

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

**I.A. (IB) 1054/KB/2020**

**and**

**C.P. (IB) No. 771/KB/2020**

**A Petition under section 7 of the Insolvency and Bankruptcy Code, 2016.**

*In the matter of:*

**Raiyan Hotels & Resorts Private Limited**

**(CIN: U72200WB2001PTC093003)**

*... Financial Creditor*

*Versus*

**Unrivalled Projects Private Limited**

**(CIN:U7010WB2012PTC176122)**

*...Corporate Debtor*

**and**

**I.A. (IB) 1054/KB/2020**

**Under section 65 of the Insolvency and Bankruptcy Code, 2016 read with  
rule 11 of the National Company Law Tribunal Rules, 2016 and section  
340 of the Code of Criminal Procedure, 1973.**

*In the matter of:*

**Unrivalled Projects Private Limited**

**(CIN:U7010WB2012PTC176122)**

*... Applicant*

*Versus*

**Raiyan Hotels & Resorts Private Limited**

**(CIN: U72200WB2001PTC093003)**

*...Respondent*

Date of hearing: 26 April 2022

Order pronounced on: 30 June 2022

***Coram:***

Shri Rajasekhar V.K., Member (Judicial)

Shri Balraj Joshi, Member (Technical)

***Appearances (through video conferencing):***

*For the Financial Creditor in C.P. (IB) No. 771/KB/2020 and Respondent in I.A. (IB) 1054/KB/2020:*

1. Mr. P. S. Raman, Senior Advocate
2. Mr. Kumar Anurag Singh, Advocate
3. Mr. Prateek Gupta, Advocate
4. Mr. Manuj Nagrath, Advocate
5. Mr. A. Badar, Advocate
6. Mr. Zain A. Khan, Advocate

*For the Corporate Debtor in C.P. (IB) No. 771/KB/2020 and Applicant in I.A. (IB) 1054/KB/2020:*

1. Mr. Abhrajit Mitra, Senior Advocate
2. Mr. Shaunak Mitra, Advocate
3. Mr. Biswajit Kumar, Advocate
4. Mr. Debayan Sen, Advocate

**COMMON ORDER**

**(C.P. (IB) No. 771/KB/2020 and I.A. (IB) 1054/KB/2020)**

1. This Court convened through video conferencing.
2. The I.A. and CP are being decided in a common order as the relief prayed for in the I.A. and the decision given in the I.A. will also decide the fate of the Company Petition.

**C.P. (IB) No. 213/KB/2019**

3. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) by Raiyan Hotels & Resorts Private Limited, a company within the meaning of section 2(20) of the Companies Act, 2013 and represented by its Director, Partha Sarathi Dey, authorised by a Board Resolution dated 20.07.2020 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Unrivalled Projects Private Limited.

***Arguments of Mr. Dhruva Mukherjee, learned Senior Counsel for the Financial Creditor***

4. The case of the Financial Creditor is that the Corporate Debtor approached the Financial Creditor to purchase rights, title and interest of the premises no. 5A, Royd Street, Kolkata-700016 admeasuring about 30 cottahs 15 chittacks and 7 square feet together with building/structures. An indenture (sale agreement) was entered into between the Financial Creditor and the Corporate Debtor dated 27.09.2014 for a total consideration of Rs.21,60,00,000/-<sup>1</sup>. It is submitted that the Corporate Debtor made a payment of Rs.8,21,00,000/-, thereafter the Corporate Debtor defaulted in making payments as per the schedule in the sale agreement.
5. Learned Senior Counsel for the Financial Creditor submits that the financial debt claimed as on 01.05.2020 is Rs.13,24,16,700/- (Rupees Thirteen Crore Twenty-Four Lakh Sixteen Thousand and Seven Hundred only). It is further submitted that the date of default is 28.12.2017, which is the date of acknowledgement of liability and payment of Rs.1,00,000/- to the Financial Creditor.

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<sup>1</sup> Annexure A-2 at Pp. 25-36 of the C.P.

