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**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH**
**KOLKATA**

**C.P. (IB) No. 1278 / KB 2019**
**C.A. (IB) No. 1482/KB/2019**

IN THE MATTER OF:

An application under Section 65 of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of Insolvency and Bankruptcy Code 2016 (Application to Adjudicating Authority) Rules, 2016

And

In the matter of:

M/s Middleton Solitaire Hotel India Private Limited, having its Registered Office at 44A, Sarat Bose Road, Kolkata 700020.

Financial Creditor /Applicant

-Versus-

M/s Middleton Hotels Private Limited, having its Registered Office at 10, Middleton Street, Kolkata 700071.

Corporate Debtor / Respondent

Date of hearing 03 February, 2020

Order Delivered on 18 February, 2020

**Coram :**

**Madan B. Gosavi, Member (Judicial)**

**Virendra Kumar Gupta, Member (Technical)**

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| For the Appellant / Petitioner | : | Ms. Manju Bhuteria, Advocate |
| | : | Mr. Suvam Sinha, Advocate |
| For the Suspended Director | : | Mr. Ratnanko Banerjee,Sr. Advocate |
| Of Corporate Debtor | : | Ms. Amrita Pandey, Advocate |
| | : | Ms. Pallavi Roy, Advocate |
| Resolution Professional | : | Mr. Chandra Kumar Jain |
| | : | Mr. Surendra Kumar Agarwal |
| For Intervenor | : | Mr. Jishnu Saha, Sr. Advocate |
| | : | Mr. Ashis Kr. Mukherjee, Advocate |
| | : | Mr. Ishan Saha, Advocate |

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: Mr. Saurabh Prasad, Advocate

**Per Virendra Kumar Gupta, Member (T)**

1. This application has been filed under section 65 of IBC, 2016 read with rule 11 of NCLT Rules, 2016 for recalling of the order of admission passed by this authority on 31.10.2019 in C.P. No. 1278/KB/2019 on the ground that the said petition had been filed fraudulently with malicious intention. It was also been pleaded that the order was obtained by Financial Creditor and the Corporate Debtor getting in league and collusion with each other.

2. The facts, in brief, are that the application under section 7 of IBC 2016 had been filed by the Financial Creditor against the Corporate Debtor as the Corporate Debtor had failed to pay the debt which had become due and payable. Order was passed by this authority admitting Corporate Debtor in CIRP and Moratorium under section 14 was made operational. In this background, the Ld. counsel for the applicant appeared and contended that said petition was an instance of collusive action just to deprive the applicants to get the shares of the Corporate Debtor held by the applicants as security for the loan of Rs. 30 crores which was given to Shanti Kumar Surani and Prabha Surana who held 100% shares in the Corporate Debtor in their name along with one Moksh Investors Pvt. Ltd. and one individual Pawan Kumar Surana. Ld. Counsel further pointed out that Mr. Shanti Kumar Surana and his wife Mrs. Prabha Surana had borrowed substantial sum of money from the applicants on the promise that they would transfer the immovable property owned by the Corporate Debtor to the applicant by transferring the Corporate Debtor company to them in order to liquidate their dues. However, when the shares along with the requisite documents were lodged for transfer, the Corporate Debtor did not give effect to such transfer. On 10.01.2019, the applicant wrote to the Suranas to issue necessary directions to the company to register the shares of the Corporate Debtor in the name of the applicants. However, in reply the Suranas submitted that these were given only as security and not for giving control of the company in fact. The applicant filed a suit (C.S. No. 34 of 2019) in the Hon'ble High Court at Calcutta.

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However, they could not get any relief there for the reason that the Hon'ble High Court was of the view it did not have jurisdiction under provisions of the Companies Act, 2013. Subsequently, request for injunction against the Corporate Debtor restraining Corporate Debtor from disposing of its property was granted on 14.06.2019. However, ultimately the said appeal was finally dismissed and it was held that remedy for the applicant existed under section 58 and 59 of the Companies Act, 2013. The Ld. Counsel submitted that during the process of filing of application under section 58-59 the impugned order dated 30.10.2019 was passed which stalled all the proceedings against the Corporate Debtor in view of the provisions of Section 14 of IBC, 2016.

3. In this background, the Ld. Counsel submitted that Financial Creditor was incorporated with a paid up capital of Rs. 1,00,000/- only on 12.04.2019. It allegedly gave loan of Rs. 50,00,000/- in two tranches of Rs. 25,00,000/- on 23.05.2019 without any security of any nature whatsoever. The said loan was for 30 days period with whom the Financial Creditor had no earlier dealings. Hence, this fact by itself was sufficient to indicate that the apparent was not the real. It was also claimed that such loan had been given after arranging funds although the Financial Creditor was incorporated with the object to establish hotels and to deal in real estate properties. The Ld. Counsel further contended that the Resolution under Section 186 had not been passed and there was also a violation of section 45-1A(1)(a) of the Reserve Bank of India Act, 1934.

