

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**  
**NEW DELHI**

**COURT-VI**

**C.P. NO. IB-987 (ND)/2019**

**IN THE MATTER OF:**

Rita Kapoor

..... Petitioner

v.

Invest Care Real Estate LLP

..... Respondent

**SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016**

**Judgment delivered on:26.11.2019**

**Coram:**

**(Dr.)P.S.N PRASAD, HON'BLE MEMBER (J)**  
**DR. V.K. SUBBURAJ, HON'BLE MEMBER (T)**

**For the Petitioner: Mr. Ranvir Singh,Advocate.**

**For the Respondent: Mr. Vivek Sinha, Mr Vivek Malik and Mr. Kartikeya Jain, Advocates.**

**ORDER**

**(Dr.) P.S.N PRASAD, HON'BLE MEMBER (Judicial**

1. Ms. Rita Kapoor, claiming as the financial creditor, has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency

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Resolution Process in respect of respondent Company Invest care Real Estate LLP referred to as the corporate debtor.

2. The Respondent LLP Invest care Real Estate against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 30.11.2010 having its registered office at 307-308, roots tower, Laxmi Nagar, New Delhi-110092 . Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

3. The applicant has proposed the name of Mr. Abhishek Anand, for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/ IP-N00038/ 2016-17 /10077 resident of E-103, Greater Kailash Enclave-1, New Delhi-110048. Mr. Abhishek Anand has agreed to accept appointment as the interim resolution professional and has signed a communication dated 09.04.2019 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere.

4. The case of the Financial Creditor is as under:

- a) That on 14.07.2011 Sh. Ajit Sinha and Ajit Mishra formulated Invest Care Realty LLP, with total capital of Rs.1 Lac (Rs.50,000/- each) for five years to undertake business of developing projects,.
- b) Thereafter on 15.07.2011 Invest Care Pvt. Ltd. passed “Board Resolution” authorizing Sh. Samar Vijay, its Director, respondent No.2, to execute LLP: agreement in the name of and on behalf of the company and to sign and submit necessary forms, documents, deeds etc. in the name of and on behalf of the company in connection with the amendment in the LLP:
- c) On 30.08.2012 Invest Care Real Estate LLP: incorporated under LLP Act 2008 with LLP identity number AAB- 2358; but its copy not supplied to petitioner, even on request.
- d) Subsequently, the Respondents No.2,3 and 4 approached petitioner, jointly and severally, to advance loan, with assurance of 12.174% return to be made punctually and in case of non-performance punctually, separate clause was introduced for payment, without any limitation and with additional interest of 0.5% on the principal for the delayed period, in addition.



e) It is also submitted that Sh. Samar Vijay also documented loan agreement with Mrs. Rita Kapur and Invest Care Real Estate LLP: and Rs.40,00,000/- out of Rs.50,00,000/- advanced by cheque, was documented as loan and petitioner inducted as its “New Partner” in Invest Care Real Estate LLP: for return of four equal yearly installments of Rs.14,86,955/- totaling to Rs.59,47,820/-. The installments included the principal and interest.

f) It is claimed in the application that 1st supplementary agreement to Invest Care Real Estate LLP dated 13.04.2013 was executed with Mrs. Rita Kapur, was taken as equity contribution to the LLP: dated 13.04.2013, which doesn't exist as on date.

g) It is alleged that the Respondents provided copy of resolution to convert loan capital to equity without the consent of the “Promoting Partner” in violation to clause 18(b) of LLP dated 13.04.2013 and no such information was provided either before or at the time of writing the 2nd supplementary agreement dated 25.03.2014 and at any time, before filing counter affidavit dated 26.12.2018 in (IB) 1594 of 2018.

h) It is further alleged that without assigning reasons, respondents had executed 2nd. Supplementary Agreement to

Invest Care Real Estate LLP duly signed by all three Designated Partners with 37 other General Partners on e-stamp paper dated 5.6.2013 and petitioner's contribution of Rs.40,00,000/- in loan agreement 9.7.2013 transferred in it as equity capital, in violation to clause 6C of LLP: dated 13.04.2013, despite petitioner's objection, the amount was not returned/ paid back, to raise Rs.19,00,50,000/- and after selective payment, reduced to Rs.16,90,00,000/-. Particularly when no LLP dated 13.4.2013 exists.