6. The Financial Creditor has proposed the name of Mr. Ajay Goyal, Regn. No. IBBI/IPA-001/IP-P01083/2017-18/11783 as the Interim Resolution Professional of the Corporate Debtor.

*Arguments of Mr. Abhrajit Mitra, learned Senior Counsel for the Corporate Debtor*

7. The learned Senior Counsel for the Corporate Debtor submitted that the petitioner is not a Financial Creditor and the debt does not come under the definition of financial debt as provided under section 5(8) of the Code. It is submitted that the basic condition under section 5(8) of the Code is that a financial debt must be a debt which is disbursed. It is further submitted that in the present matter, no money has been disbursed by the Financial Creditor. Reliance has been on *Nikhil Mehta & Sons versus AMR Infrastructure Ltd.*<sup>2</sup>
8. It is submitted that the alleged claim related to the sale of a property for a consideration of Rs.21.60Crore out of which Rs.8.21Crore was paid as reflected in the sale agreement. Thereafter, the entire balance amount has been paid by the Corporate Debtor through RTGS transactions to the Financial Creditor<sup>3</sup>. The learned Senior Counsel for the Corporate Debtor submits that due to the internal disputes in the management of the Financial Creditor hence the last and final tranche of payment could be made on 30.12.2015 after the disputes were settled.
9. It is further submitted that an agreement for Assignment of Tenancy was executed on 27.09.2014 and the Corporate Debtor made a payment of Rs.79,00,000/- (Rupees Seventy-Nine Lakh) to the tenant which was to be adjusted out of the consideration to be paid to the financial Creditor.

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<sup>2</sup> MANU/NL/0041/2017 dated 21.07.2017

<sup>3</sup> Annexure L at Pp. 91-93 of the reply to the C.P.

10. It is averred that the Company Petition is barred by limitation as the last payment was made in 2015 and no payment has been made on 12.12.2017. It is further submitted that the Financial Creditor has suppressed several facts and has not come with clean hands. It is further submitted that the payment of Rs.1,00,000/- on the basis of which this Company Petition has been filed was not made to the Financial Creditor but the said payment was made to Partha Sarathi Dey and hence the Company Petition is *ex-facie* barred by limitation.

11. The learned Senior Counsel asserts that the Company Petition is not complete as per the Code. The Board Resolution filed along with the Company Petition is not proper, it is further asserted that the Director, Partha Sarathi Dey who has filed the Company Petition is not eligible to file the Company Petition as he is a disqualified director. Mr. Mitra relied on the master data of the Financial Creditor in support of his contention that Mr. Partha Sarathi Dey was not a Director of the Financial Creditor at the relevant time. It is further submitted that Form 2 has not been filed along with the Company Petition.

12. It further stated that the Financial Creditor has suppressed the facts that payments have been made in the account of the Financial Creditor maintained with the HDFC Bank. The Financial Creditor has bank accounts in three Banks, i.e. HDFC Bank, Indian Bank and Indian Overseas Bank, but the Financial Creditor now claims that the Financial Creditor has only two Bank accounts and is misleading the Adjudicating Authority.

***Rejoinder of Mr. Dhruva Mukherjee, learned Senior Counsel in reply to the submissions made by Mr. Abhrajit Mitra, learned Senior Counsel***

13. The learned Senior Counsel for the Financial Creditor asseverates that payment of Rs.1,00,000/- (Rupees One Lakh only) was made by the

Corporate Debtor in consideration of the sale agreement. The transaction is reflected in the Bank statement of Axis Bank<sup>4</sup> on 12.12.2017, hence the Company Petition has been filed within the period of limitation.