4. The Ld. Counsel, thus, concluded his argument by stating that the whole object of filing the petition under section 7 of IBC 2016 was to obtain order and moratorium so that the applications filed under 58-59 of the Companies Act 2013 before filing petition under section section 7 could not be heard and decided. It was also contended that it is for this reason only the fact of such application being pending with this authority was not brought to the notice by the Corporate Debtor nor any attempt was made to defend proceedings under section 7 of IBC 2016.

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5. According to the Ld. Counsel, fraud had been perpetrated and therefore, order dated 13.10.2019 passed by this Authority should be set aside. In support of such contention, he relied on the following judicial decisions :

(i) Mr. Shobhnath Vs Prism Industrial Complex Limited - C.P. No. 168/ALD/2017 by NCLT, Allahabad Bench
(ii) Mr. Shobhnath & Ors vs. Prism Industrial Complex Limited, NCLAT, New Delhi MANU/NL/0353/2019
(iii) Praveen Kumar Mundhra vs. CIL Securities Limited - NCLAT 2019 SSC online NCLAT 334.
(iv) Leo Duct Engineers and Consultants Limited - NCLT, Mumbai Bench - MANU/NC/0720/2017.
(v) Unigreen Global Private Limited, NCLT, Principal Bench, New Delhi - MANU/NC/0338/2017.

6. He also referred to the relevant paragraphs in detail to support his contentions. He further contented that the name of both Financial Creditor and Corporate Debtor were similar which could be possible only in the case of connected entities or consent given by the existing entity to the new entity to get the similar name. In this regard, he drew our attention to provisions of section 4(2) of the Companies Act, 2013.

7. The Ld. Counsel appearing on behalf of the Financial Creditor, on the other hand, alleged that it was a collusive petition by the Corporate Debtor and applicants so that the Corporate Debtor come out of the moratorium and avoid the process of Corporate Insolvency Resolution / liquidation. Ld. Counsel for the Financial Creditor further submitted that funds were taken from one finance company namely, Chhajer Credit & Investments Pvt. Ltd. and were received on 10.05.2019, 13.05.2019 and 15.05.2019 which in turn were given to the Corporate Debtor. The funds had been taken originally for the purpose of business activities. However, considering the situation that the requirement could be later on, these were given on loan to the Corporate Debtor to earn some interest. It was also submitted that there was no

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connection between the Financial Creditor and the Corporate Debtor and no material had been brought to record by the applicants hence, their such contention had no force. It was also contended that as far as proceedings under section 7 were concerned, only requirement was that there should be debt which was due and payable and default had occurred. In the present case, all these conditions existed. Therefore, Corporate Debtor was put under CIRP. It was also pleaded that merely because Financial Creditor had been incorporated recently or it had low paid up capital, this fact by itself was not sufficient to indicate any malafide.

8. Ld. Counsel for the Corporate Debtor on the other hand initiated his arguments by stating that both the entities were different and due to liquidity issues it could not pay the loan of Rs. 50,00,000/-, hence, it was made to suffer in this manner. It was further pleaded on part of the Corporate Debtor that the transaction of the applicant were not with the Corporate Debtor but with the Suranas who were share holders / directors of the company and therefore, the Corporate Debtor which continues to be an independent legal entity should not be made to suffer for their personal issues. It was also contended that similar name could not be conclusive factor and same name can be given after no objection by the existing company.

9. We have considered the submissions made by both sides. In this application it has been alleged that the order for CIRP 31.10.2019 in C.P. No. 1278/KB/2019 has been obtained by way of fraud, hence, this order needs to be set aside. This issue has got two dimensions. Firstly, whether the impugned order can be set aside within the scope of section 65 of IBC 2016 or this plea can be considered by this Authority in terms of its inherent power read with rule 11 of NCLT Rules, 2016. Secondly, whether in the facts of case collusive application and / or fraud appear to exist.

10. The question which needs answer is what we understand by inherent power of Court or Tribunal. As per accepted and settled judicial understanding, inherent powers are such powers which are unalienable from Court / Tribunal and may be exercised by Court or Tribunal to do full and complete justice between the parties before it. Such power is derived from the principles of natural justice and equity.