i) The applicant filed certificate by HDFC bank regarding issue of cheque's No.'s 687468 and 687469 dated 9.7.2013 for Rs.10,00,000/- and Rs.40,00,000/- by Mrs. Rita Kapur favouring Invest Care Real Estate LLP.

j) Thereafter the applicant sent a Legal notice seeking specific information, in terms of loan agreement dated 9.7.2013 and the management of LLP dated 13.4.2013.

k) The Petitioner through its counsel again issued legal notice to respondents to account for the interest along with the principal of Rs.50,00,000/- (Rupees Fifty Lakh Only), and sought reply to specific points, raised earlier in letters dated 3.9.2017 and 6.3.2018, to which no reply is given.

l) The applicant has referred too many judgements in the support of his case. The following are the worthy.

i. **Pioneer Urban Land and Infrastructure Limited**

**Vs. Govindan Raghavan**; Geetu Gidwani Verma and

Anr. : Court has held that a term of contract will not be final and binding if it is shown that the flat purchase had no option but to sign on the dotted line, on a contract framed.

ii. **Kuldeep Gandotra Vs. Union of India**: Court has

held that Omission and concealment which involves breach of legal or equitable duty and confidence justly reposed, is equal to fraud.

- Regarding the avbove mentioned judgement (Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan & Kuldeep Gandotra Vs. Union of India )we are of the view that Although the petitioner has cited this decision with regard to conversion of equity into loan and to prove his claim, however, the equity related documentation

shows that Rita Kapoor is signatory to those documents. In case if the petitioner is of the view that his client was forced to be a signatory to the said equity agreement, this Tribunal is not the appropriate forum to look into this matter.

iii. **Mrigrndra Pritam Vikram and Ors. V. Jaswinder**

**Singh & Ors.** : Court has held that a collusion or conspiracy with a view to deprive the rights of others in relation to property would render the transaction void ab initio.

- Regarding the above mentioned judgement (Mrigrndra Pritam Vikram and Ors. V. Jaswinder Singh & Ors) we are of the view that although the petitioner has contended that he has no knowledge of conversion of loan into equity prior to respondents resolving to such actions, the petitioner has not produced the satisfactory documentary proof regarding the same. So, mere averments in the petition does not establish the same, in absence of supporting material evidence regarding the same.

iv. T. Nagappa V. Y.R. Murlidharana: It is well settled principle of law that non-mentioning or wrong mentioning of provision of law would not be of any relevance, if the court has the requisite jurisdiction to pass an order.

- Regarding the above mentioned judgement (T. Nagappa V. Y.R. Murlidharana) we are of the opinion that this Tribunal is not the proper forum to look into the fraud related matter.

5. Upon receipt of the notices issued by this tribunal as well as service of notice by the petitioner, the Respondent / Corporate debtor has appeared through its counsel and has filed a detailed reply in the matter. Gist of the Contentions of the Corporate Debtor/ Respondent are as under:

a. It is stated by the respondent that the applicant is a general partner of LLP and hence, cannot be termed as a financial creditor. It is alleged that the claimed amount is not a loan but capital contribution of the applicant for being a general partner in the LLP.



b. The respondent has pointed out various technical defects in the petition. The respondent has challenged the authority of the advocate filing present petition on behalf of the applicant apart from other points.

c. the respondent also contended that all the documents and supplementary agreements were duly signed and executed by the applicant in capacity of general partner of the LLP.

d. The respondent has also pointed out that this present application is filed by power of attorney holder of Financial Creditor Mr. Ranvir Singh, Advocate, based on authority letter of Ms. Rita Kapoor. Based on the said authority letter the legal counsel, Mr. Ranvir Singh, Advocate, filed the pleadings in his own name and deposit the affidavit in his own name and by doing so he stepped in the shoes of his client himself which is against the requirement of "practice" as mentioned under Section 30 of the Advocates Act, 1961.

e. Also, the said authority letter as issued by the financial creditor to her legal counsel is neither properly executed not duly stamped.

