have requisite authority to present the application under Section 7 of the Code before this Authority , on this count also the application is liable to be rejected ----contended Ms Mili Hazarika , learned Sr. Counsel appearing for the CD.

21. Referring to Rule 4 (3) of the Rules of 2016, it has been submitted that the Rule 4 (3) requires the FC to despatch forthwith by registered post or speed post a copy of the application, filed with the Adjudicating Authority, to the registered office of the Corporate Debtor. However, at no point of time, the FC herein sent a copy of the application, filed with the Adjudicating Authority, to the registered office of the CD, which is situated at Makam Pathar, A T Road, Margherita, Assam, 786181.

22. Quite contrary to it, the FC sent a copy of the application to the corporate office of the CD instead which hardly satisfied the requirement of Rule 4 (3) of the Rules of 2016. According to learned Sr. counsel appearing for the CD, the directions in Rule 4(3) of the Rules of 2016 are mandatory in nature and violation thereof would invariably make the proceeding under section unsustainable in law. Since there is no material on record to show that the mandatory direction in aforesaid Rule was complied with, this authority has no other option but to dismiss the application.

23. What is worse is that when such defects were pointed out urging the FC to rectify the same, the FC instead of rectifying such defects falsely claimed that the copy of such application had duly been served on the registered office of the CD, apart from serving copies thereof on the counsel appearing for the CD. Since the FC had resorted to limitless falsehood in concealing its infirmities in presenting the application under consideration, such conduct provides one more ground to this Authority to reject the present application.

24. Referring to section 7(3) (b) of the IBC, 2016, it has again been submitted that the said section, amongst others, provides that a financial creditor shall, along with application, "*furnish the name of the resolution professional, proposed to act as interim resolution professional*". The financial creditor initially in its Form 1 named one Sri Anup Kumar Singh as IRP and in support thereof, it had also annexed with the application letter dated 22-11-2017, issued by FC (vide page No 1838, Vol V of the application), whereby it had appointed Sri Anup Kumar Singh to work as IRP.

25. However, the letter dated 22-11-2017 reveals some facts which raises a serious doubt about the impartiality of such a person to work as IRP and therefore, same was conveyed to the FC through the Registry of this Authority. On coming to know about such apprehensions, expressed by the CD, the FC, in its rejoinder, stated that Sri Anup Kumar Singh had rescued himself from the proceeding and as such, he was replaced by one Sri Vijay Murmuria.

26. However, **the replacement** of Sri Anup Kr. Singh by Sri Vijay Murmuria was as worse as earlier one. This is because of the fact that now, FC, instead of naming a person to act as IRP as required under section 7(3) (b) of the Code, 2016, appointed such a person as the IRP, as is evident from Annexure-A of the rejoinder which is, however, not permissible under the law since law requires the FC only to name a person having the qualifications, specified in the Code, to act as IRP. According to the CD, this is another reason why the present application is required to be rejected.

27. The FC in its reply submitted that the allegations, advanced from the side of the CD, aimed at dislodging the proceeding under consideration, were structured more on fancy and fiction than on law, logic and facts and in support of such contention, it tries to address each of such allegation separately. In regard to the contention that the application under consideration is required to be rejected for the lack of proper authority to file such an application, it has been submitted that such a contention is far unequal to the task, assigned to it.

28. Admitting that the power of attorney in question suffers from some defects, it has again been contended that in the proceeding at hand, the FC has placed no reliance whatsoever on the power of attorney dated 29.11.2017. Instead, it relies only on the resolutions, adopted by the Board of Directors of the Bank in its meeting, held on 23.06.2017 as well as on 14-08-2017. Under the aforesaid resolutions, bank has authorised its officers of certain categories to do various acts and deeds, so specified in those resolutions which included the power to present an application under section 7 of the Code, 2016.