14. It is asserted that the Company Petition has been filed by Partha Sarathi Dey, who is the 99% [79% as *per the indenture dated 29<sup>th</sup> October 2014*] shareholder of the Financial Creditor and hence the contention of the improper Board Resolution holds no significance as Partha Sarathi Dey is also a shareholder. Further, it is submitted that Partha Sarathi Dey continues to act as a director of the financial Creditor in terms of judgment and order dated 04.11.2019 passed by the Hon'ble High Court of Delhi in W.PIno. 9088 of 2018 titled as *Yogesh Khantwal versus Union of India & Anr.* and judgment dated 22.12.2020 passed by the Hon'ble High Court of Delhi in Writ Petition (Civil) No.10876 of 2020 titled as Partha Sarathi Dey Vs. Union of India & Ors. wherein the Hon'ble Delhi High Court set aside the disqualification of the Director and hence the argument does not hold strong, in view of the said judgment.

15. Learned Senior Counsel for the Financial Creditor contends that the Corporate Debtor has not made any payment and that the documents filed by the Corporate Debtor that are marked as Annexure K- Annexure N are forged and fabricated documents. It is further stated that the letter dated 30.12.2015 is forged and it has not been supported by a proper Board Resolution of the Directors of the Financial Creditor and hence the signature confirming the accounts has no relevance in the eyes of law the said issue is squarely covered by the Judgment of the Hon'ble Supreme court in *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan*,<sup>5</sup>(para 11).

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<sup>4</sup> Annexure A-4 at page 79 of the C.P.

<sup>5</sup> (2005) 1 SCC 212

**I.A. (IB) 1054/KB/2020**

16. The I.A. has been filed under section 65 of the Insolvency and Bankruptcy Code, 2016 (Code) by Unrivalled Projects Private Limited (Corporate Debtor) seeking leave to prosecute Partha Sarathi Dey for committing perjury.
17. The case of Corporate Debtor is that C.P. (IB) No. 771/KB/2020 is not maintainable as the authorised signatory who has signed the main Company Petition on behalf of the Raiyan Hotels & Resorts Private Limited (Financial Creditor) has been disqualified as a director by the Registrar of Companies (RoC).
18. The learned Senior Counsel for the Corporate Debtor avers that the Board Resolution of Raiyan Hotels & Resorts Private Limited dated 20.07.2020 wherein Partha Sarathi Dey has been authorised to file the Company Petition, has not been certified. Further, the Board Resolution has been signed only by Partha Sarathi Dey and the signature of the other directors are not in the said Board Resolution, hence the same is invalid.
19. It is further submitted by the learned Senior Counsel that on enquiry on the website of the Ministry of Corporate Affairs, it was found that Partha Sarathi Dey having Director Identification No. (DIN) 00658131 has been disqualified by the RoC under section 164(2) of the Companies Act, 2013, which is effective for a period of five years i.e. from 01.11.2016 to 31.10.2021<sup>6</sup>.
20. The learned Senior Counsel asseverates that the Company Petition has been wrongfully submitted as Partha Sarathi Dey has deliberately made false statements and has misled the Court and that Partha Sarathi Dey is guilty of perjury and has committed offences under the provisions of the

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<sup>6</sup> Annexure A of the I.A.

Indian Penal Code, 1860 and Code of Criminal Procedure, 1973. In support of this contention, the learned Senior Counsel placed reliance on *Re- Suo Moto Proceedings against R. Kruppan, Advocate*<sup>7</sup> (paragraphs 15 and 16) and *Sanjiv Kumar Mittal v. State*<sup>8</sup> (paragraphs 8-10).

21. The learned Senior Counsel for the Financial Creditor has not filed a reply to the I.A. but has relied on the rejoinder filed in the C.P.. The learned Senior Counsel submits that Partha Sarathi Dey, is the 99% shareholder of the Financial Creditor and hence the contention of the improper Board Resolution holds no significance as Partha Sarathi Dey is also a shareholder. Further, it is submitted that Partha Sarathi Dey continues to act as a director of the financial Creditor in terms of judgment and order dated 04.11.2019 passed by the Hon'ble High Court of Delhi in I(c)no. 9088 of 2018 titled as *Yogesh Khantwal versus Union of India & Anr.* and the judgment and order dated 22.12.2020 passed by the Hon'ble High Court of Delhi in Writ Petition (Civil) No.10876 of 2020 titled as *Partha Sarathi Dey Vs. Union of India & Ors.*