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As far as Tribunal is concerned, Rule 11 of NCLT Rules, 2016 vests it with the inherent power. The said rule reads as under :

> *"11. Inherent Powers*
>
> *Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."*

From the perusal of the above, it becomes apparent that this rule is parallel of section 151 of Code of Civil Procedure, 1908. Two elements which it comprises of are that the Court / Tribunal may pass such orders as may be necessary to meet the ends of justice and to prevent abuse of the process of the Tribunal. These two elements have not been defined but the principles have emanated relating to these elements from several judicial decisions. It is worth noting that the Hon'ble Supreme Court in the case of Manohar Lal Chopra vs Rai Bahadur Rao Raja Seth Hiralal as reported in AIR 1962, SC 527, 1962 SCR Supl.(1) 450 observed that "The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."

11. Having outlined the basic concept of inherent power, the question arises when it can be exercised. This power can be exercised only for the ends of justice or to prevent abuse of process of the Tribunal. In the present case, mainly abuse of the process of the Tribunal has been alleged. According to Mulla the words 'abuse of process of courts' are defined as follows :

> *"Abuse of process of Court, is the malicious and improper use of some regular legal proceedings to obtain an unfair advantage over an opponent. Nothing short of obvious fraud on the part of a debtor would render him liable to have his petition for insolvency dismissed on the grounds of 'abuse of process of court'. The term is generally used in connection with with action for using some process of court maliciously to the injury of another person."*

The underline principle which emerges is Tribunal or Court can recall an order earlier made by it if there exist fraud or collusion in obtaining the judgement or abuse of process is established and both of these cause injury to another person. It is also important to note such power can be exercised only when applicant does not have any other remedy available to it. The other condition is that all the parties must be given an opportunity of hearing before recalling the order. In the present case, the applicants do not have any other option / available remedy in view of provisions of section 14 of IBC, 2016, hence, their application has legs to stand. Considering this judicial principle read with the provisions of rule 11 of NCLT Rules, 2016, we hold that the order for CIRP can be set aside if the facts given in the application support / prove the case of the applicant.

11. As far as scope of provisions of section 65 of IBC 2016 is concerned, we are of the view that such section is limited in its scope as it empowers the Adjudicating Authority to impose penalty if it is found that initiation of insolvency resolution process is due to fraudulent act or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation as the case may be. The preceding stage of the applicability of this provision is a conclusive finding by the Tribunal in the case that there was an act of fraud or malicious intent in initiation of Insolvency Resolution Process or Liquidation proceedings. Further, for taking any action under this section, opportunity of hearing to the party going to be affected is a must.

12. Thus, based on the above discussion it can be concluded that the Tribunal has got inherent powers to recall its earlier order and also to impose penalty if it is found that such order has been procured by an act of fraud or with malicious intent or through abuse of the process of Tribunal.

13. Now, we will look into facts of the case to find out the fact of malicious intent or abuse or process of Tribunal. It is not in dispute that an application under section 58 and 59 of the Companies Act 1956 was pending before the adjudication of application filed under section 7 of IBC, 2016 by the Financial Creditor. In the said application issue of transfer of shares of the Corporate Debtor in favour of the applicant by Directors / shareholders of the Corporate Debtor is involved. If the Corporate Debtor is put under CIRP, then, moratorium under section 14 of IBC, 2016

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takes place and, therefore, the application filed u/s 58 & 59 of the Companies Act, 2013 cannot be proceeded with till disposal of CIRP proceedings and its value may get eroded during the course of CIRP proceedings or liquidation, if CIRP fails. Having discussed this apparent position, we further find that a substantial sum of Rs. 30 crores has been given on loan by the applicants to Shanti Kumar Surana and Prabha Surana. Although the lender has claimed that it was the understanding between the parties was that in case of non repayment of such loan by Suranas, the property of the Corporate Debtor would stand transferred to them as repayment of loan in kind, by transfer of the Corporate Debtor through transfer of their shares in Corporate Debtor to the applicants. This has been disputed by the Suranas but the undisputed fact is that even as per Suranas, these shares were given as security against such loan. It is also not in dispute that application for transfer of such shares in the name of applicant has been lodged with the Corporate Debtor much before filing of petition under section 7 of IBC, 2016. It is also on record that correspondence has happened between the applicants and the Suranas and Management of Corporate Debtor for registering the transfer of of shares in their names which has not been done. These facts were not on record when application under section 7 was filed by the Financial Creditor nor these were disclosed by Corporate Debtor. In this regard, plea has been taken that it was also not required as per provisions of IBC, 2016. Though it may be correct in law, but in the facts and circumstances of the case where the Corporate Debtor has not contested the claim of the Financial Creditor at all and have obtained the advantage of moratorium, this fact cannot be ignored also because it is the real purpose / object. Thus, a grave injury has been caused to the applicants by adopting this mechanism, hence, malicious intent and abuse of process of Tribunal is established.