29. Quite importantly, such authority was conferred on those officers of the bank -- not by name--- but--- by their designations. Sri Dattaraya Bapurao Sawangikar, who had filed the present application, is the General Manager of the bank and being the General Manager of the bank, under the resolutions aforesaid, he had necessary authority to file the application under consideration. Therefore, it is not correct to contend that the person who had presented this application before this Authority had no power whatsoever to present the same seeking initiation of CIRP.

30. Referring to the decision of NCLAT in ***Palogix Infrastructure Private Limited Vs. ICICI Bank Limited, (2017) 141 CLA 83,*** it has been submitted that in view of law laid down

in ***Palogix Infrastructure Private Limited (supra),*** *even* if there is defect in the authority of the person concerned in filing of the application under section 7 of the Code, same cannot be rejected straightaway. Rather, an opportunity needs to be given to the FC to rectify the defect in authority, if any. For ready reference, relevant part of the decision is reproduced below: -

> *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 "Authorized Representative". Entry 5 & 6 (Part I) of Form No. 1 mandates the 'Financial Creditor' to submit "name and address of the person authorized 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 authorized person's detail is to be inserted and also includes inter alia the position of the authorized person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorized 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 sub section (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 Tor 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."*

31. In regard to the violation of Rule 4 (3) of the Rules of 2016, it has been stated that there is clear proof that application was despatched to the registered office of the CD immediately after the filing of the present proceeding. The CD further submits that the very purpose of the Rule 4(3) of the Rules 2016 is to give the CD a fair chance to make representation against the allegation, made in the application seeking initiation of CIRP against it.

32. Therefore, when on being notified, the CD put in appearance and also fiercely contested the proceeding having filed reply, it needs to be concluded, even if there is some defects, in despatching a copy of the application, filed with the Authority to the registered office of the CD, in view of full participation of the CD throughout the present proceeding, such defects need to be considered as too insignificant, too inconsequential to require this authority to dismiss the present proceeding on this count alone.

33. In regard to the allegation that there was fabrication of some facts in order to conceal some alleged lapses on the part of the FC in filing the application under consideration, it has been submitted that such allegation too is farfetched one. Since there is no absolutely material on record to show that at any point of time, the FC had resorted to any falsehood in

order to cover up some shortcomings in presentation of the application under consideration, such allegation too is required to be rejected as fanciful one.

34. In regard to the contention that the defects in naming the application require this Authority to reject the application, it has been stated that such a contention is also without any substance. According to the learned counsel appearing for the FC, the Code, particularly section 7(3) (b) of the Code of 2016 specifies that certain qualifications for a person to be named as IRP. Once it is found that the person, chosen by the FC to work as IRP, possesses such qualifications, the defect of the nature, so pointed out by the CD, cannot come in the way of initiating CIRP against the CD.

35. I have considered the rival submissions having regard to the materials on record as well as the decisions, relied on by the parties. Coming to the allegation that a defective power of attorney cannot give requisite authority to Sri Dattaraya Bapurao Sawangikar, General Manager IBDI Bank Ltd. Kolkata to file the application under consideration, it is found that the FC too admitted that the aforesaid power of attorney suffers from the defects, so pointed out by the learned counsel for the CD.

36. Since the power of attorney dated 29-11-2017 admittedly suffers from lapses, and since such lapses are found to be quite serious in nature, such lapses, in my considered view, reduce the aforesaid power of attorney to a piece of paper, which has no legal validity whatsoever. Therefore, I have no hesitation in concluding that the power of attorney dated 29-11-2017 could not give any authority whatsoever to Sri Dattaraya Bapurao Sawangikar to present before this Authority the application under consideration.

37. In such a scenario, it needs to be seen if the claim of the FC that it had brought on record more and more evidence to show that the applicant bank had duly authorised its officers, working in different positions to initiate proceedings under the IBC, 2016 before the Adjudicating Authority, has found favour from the materials available on record. On the perusal of the record, I have found that the FC has brought on record two more resolutions, adopted by the Board of Directors of the applicant bank.