### *Analysis and Finding*

#### *Rajasekhar V.K. Member (Judicial)*

22. It is paramount that the maintainability of the Company Petition is considered before considering the merits of the Company Petition. The Corporate Debtor alleges that Partha Sarathi Dey has committed perjury and has filed the Company Petition despite the fact that he was disqualified as a Director by the RoC with respect to the India Reforms Infrastructure Limited. The Hon'ble High Court at Delhi in *Mukut Pathak & Ors. v. Union of India and Anr*<sup>9</sup>. has settled this proposition

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<sup>7</sup> (2001) 5 SCC 289, dated 12.05.2001

<sup>8</sup> 2011(121)DRJ328, dated 18.11.2010

<sup>9</sup> W.P.(C) 9088/2018, dated 04.11.2019

and held that on a plain reading of section 164(2) of the Companies Act, 2013, it is clear that the disqualification under section 164(2) does not affect the functioning as a director in companies, in which he held office before the date of disqualification. It is seen that the Writ Petition (Civil) No.10876 of 2020 filed by Partha Sarathi Dey was disposed after considering *Mukut Pathak & Ors. (supra)*. Considering the above we are satisfied that the Partha Sarathi Dey can function and perform his duties as a director of the Financial Creditor. Therefore, the contention of the Corporate Debtor, that Partha Sarathi Dey had no locus to file the Company Petition is not sustainable in law and hence, ***the I.A. filed by the Corporate Debtor is dismissed.***

23. Secondly, on bare perusal of the Company Petition and Board Resolution dated 20.07.2020, it is observed that the signatures in the Board Resolution and the Company Petition have not been scribed directly but have been pasted on a later date. Further the affidavit verifying the Company Petition has been affirmed on 16.08.2020, which has not been notarised, whereas as per records the Company Petition was filed before this Bench on 11.08.2020. Further, the Affidavit in support of the Application has been verified in Delhi but the address of the Deponent is that of Kolkata and no alternate or temporary address has been provided in the said affidavit.

24. The Financial Creditor had filed an application seeking extension of time for filing written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration due to the restrictions imposed by the Government of West Bengal but the same has not been filed in the record till date, therefore the Company Application is not complete in terms of section 7 of the Code.

25. The proviso to section 7(5) provides that the Adjudicating Authority shall give notice to the Applicant (Financial Creditor) to rectify the defect in the Company Petition and the Financial Creditor is bound to rectify the same within seven days of receipt of the said notice. The observations mentioned above can be rectified, but it is imperative on the part of the Counsel or Authorised Representative to be more vigilant so that these mistakes do not arise in the near future.
26. The Petition was heard and reserved for order on 09.07.2021 but on perusal of the records the above mentioned observations were made. Hence, clarification was sought by this Adjudicating Authority on 10.08.2021 with regard to the above points and the Financial Creditor have filed an affidavit affirmed on 16.08.2021 wherein the Financial Creditor has submitted that the Petition was filed during the period when restrictions were imposed by the Government due to the Covid-19 pandemic hence, the Form 2 could not be submitted initially. The Financial Creditor has filed a Form 2 ‘;’ along which is annexed with the affidavit. It is further submitted that there had been an error in the calculation of the total amount of debt due to the Petitioner, hence, the amounts are different in the Petition filed on 21.08.2020.
27. It is further submitted that the Petition under section 7 of the Code was initially filed by Mr. Deep Ghosh who was authorised by the Financial Creditor. However, after certain defects were pointed out by the registry, an affidavit was filed by Mr. Partha Sarathi Dey who also filed the Petition and it is submitted that the defective pages of the affidavit were replaced and the affidavit was sworn by Mr. Partha Sarathi Dey on 21.08.2020.
28. The explanation given, though not satisfactory can be accepted, but it is also to be noted that initially in Part III of the Form, the name of Mr. Ajay Goyal was proposed as the Interim Resolution Professional and

without any permission or application for change in the name of the proposed Interim Resolution Professional, the Petitioner has proposed the name of Ms. Sonu Jain in affidavit affirmed on 16.08.2021. No explanation has been given by the Petitioner explaining the reason for change in the name of the proposed Interim Resolution Professional. This casual behaviour on the part of the Petitioner towards filing the present Petition is rather appalling.

