

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 828 of 2019

(Arising out of Order dated 11.03.2019, passed by National Company Law Tribunal, Mumbai Bench in C.P. No. 19/IB/NCLT/MB/MAH/2018)

IN THE MATTER OF:

**Software One India Private Limited,
A Company existing under the Companies
Act, 2013.**

**R/o 4th Floor, Kaveri Tower-1, 211,
Sector-D, Pocket-6, Vasant Kunj,
New Delhi-110070.**

...Appellant

Versus

**Magnamious Systems Pvt. Ltd.,
A Company existing under the Companies
Act, 2013.**

**R/o 102, Chintamani Kutir, Azad Road,
Vile Parle East, Mumbai – 400057.**

...Respondent

For Appellant:

Mr. R. Jawahar Lal, Advocate.

For Respondent:

Mr. Siddharth Tandon, Advocate.

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Aggrieved by the Impugned Order dated 11/03/2019 passed in C.P. No. 19/IB/NCLT/MB/MAH/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), *M/s. Software One India Private Limited/ Operational Creditor* preferred this Appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 (Hereinafter referred to as the 'Code'). By the Impugned Order, the Adjudicating Authority has dismissed the Application preferred under Section 9 of the Code on the ground that the Appellant herein was not authorised to initiate CIRP on the date of issuance

of Notice and, therefore, by ratification of the Board Resolution, Notice issued under Section 8 of the Code cannot be validated. While dismissing the Application, the Adjudicating Authority has observed as follows:

“9.Ld. Counsel has relied on the case law Hon’ble Supreme Court SCC 96 Maharashtra State Mining Corpn Vs Sunil S/o Pjundikarao Pathak wherein the Hon’ble Supreme Court has held that “the High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently “rectified” by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim rati habitio mandato aequiparatur, namely, “a subsequent ratification of an act is equivalent to a prior authority to perform such act.” Therefore, ratification assumes an invalid act which is retrospectively validated.

10. In view of the law laid down by the Hon’ble Supreme Court, Counsel for the Petitioner emphasised by subsequent ratification by the Board of Directors it shall be presumed that Board has initially authorised Ms Meetu Bajaj for filing insolvency APetition.

11. It is to be clarified that to initiate proceeding under Section 9 of the Code, notice under Section 8 is mandatory. After sending the valid notice under Section 8, if the Corporate Debtor fails to make the payment within 10 days, then only the person gets right to file petition under Section 9 of the IB Code, 2016.

12. Admittedly, on the date of issuance of Section 8 notice under IB Code, Petitioner was not authorized for initiation of CIRP. By the implication of the judgement of Hon’ble Supreme Court, Ld. Counsel for the Petitioner states that Ms. Meetu Bajaj has got authority for initiation of CIRP retrospectively. Since the proceedings/notice under Section 8 was issued without authority, even if we consider that Ms. Meetu Bajaj has been authorized for initiation of CIRP retrospectively, then demand notice under Section 8 is necessary and if the Corporate Debtor fails to make payment then only Petition under section 9 can be filed.

13. In this case, the Petitioner was not authorized to initiate CIRP on the date of issuance of notice and

therefore, by ratification of Board Resolution, Notice under Section 8 of the IB Code cannot be validated. Since Notice under Section 8 of IB Code is not valid, Petition under section 9 is not maintainable therefore, the petition under section 9 filed under I&B Code, 2016 is dismissed at the very threshold with liberty to file a fresh Petition.”

2. Submissions of the Learned Counsel appearing on behalf of the

Appellant:

- It is the case of the Appellant that the Appellant had filed Minutes of Meeting of the Board of Directors of the Appellant Company held on 05.10.2017, wherein, Ms Meetu Bajaj, Legal Counsel and Company Secretary of the Appellant Company was authorised to initiate proceedings before the Adjudicating Authority, but the said Resolution did not expressly state that she is authorised to initiate CIRP proceedings under the Code. Hence the Board of Directors of the Appellant Company in their Meeting held on 29.01.2019 expressly authorised Ms Meetu Bajaj to institute proceedings under IB Code 2016 before any of the Benches of the NCLT as well as before NCLAT. The Learned Counsel for the Appellant drew our attention to the certified copy of the Resolution dated 29.01.2019 alongwith Additional Affidavit of February, 2019
- The Learned Counsel further contended that the Adjudicating Authority erroneously relied on the judgement of this Tribunal in the matter of ***Palogix Infrastructure Pvt Ltd Vs ICICI Bank 2017 SCC OnLine NCLAT 266*** which is in the context of a Power of Attorney issued under Section 2 of the Power of Attorney Act which does not provide for ratification, whereas under the Companies Act, 2013, the Board of

Directors has the 'power to ratify' an act done by a delegate and, therefore, ***Palogix Infrastructure Pvt Ltd (Supra)*** is not applicable to the facts of this case.