38. First one of such resolution was adopted in Board meeting held on 23-06-2017 whereas the second one was adopted by the Board in its meeting held on14-08-2017. What is of utmost importance is that such authorization was made ---*not by names –but by the designations* only. The documents at page 186/187 of the application as well as the documents which are made part of the rejoinder as Annexure –D (at page 16-18 of the rejoinder) makes such position abundantly clear.

39. Annexure –D to the rejoinder further reveals that when the value of the claim is Rs.100 crores or more, the authority to initiate proceedings before the NCLT/Adjudicating is conferred

on the General Manager of the Bank (GM, in short). However, where the value of such claims is less than Rs.100 crores, such authority is conferred on the Deputy General Manager of the Bank (DGM, in short). It is not in dispute that the application has been presented before this Authority by the GM of the bank. No dispute was there over the fact that the value of the claim herein was less than Rs. 100 crores.

40. However, the CD still notices some more and more irreconcilable contradictions between the resolution, adopted by the Board on 23-06-2017 and the resolution, adopted by the same Board on 14-08-2107 and therefore, contended that those two resolutions too, for their being enormously defective, could confer no valid authority on Sri Sawangikar, General Manager of the Bank, to present application under section 7 of the Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against the CD.

41. Such alleged contradictions between the resolution, adopted by the Board on 23-06-2017 and the resolution, adopted by the same Board on 14-08-2107 are detailed in the reply, filed by the CD opposing the contentions in the application under consideration. For ready reference, the relevant part of the reply is reproduced below: -

> *The resolution dated 14.08.2017 was brought into record subsequently by the Financial Creditor along with its Rejoinder wherein it was specifically stated in paragraph 8 that "to avoid further controversies and to put at rest all the purported objections with regard to my authority to file and proceed with the case, I am enclosing herewith an Extract form Minutes of the 134th Meeting of the Board of Directors of IDBI Ltd. held on 14.8.2017at Mumbai regarding the Revision in Delegation of Powers of the Bank to competent individuals. By the said resolution dated 14.08.2017 the Board of Directors of the IDBI Bank Limited had resolved to approve the revision in the Delegation of Powers (DOPs) with directions that Standard Operating Procedures (SOP) be devised for NCLT/JLF cases. Accordingly, it was specifically provided in therein that when the bank's exposure is less than Rs.100 crore, the authority to file claim been delegated to Deputy General Manager and the when the bank's exposure is Rs.100 crore and above the power to file claim has been delegated to the General Manager. In the present case the total amount claimed to be in default including interest is Rs.53,87,09,011.75/- (Fifty three Crores Eighty Severn Lakhs, Nine Thousand and Eleven Rupees Seventy Five Paise). Hence, the exposure of the Bank being less than Rs.100 crore, the power to file claim as per the Resolution was with the Deputy General Manager and not the General Manager. The Board having specifically delegated the power to the Deputy General Manager Shri Dattaraya Bapurao Sawangikar, who is a General Manager cannot file the claim and act against the resolution passed by the Board of Directors. The said resolution dated 14.08.2017 therefore cannot be considered to be a valid authorization in favour of Shri Dattaraya Bapurao Sawangikar, who is a General Manager and not a Deputy General Manager."*

42. But on a careful perusal of those allegations in between the lines, I have found that those two resolutions are very similar on all the fundamental and elementary aspects though there are some inconsistencies between those resolutions on some peripheral aspects which

are, however, found to be of no consequences. Therefore, it is not correct to say that those two resolutions speak in different voices as far as the conferment of the authority on the officers of the FC to initiate proceeding under IBC etc is concerned.