14. It is also not in dispute that the Financial Creditor has been incorporated in April 2019 with a paid up capital of Rs. 1 lakh only. It has borrowed 57 lakhs in three tranches of Rs. 20 lakhs, Rs. 23 lakhs and Rs. 14 lakhs on 10.05.2019, 13.05.2019 and 15.05.2019 respectively from M/s Chajjer Credit & Investments Pvt. Ltd. Out of this, Rs. 50 lakhs have been given to the Corporate Debtor in two tranches on 23.05.2019.

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The main object of the Financial Creditor is to engage in the business of accommodation services (room), hotels, motels etc. which is incidentally the activity of the Corporate Debtor as well. It has been claimed by Financial Creditor that these loans were taken for its business purposes. However, anticipating some delay thereon, these were lent to the Corporate Debtor. We are amused as to how this plea is being made as there is hardly any gap between taking of loan and giving of loan as both these transactions have happened within a span of less than 15 days. Further, no material has been brought to record as for what business purpose such borrowing of loan by Financial Creditor was done. We are further of the view that no prudent business man would give loan without having any security to an unknown concern immediately after its incorporation particularly where it is not engaged in this activity and that too by borrowing the money. It has also not been brought on record that how much net interest margin the Financial Creditor could have earned. Hence, if such loan was not required for its business purpose, then a prudent business man would normally return the loan instead of burdening with the risk of non recovery of loan that is given to somebody without security. On the basis of this analysis, a case of malafide is further made out.

15. Next fact is similarity of name of both Financial Creditor and Corporate Debtor. Section 4(2) of Companies Act, 2013 provide that name of proposed company cannot be identical or resemble too nearly to the name of the existing company registered under this Act or any previous company law. Earlier to this specific provision, guidelines were issued to this effect and even names were reserved for certain period for the applicant thereof. In case of such situations alternate names were sought or non objection used to be obtained. Hence, this provision sufficiently indicates that there is connection with the Financial Creditor and the Corporate Debtor or its constituents particularly when it was pleaded before us that Corporate Debtor had not raised any objections in this regard. Though it has been denied both by the Financial Creditor and Corporate Debtor, but from the statement of account of the Financial Creditor with Kotak Mahindra Bank bearing account no. 4412875263 which is annexed at Page 47 of the main Company Petition in C.P. No. 1278/KB/2019

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wherein transactions of loan by Financial Creditor to the Corporate Debtor have taken place, there is a transaction of giving of loan to Prabha Surana on 30.05.2019 to the tune of Rs. 25 lakhs by way of transfer which means that the accounts of the Financial Creditor and the Corporate Debtor are in the same branch. Further, the said loan has been returned by Prabha Surana on 2.7.2019. Thus, this transaction establishes the connection between the Financial Creditor and the constituents of Corporate Debtor who are the ultimate beneficiary of admission of application filed u/s 7 of IBC, 2016 beyond any doubt.

16. Further, it is not disputed that a sum of Rs. 30 crore has been taken by the constituents of the Corporate Debtor from the applicants against security of the shares of the Corporate Debtor (by own admission of Corporate Debtor during the course of proceedings) and such security has not been effected by way of registration of transfer application lodged by the applicants. Thus, it is a clear cut case of defrauding the applicants by getting moratorium under section 14 of IBC 2016. We also do not find any merit in the contention on behalf of the Financial Creditor that it is a case of collusion between the Corporate Debtor and the applicants because as compared to the claim of the Financial Creditor of Rs. 50 lakhs, the constituents of the Corporate Debtor are getting much more benefit which is many times of the said amount, i.e., Rs. 50 lakhs involved in section 7 application.

17. Thus, considering the facts and circumstances of the case as discussed above along with applicable legal provisions, we have no hesitation in holding that the order for CIRP was obtained fraudulently and with malicious intention to defraud the applicant by abusing the process of Tribunal. Accordingly, we set aside the order dated 31.10.2019 in C.P. No. 1278/KB/2019 and accordingly, the moratorium imposed u/s 14 of IBC, 2016 stands terminated.

18 As far as imposition of penalty under section 65 of IBC, 2016 is concerned, the same cannot be imposed without giving an opportunity of hearing to the defaulting party. Hence, we direct the Registry to issue notice to the Corporate Debtor, Mr. Shanti Kumar Surana and Mrs. Prabha Surana to present their case before this

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Authority to enable us to adjudicate the same, list the same for hearing on **4th March, 2020.**

ORDER

a) This application has stands allowed in terms indicated above.

b) This order of CIRP has been set aside, moratorium has been vacated.

c) We further direct the Registry to list the application filed by the applicant under section 58 and 59 of the Companies Act 2013 on priority.

Sd 18/2/2020

**(Virendra Kumar Gupta)**
**Member (T)**

Sd 18/2/2020

**(Madan B. Gosavi)**
**Member (J)**

Signed on 18 February, 2020