29. Going into the merits of the case, the fact that the Corporate Debtor purchased the right, title, and interest of 5A, Royd Street, Kolkata-700016 admeasuring about 30 cottahs 15 chittacks and 7 square feet together with building/structures is not in dispute.
30. The Corporate Debtor contends that the entire consideration amount has been paid and the Financial Creditor disputes the same, but no proper documents have been filed by the Corporate Debtor in corroboration of its contention that the entire payment has been made hence, we are not able to verify the same.
31. The Financial Creditor has relied on the payment of Rs.1,00,000/- made on 12.12.2017 as the last date of default, and on perusal of the records of the Financial Creditor, it is pertinent to note that the payment has been made in the account of Partha Sarathi Dey maintained with the Axis Bank<sup>10</sup>, hence the question that piques our mind is that if all the debts were paid as contented by the Corporate Debtor then why would the Corporate Debtor transfer an amount to Partha Sarathi Dey.
32. This, therefore, is a pointer towards acknowledgement of liability, though paid to the wrong account, hence the petition has been filed within limitation and there is a debt and a default.

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<sup>10</sup> Annexure A-4 at page 79 of the C.P.

*Balraj Joshi, Member(Technical)*

33. During arguments, the learned Counsel had raised the issue of six Cheques dated 30 September 2015 and had submitted that the entire balance dues had been paid.
34. With regard to the Petition, the board resolution appended with the petition does not carry the stamp of the Financial Creditor and is not even on the letter head of the company. In such circumstances, the petition should not be considered due to lack of proper authorisation
35. Further, in order to extend the limitation under section 18 of the Limitation Act, 1963, the acknowledgement has to be made in writing by the Corporate Debtor, whereas in the instant case the money has been deposited not in the account of the Financial Creditor but in the account of one of the directors of the Financial Creditor. No written acceptance is available on record which could be regarded as an acceptance of liability which then can be used to extend the limitation.
36. However, the assertion that the said pittance of Rs.1,00,000/- was deposited by the Corporate Debtor, which “coincidentally’ is timed so as to extend the limitation period, is too much of a coincidence. This deposit makes it look as if the petition is collusive and is filed so as to avoid returning the loan of ICICI by the Financial Creditor. Anyhow the question that fogs our mind is whether a payment made in some other account can be taken as an acceptance of the liability by the Corporate Debtor
37. Just because the bank entry mentions the name of the Corporate Debtor, is not a proof conclusive enough to mark it as an acceptance of the liability of this particular debt in question.

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

Raiyan Hotels & Resort Pvt. Ltd. v. Unrivalled Projects Pvt. Ltd.

I.A. (IB) No. 1054/KB/2020 and C.P. (IB) No. 771/KB/2020

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38. There is a difference of opinion between the Members of the Bench for the following points:

a. Whether the Petition made by the Financial Creditor is complete in all aspects?

b. Whether the deposit of Rs.1,00,000/- in the account of the Director can be considered as acknowledgement of debt or not?

39. Hence, the Registry is directed to refer this matter to the NCLT Headquarters, New Delhi, for placing the same before the Hon'ble President, for constitution of an appropriate Bench to decide the matter in terms of section 419(5) of the Companies Act, 2013.

**BALRAJ  
JOSHI** Digitally signed by  
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**Balraj Joshi  
Member (Technical)**

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**Rajasekhar V.K.  
Member (Judicial)**

30 June 2022

GGRB[LRA]