43. In regard to the allegation that since there is nothing on record to show that the resolution dated 23-06-2017 was signed by the directors of the bank concerned, therefore, such resolution cannot be treated as valid Board resolution conferring various powers on the offices of the bank including the power to initiate proceedings U/s 7 of the Code of 2016, it needs to be stated that the FC had placed before this Authority only a part of the resolution dated 23-06-2017 which becomes evident from the fact that the copy of resolution dated 23-06-2017 clearly shows that it starts from item no. ii (*delegation of power for initiation of action under the Insolvency and Bankruptcy Code, 2016*).

44. Since only a part of copy of the resolution dated 23-06-2017 was produced before this authority (*which has bearing on the matter under consideration as is evident from title of the item, same being "the delegation of power for initiation of action under the Insolvency and Bankruptcy Code, 2016"*), it cannot be expected that such a copy would contain the signatures of the Directors of the CD –since-- the signature of the authors of the resolution generally occur on the last page of such resolution.

45. Being so, one cannot find fault with the resolution dated 23-06-2017 for its not containing signature of the directors of the Board of the applicant bank. The fact that such a copy is certified by the Company Secretary of the FC makes such a conclusion inevitable. In the face of above revelations, one needs to conclude that the allegation that Sri Sawangikar could not have presented the application U/s 7 of the Code is found to be wholly without any substance.

46. In regard to the allegation that since in presenting the application U/s 7 of the Code, Sri Dattaraya Bapurao Sawangikar, GM of the applicant bank, paid no regard whatsoever to the pecuniary qualifications, specified in the resolution, dated 14-08-2017, thereby requiring this Authority to reject the application under consideration, I have found that such contention too carries no conviction. It is true that as per aforesaid resolution, GM is authorised to initiate the proceeding before the Adjudicating Authority when the value of the claim is Rs. 100 crores or more.

47. It is also true that when the amount in default is less than Rs.100 cores, in terms of aforesaid resolution, the necessary proceeding before the Adjudicating Authority is required to be initiated by the DGM of the bank having territorial jurisdiction over the matter. However, here in this proceeding, the amount, said to be in default is Rs 53,87,09,1011.75 (Fifty-Three Crores Eighty-Seven Lakhs, Nine Thousand and Eleven Rupees Seventy-Five Paisa) as on 31-11-2017.

48. Being so, as per arrangements, made in the resolution, dated 23-06-2017 (vide Annexure –A to the rejoinder), the application under consideration was to have filed by the DGM of the bank concerned. Unfortunately, the application was filed by Sri Dattaraya Bapurao Sawangikar, he being the GM of concerned Bank. Such disclosures unmistakably evince that in presentation of the application by Sri Dattaraya Bapurao Sawangikar, the arrangements, made in resolution dated 23-06-2017 was honoured only in violation.

49. But then, one must not be oblivious to the fact that generally, an officer of higher grade could discharge the function(s), earmarked for a junior officer-- unless exercising such power is specifically prohibited. However, in the present case, there is nothing on record to show that GMs of the applicant Bank have ever been prevented from exercising the authority in respect of the matters, assigned to junior officers, more particularly DGMs.

50. Being so, there cannot be any escape from the conclusion that the initiation of the proceeding under consideration by the GM --instead of by the DGM as required under the 14-08-2017-- cannot take the wind out of the sail of the FC, same being held to be an irregularity notwithstanding. The result might have been different all together, had a junior officer without any authority chosen to discharge the function(s) entrusted to an officer superior to him.

51. The CD has, however, made one more attempt to dislodge the application stating that in its application, FC has specifically and categorically stated that as far as the authority to file application is concerned, it relies on the power of attorney dated 29-11-2017 and nothing else. In the teeth of such a claim, FC must not be allowed to say that it has in its possession more and more document(s) to show that Sri Dattaraya Bapurao Sawangikar was duly empowered to file application in hand.