\* The Respondent has relied upon the following judgements in respect of its submissions:

i. Lalit Mishra & Ors Vs. Sharon Bio Medicine Ltd & Ors./ Company Appeal (AT) ( Insolvency) No 164/2018) : *NCLAT decided that*

admittedly; shareholders and promoters are not the creditors thereby the resolution plan cannot balance the maximization of the value of the assets of the Corporate Debtor at par with the financial creditors or operational creditors or secured creditors or unsecured creditors. They are also ineligible to submit the resolution plan to again control or take over the management of the Corporate Debtors.

ii. **Vinod Kumar Vs. State of UP and Ors**: Hon'ble Supreme Court has held that in the discharge of his professional obligations, the petitioner-advocate is not obliged to file the writ petition on behalf of his client.

iii. **Palogix Infrastructure Private Limited Vs. ICICI Bank Limited Appeal (AT) ( Insol.) No. 30 of 2017**:

"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'.*

\* Through mere perusal of the above referred judgement it can be concluded that the present application is not maintainable due to non-compliance of mandatory statutory requirements.

6. We have heard the arguments advanced by the counsels of both the parties and perused the other documents filed by them.

7. The respondent in its reply has contended that the loan given by the applicant was converted into a capital contribution and the applicant was

made general partner of the LLP and therefore, the applicant cannot be termed as a financial creditor.

8. It is seen from the records that the applicant had given loan to the respondent company and that loan was converted into capital contribution of the applicant and the applicant was made general partner of the LLP.

9. It is seen that the applicant Ms. Rita Kapoor has signed the authority letter in favour of her advocate at London. However, the document shows that the person who witnessed the said authorisation has signed the said document in India at the time of signing the authorization letter on 19.03.2019. The Advocate for applicant has not justified how a person in India can witness the authorisation issued at London on the same day. The vakalatnama filed by the applicant is not duly signed by the applicant. The Advocate has executed the vakalatnama in his favour by acting in the Capacity of Authorised representative based on the Authorisation Letter dated 19.03.2019. It is also seen that the affidavit in support of the application is not signed by the applicant but it is signed by advocate. The Advocate is not expected to vouch for correctness of the fact as the professional Ethics demands that Advocate Should not step into the shoes of his client.



10. The Advocates Act, 1961 and The Bar Council of India Rules prescribe rules for professional conduct and ethics for lawyers. Rule 13 of the Bar Council of India states that:

*“An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he can retire without jeopardizing his clients interest”.*

Thus as is manifest from the said rule, it would be a professional misconduct if a lawyer were to don two hats at the same time.

11. The Ministry of Corporate Affairs vide its notification dated 27.02.2019, has dealt with the persons who may file an application for initiating the IRP. “The Gazette of India” dated 01.03.2019 has been reproduced below:

**MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, the 27th February, 2019:**

*S.O. 1091(E).—In exercise of the powers conferred by sub-section (1) of section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies following persons who may file an application for initiating corporate*

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*insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the financial creditor:*

*(i) A guardian;*

*(ii) An executor or administrator of an estate of a financial creditor; (iii) a trustee (including a debenture trustee); and*

*(v) A person duly authorised by the Board of Directors of a Company.*

12. In view of the statutory provision of the code and in view of the above clarification proper valid authorisation letter is necessary for filing of the application under the code. Invalid or defective authorisation letter cannot be rectified after reserving the order that should have been done prior to completion of the pleadings. In absence of valid authorisation in favour of the person filing the application the present application is not maintainable.

13. Also, it can be seen that the loan was converted into equity by the acts of the applicant and for the reasons stated above the transaction can no longer be termed as “financial debt” under the code, which is due and Payable.

14. In light of the above, after giving careful consideration and seeing the contentions of the party and upon appreciation of the documents placed on



record to substantiate the claim, the present petition is rejected in terms of Section 7(5) (b) of the Code.

15. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant petition.

Serve copy of the order to parties and consign the case records to record room.

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**DR. V.K. SUBBURAJ,**

**MEMBER (T)**

S - d

**(Dr.) P.S.N PRASAD,**

**MEMBER (J)**