3. Submissions of the Learned Counsel appearing on behalf of the Respondent:

- It is the case of the Respondent that the 'Demand Notice' was raised arbitrarily on the Respondent for which no purchase order was made; that the amount is already paid and that there is an existence of 'dispute'. The Learned Counsel relied upon several judgements with respect to pre-existing dispute as we are not making any observations regarding the merits of the Application, the ratio of the judgements relied upon with respect to the 'disputes', if any, is not being addressed to.
- The Learned Counsel strenuously contended that there is no specific authorisation for initiation of CIRP and the Adjudicating Authority was 'just' in holding that on the date of issuance of Section 8 Notice under the Code, the Appellant was not authorised as on the date of issuance of Notice and, therefore, by ratification the Board Resolution, Notice under Section 8 cannot be revalidated.
- A bare perusal of the Extracts of the Minutes of the Meeting of the Board of Directors of the Appellant Company held on 29.01.2019 clearly shows that Ms Meetu Bajaj, Legal Counsel and Company Secretary of the Appellant Company was authorised to file Petitions in NCLT as well as NCLAT. The relevant Extract of the Minutes is detailed as hereunder:-

“ii. Ms Meetu Bajaj, Legal Counsel and Company Secretary, be and is hereby authorised to execute power of attorney and to issue of letter(s) of authority, vakalatnama and any other document thereby delegating, empowering and authorising any employee of the Company or any other person to do any or all acts, deeds and exercise powers as are envisaged in the above resolution in the matter of filing of an instituting legal proceedings before the NCLT/NCLAT/High Court/Supreme Court.

iii. Ms Meetu Bajaj shall be deemed to have been conferred the powers specified under this resolution under the terms of board resolution No.3 dated 05th October, 2017 and this resolution shall be deemed to be in clarification/elaboration of powers conferred on Ms Meetu Bajaj under the said board resolution.

iv. Without prejudice to and notwithstanding anything contained in the foregoing paragraph, all acts, deeds and things done, all petitions, affidavits, documents and papers executed, filed or deposed, legal proceedings instituted before the NCLT/NCLAT/High Court/Supreme Court by the person(s) aforementioned with effect from 05th October, 2017 be and are hereby affirmed, ratified and made effect as actions done on behalf of the Company and shall be binding on the Company.

v. All acts, deeds and things to be undertaken, all documents and papers to be executed, filed or deposed, legal proceedings to be instituted before the NCLT/NCLAT/High Court/Supreme Court by the person(s) aforementioned shall be construed as actions done on behalf of the Company and shall be binding on the Company.”

4. At this juncture, it is relevant to reproduce the provisions of Section 9 sub-section (5) of the Code which is as hereunder:-

“9. Application for initiation of corporate insolvency resolution process by operational creditor.—

- (1) xxxx
- (2) xxxx
- (3) xxxx
- (4) xxx

(5) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no 3 [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been 3 [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional.

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

5. Be that as it may, the aforementioned Minutes of the Meeting of the Board of Directors of Appellant Company dated 29.01.2019 specifies that all actions taken by Ms Meetu Bajaj by way of earlier Resolution dated 05.10.2017 were ratified and she was clearly authorised by the Board of Directors to initiate

CIRP under the Code before the NCLT. Therefore, this Tribunal is of the earnest view that the Adjudicating Authority ought not to have dismissed the Application on such technical grounds. Having regard to the aforementioned Board Resolution dated 29.01.2019 and also the provisions of Section 9 subsection (5) of the Code, the impugned order is set aside and this Appeal is allowed and the Adjudicating Authority shall decide the Admission/Rejection of the Application as expeditiously as applicable keeping in view that the Application is of the Year 2019. The Adjudicating Authority shall proceed in accordance with Law uninfluenced by any observations made in this order. At the cost of repetition, we have not made any observations on the merits of the matter.

6. The Registry is directed to upload the Judgement on the website of this Tribunal and send a copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms Shreesha Merla]
Member (Technical)**

**New Delhi
18th April, 2022**

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