52. One again, such a claim cannot be allowed to take the better of the case of the FC. In ***Palogix Infrastructure Private Limited (supra), it*** has been held that when the authority to file application U/s 7 of the Code is found defective for one reason or other, the Authority concerned, instead of rejecting the application straightway, needs to give the applicant an opportunity to rectify the defects in authority in presenting the application. Such a decision also demonstrates that a too technical approach qua defect in authority/power may not advance the cause of justice.

53. On considering the present controversy in the light of what has been decided in ***Palogix Infrastructure Private Limited (supra)***, I have found that this authority must take into consideration the Board resolution dated 23-06-2017 as well as the resolution dated 14-08-2017 in ascertaining if Sri Dattaraya Bapurao Sawangikar had valid authority to present the application under consideration before this authority. This is more so, when such resolutions are already brought on record when the application was taken up for consideration.

54. It needs to be stated here that I have already scrutinised the aforesaid resolutions and have found that such resolutions very clearly show that under those resolutions, the applicant bank had authorised some of its high ranking officers including the GM of such bank to do various acts and deeds for and on behalf of the bank which included the authority to present application U/s 7 of the Code. In that view of the matter, the last allegation too, employed to discredit the proceeding under consideration, in my opinion, fades into total insignificance.

55. Coming to the allegation that there was profound violation of Rule 4 (3) of the Rules of 2016 which unmistakably overthrows the entire proceeding under consideration, I have found that such contention is not completely correct. It is true that the Rule 4 (3) of the aforesaid Rules mandates that the applicant initiating a proceeding under section 7 of the Code, 2016 is under an obligation to despatch forthwith by registered post or by speed post a copy of the application to the registered office of the CD immediately after the filing of the present proceeding.

56. But then, what could be the rationale behind the mandate in the aforesaid Sub-Rule? In my considered opinion, the rationale behind the mandate in the aforesaid Sub-Rule is to give the CD a reasonable and an adequate chance to response to the allegation in the application U/s 7 of the Code, 2016 –since-- in the event of admission of such a proceeding, which law has termed as Corporate Insolvency Resolution Process, the CD is likely to suffer some setback which may ultimately take such an entity to liquidation as well.

57. Therefore, complete violation of the mandate in such a Sub Rule would definitely leave the Authority constituted under the Code with no other option but to dismiss the proceeding so afflicted by the vice for not following the prescriptions in Rule 4(3) of the Rules 2016. But where it is found that there was substantial compliance of the directions in Rule 4(3) and in pursuance thereto, the CD had even participated in the proceeding questing the initiation of a proceeding U/s 7 of the Code, mere peripheral infringements of the said provision cannot throw overboard such a proceeding. In that view of the matter, the word "shall", so used in Rule 4(3) of the Rules of 2016, cannot also be read as mandatory.

58. Coming back to our case, I have found that the counsel for the FC arduously contends that there was no violation of the mandate in the Rule 4(3) of the Rules 2016 -------since ----it had duly despatched forthwith a copy of the application, filed with Authority, to the registered office of CD. More importantly, the copies of such application were also furnished to learned counsel for the CD. On the perusal of the materials, I feel inclined to accept such contention which, in turn, requires me to hold that this proceeding cannot be rejected at the threshold as prayed for by the CD for alleged violation of Rule 4(3) of the Rules, 2016.

59. But then, even if one assumes for the sake of argument that the copy of the application was despatched only to the corporate office of the CD, as alleged by the learned Sr. counsel appearing for the CD -- *yet then*--- there are enough materials on record to show that the CD received the copy of the application in time , filed with Adjudicating Authority and having been so furnished with copy of the application, the CD duly participated in the proceeding under consideration and also challenged the application on grounds more than one.

60. Here, it needs to be stated that the CD has informed that it had already filed an application against the FC seeking initiation of appropriate proceeding against the FC. According to the CD, it had to file said application seeking initiation of proceeding against the applicant since in its rejoinder; the FC falsely claimed that in presenting the application U/s 7 of the Code, it had faithfully carried out the prescriptions, rendered in Rule 4(3) of the Rules of 2016.

61. Initiation of such a proceeding became obligatory on the part of the CD since such false representation from the side of the FC shows the CD as well as its engaged counsel in poor light as far as their conduct in the proceeding under consideration is concerned. The allegations, above ----- I find -----is also sought to be made a ground to derail the present proceeding. However, in my considered opinion, the veracity of allegations, aforesaid, cannot be enquired into and ascertained in the present proceeding.

62. Rather, the veracity of such allegations can be considered in a proceeding initiated for such purpose where both the parties are required to be given proper opportunities to place their side of the story before being taken any decision on the aforesaid allegation. Being so, such an allegation cannot be allowed to come in the way of the present proceeding where FC prays for initiation of CIRP against the CD.

63. In view of what I have discussed hereinbefore and what have emerged there-from, I have no hesitation whatsoever to conclude that the allegation of violation of the mandate in Rule 4(3) of the Rules of 2016 remains far from being established and consequently, such an allegation fails to measure the strength of merit of the case of the FC which is propagated through the application in hand.

64. In regard to the allegation that first IPR, proposed by the FC, was not impartial and unbiased, I find it necessary to have a look at the explanation, put forward from the side of the FC, contradicting such allegations. On going through such explanations, I have found such justification to be proper and, therefore, safe for reliance. For ready reference, the relevant part of the explanation in the rejoinder is reproduced below: -

> *"5. With reference to the statements made in paragraph 5 of the said reply, I deny that the proposed Interim Resolution Professional (hereafter referred to as IRP) i snot independent. I deny that the IRP had made communication with any of the stake*

holders. I deny that the IRP had sent any advance copy of the present application to the company on his letter head as alleged or at all. I say that the alleged letter does not bear any signature of IRP. I say that the said letter was prepared at the office of the Advocate and was forwarded to the Corporate Debtor. The IRP was completely unaware of the exercise of service of the copy of such application and he has no role therein. I say that the forwarding letter was inadvertently made due to misinterpretation of the newly enacted Insolvency and Bankruptcy Code, 2016 by a junior Advocate at the office of the advocate-on-record of the Financial Creditor. I say that the alleged forwarding letter of IRP does not bear his signature either. It cannot be said that such a letter was issued by him or the service of the said application was effected by the IRP. I deny that there is any occasion of raising a question mark on the independence of the proposed IRP. In any event, upon such unfounded allegation being made the IRP has sought to excuse himself from the present proceedings and has withdrawn his name by a letter dated 9.03.2018 issued to the Financial Creditor. I say that in view of the fact that Mr Anup Kumar Singh, the erstwhile IRP has excused himself from the present proceedings and has been replaced by Mr Bijay Murmuria, the objection raised in paragraph 5 no longer survives."

65. In regard to the allegation that in naming the second IRP, the FC committed equal blunder which, in turn, requires this Authority to reject the present application, I have found that in naming the IRP second time, the FC had done something which has no approval of section 7(3)(b) of the Code, 2016. Section 7(3) of the Code, 2016, amongst others things, requires the FC to furnish the name of person in the application itself who is to act as IRP in the event of application under section 7 of the Code is admitted.

66. But then, the FC has no business, whatsoever, to appoint the IRP. That is a duty which law specifically assigns to the Adjudicating Authority and none else. Unfortunately, the FC—did not confine its role to naming such person as IRP in the application under consideration. Rather, he had travelled well beyond its assigned territory and even appointed one Sri Bijoy Murmuria as IRP. Now, the question is whether such a wrong costs the entire proceeding as contended by Ms Mili Hazarika, learned Sr. Counsel appearing for the CD.

67. My suave perusal of the section 7(3) (b) and 7(5) (a) read with various Rules, framed there-under the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2006 in particular, would reveal that the IRP is a significant actor in Corporate Insolvency Resolution Process since he is the person who is to perform various functions, such as , the collection of claims , the collection of the information about the corporate debtor , constitution of committee of creditors and the interim management of affairs of the company till a resolution professional is appointed.

68. Since the IRP is to discharge some very important duties at the very initial stage of the Corporate Insolvency Resolution Process, therefore, it becomes obligatory to find a professional who has in his possession all the wherewithal's to cobble all the aforesaid things together so that in the event of admission of the application, the affairs of the CD could be

conducted reasonably normally. What is, however, important to note is that the legislature in their wisdom found it fit to leave such a duty to the person who is desirous of initiating such a process and such wisdom of the legislature has assumed the shape of section 7(3) (b) of the Code, 2016.

69. Therefore, when one considers the aforesaid lapses, on the part of the FC, in attending the duty imposed on it by law having regard to the scheme of the section 7(3) (b) of the Code of 2016—as is evident from our foregoing discussion--- it would appear clear that if the person concerned otherwise fulfils the requirements which law wants to see in an IRP, the small and minor lapses which occurred in naming the IRP by the FC cannot be allowed to have size larger than their lives to overthrow the entire proceeding U/s 7 of the Code.

70. Coming back to our case, it is found that Sri Bijoy Murmuria who was appointed as IRP by the FC----*off course in an unauthorized way*-----possessed enough qualification to be appointed as IRP in the event of admission of application under consideration. The documentation of his qualifications in the Annexure B and C to the rejoinder makes such position clear. The fact that he has already worked as IRP as well as the liquidator and that no proceeding said to have been pending against him are testimonies to such a conclusion. Being so, the lapses on the part of the FC in naming the IRP seems to be of no consequences.

71. Our foregoing discussion now makes it clear that all the allegations levelled against the proceeding U/s 7 of the Code could cause no serious impediment in the way of acceptance of such an application. Consequently, all those allegations are rejected.

72. Our foregoing discussion further reveals that as on 31.10.2017, the CD owed an amount to the tune of Rs.53, 87, 09011.75 to the FC and that there was a clear default in repayment of such debt. The various materials on record, the financial statements annexed with the application as well as the averments made in the letter dated 14.03.2016 in particular make such conclusion inevitable.

73. In view of above, there cannot be any escape that this proceeding finds cause of action as contemplated in Section 7 (5) (a) of the Code of 2016 and therefore, same needs to be accepted.

74. Resultantly, this application is admitted with following consequences:

a. *That the order of moratorium u/s .14 shall have effect from 01.05.2018 till the completion of corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33 as the case may be.*

b. *That the Bench hereby prohibits the institution of suits or continuation of pending suit or proceedings against the corporate debtor including execution of any judgment ,decree or order in any court of law ,tribunal, arbitration panel or other authority, transferring ,encumbering ,alienating or disposing of by the corporate debtor any of its*

assets or any legal right or beneficial interest therein, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFESI Act, 2002 the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

c. *That the supply of essential goods or services to corporate debtor, if continuing shall not be terminated or suspended or interrupted during the Moratorium period.*
d. *That the provisions of Section 14 sub-section (1) shall not apply in such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*
e. *That the public announcement of corporate insolvency resolution process be made immediately as specified under Section13 of the Code and calling for submissions of claim under Section 15 of the Code.*
f. *An authentic copy of this order be issued to the parties after the completion of necessary formalities for their information and doing needful.*
g. *An authentic copy of this order be issued to the Interim Resolution Professional after the completion of necessary formalities for his information and doing needful in accordance with the prescription of law as well as directions rendered herein before.*
h. *Necessary order regarding appointment of IRP for doing his part of duty under the Code,2016 would be rendered shortly.*
i. *An authentic copy of the order be furnished to the financial creditor and the corporate debtor forthwith.*

In view of the above, the Application is admitted and accordingly stand disposed of.

Sd/-

National Company Law Tribunal,
Guwahati Bench, Guwahati.

Nkm