

## ATTENDANCE-CUM-ORDER SHEET OF HEARING

### NCLT, SPECIAL BENCH AT GUWAHATI

SB Case No.01/IBC/GB/2017  
(C.P.No.37 of 2017)

ICICI Bank Ltd.

... Petitioner

-Versus-

Palogix Infrastructure Pvt. Ltd. & Ors. ... Respondents

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

Mr R. Banerjee, Sr. Advocate  
Mr V. Jhunhunwala, Advocate

... for the petitioners

Ms M. Bhuteria, Advocate  
Mr R. Gupta, Advocate  
Ms S. Mukherjee, Advocate

... for the Respondents

Name of the Company	ICICI Bank Ltd. -Versus- Palogix Infrastructure Pvt. Ltd. & Ors.
Under Section	7

Sl. No.	Name & Designation of Authorized Representative (IN CAPITAL LETTERS)	Appearing on behalf of	Signature with date
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### ORDER

**Date of order: 30.03.2017**

This Proceeding has been necessitated in view of two divergent orders, passed by the learned Members of NCLT, Kolkata Bench in C.P.No.37/2017. While Mr V.P. Singh, learned Member (J) directed that application be returned to the applicant for rectifying the defects notified in the order, Mr S. Vijaraghavan, learned

Member (Technical) was of the opinion that the application was duly filed and, as such, same is required to be admitted.

2. Facts leading to filing of C.P.No.37/2017 may be narrated in a narrow campus as follows:

3. ICICI Bank, a bank incorporated under the laws of India with its registered office at ICICI Bank Tower, Near Chakli Circle, Old Padra Road, Vadodara 390 007, Gujarat, India and a Regional Office at ICICI Bank House, 3A Gurusaday Road, Kolkata, had filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, Code of 2016) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 (in short, Rules of 2016) against Palogix Infrastructure Private Ltd., a company incorporated under the laws of India with its registered office at 86 B/2, Topsia Road, Gajraj Chambers, Kolkata.

4. In the application, aforesaid ICICI Bank, (hereinafter referred to as financial creditor), has alleged that it had sanctioned a term loan to the tune of Rs.111 crores to M/s Palogix Infrastructure Private Ltd., (hereinafter referred to as the corporate debtor). Out of the aforesaid loan amount, an amount to the tune of Rs.65,60,00,000/- was disbursed to the Corporate Debtor. The dates of disbursement of loan, given in instalments, has been described in detail in the application. According to the financial creditor, on 31.12.2016, an amount to the tune of Rs.32,21,97,699.06 remains as outstanding debt since the Corporate Debtor defaulted in repayment of the loan in accordance with schedule fixed earlier.

5. In the application, it has been stated that the first default occurred on 26.06.2016 and thereafter, on 30.06.2016. In such circumstances, financial creditor, through its attorney, has filed an application under Section 7 of the Code of 2016 read with Rule 4 of the Rules, 2016 seeking initiation of resolution process as contemplated in the Code of 2016 which was registered as CP No. 37/2017.

6. On the same day, a copy of the application was sent for delivery to the Corporate Debtor as required under Rule 4 of the Rules, 2016. On hearing both the parties, the learned Members, NCLT, Kolkata Bench rendered orders expressing divergent views on the qualification of attorney holder to initiate proceeding under Section 7 of the Code of 2016.



7. I have perused the orders aforesaid and found that without any notice having been served on it, the corporate debtor entered appearance and objected the application on the ground that the Attorney who had filed the application under Section 7 did not have the requisite power to initiate a resolution process under Section 7 of the Code of 2016. In that connection, it has been stated that the power of attorney in question did not at all authorise the attorney holder *Sri Srinjoy Bhattacharjee* to initiate aforesaid proceeding.

8. In support of such contention, it has been pointed out that the Code of 2016 was brought into existence in 2016 whereas the Power of Attorney was executed on 20.10.2014. The Code of 2016, it is argued, contemplated and also put in place a whole lot of new ideas and conceptions vis-a vis the recovery of debt etc. due from various debtors which include the corporate debtors as well. What is however, important to note is that it has also prescribed very special procedures for realisation of such debts etc. which were mostly unknown to the Statutes holding the field till the time of coming into operation of Code of 2016.

9. In such a complex scenario, on the date of executing the power of attorney in favour of *Sri Srinjoy Bhattacharjee*, ICICI Bank (*herein after also referred as to donor*) could not have contemplated even remotely about authorizing *Sri Srinjoy Bhattacharjee* (*hereinafter referred to as donee*), to initiate corporate insolvency resolution process under the section 7 of Code of 2016, and that too, in the capacity of the financial creditor as contemplated section 5(7) of Code of 2016.

10. In support of such contention the decision in *Shantilal Khushaldas and Bors Pvt. Ltd Vs Smt Chandanbala Sughir Shah and Another* -reported in (1993) 77 Comp Cas 253 as well as the decision in *Coromandel International Ltd V Chemcel Biotech Ltd, reported in (2011) 166 Comp Cas 676* were relied on. In both those cases, it was held that it is a settled principle of law that the power of attorney needs to be interpreted strictly, reason behind such principle being *that* the powers given are not abused by agent or the actions are restricted within an only to the extent the power is indicated or given.

11. In the aforesaid cases, it was held that when the donor of a power of attorney had authorised the donee to initiate suits, the donee, being armed with such a power of attorney, cannot initiate a winding up proceeding since a winding up



proceeding under the company law can never be equated with a suit. The relevant part of Coromandel International Ltd (supra) is reproduced below:

*"A suit for recovery of money is essentially a suit between the parties where no third party can seek any indulgence or impleadment. The proceedings under the Companies Act for winding up are entirely different, a special remedy provided for and the idea is not to restrict the proceedings to the parties alone and its range is widened and all steps taken in winding up proceedings are in public interest. Sometimes the relief for winding up is denied when it is against public interest".*

*The settled principle is that the power of attorney must be strictly construed, the rationale behind the principle being that the powers given are not abused by agent or the actions are restricted within an only to the extent the power is indicated or given".*

12. Refuting such contentions, learned counsel for the financial creditor argued that the power of attorney in question had very specifically empowered Sri Srinjoy Bhattacharjeet to do varieties of acts which clearly included the power to initiate a resolution process under Section 7 of the Code of 2016 as well. The fact that under the power in question, the attorney holder was authorised to institute suit/ winding up proceeding/ other proceeding even before a whole lot of authorities including High Court/CLB / NCLT makes such a conclusion inescapably inevitable

13. According to the learned counsel for the financial creditor, the decisions, relied on by the counsel for the corporate debtor, have no application to the proceeding in hand since the facts and circumstances in the cases, relied on, and facts and circumstances in the case, before the Tribunal, are fundamentally different inasmuch as in the case in hand, the power of attorney had clearly authorised the Attorney to institute all kinds of suits or proceedings including a winding up proceeding/insolvency proceeding/ bankruptcy proceeding , and that too, even before the NCLT. However, such facts are conspicuously lacking in the cases, referred to from the side of the corporate debtor.

14. On hearing the learned counsel for the parties, the learned Members rendered, as stated above, two divergent opinions on the competence of the attorney holder to initiate the proceeding under section 7 of the Code. While the learned Member (Technical) did not find any fault in attorney holder's initiating a proceeding under section 7 of the Code, the learned Member (Judicial) upheld the objection, raised, holding that the Attorney holder did not have the required competence to initiate the proceeding under consideration.



15. For ready reference, relevant parts of the orders, rendered by learned Member (J) and Learned Member (T) are reproduced below:

**Order by: (Member) (J)**

*"In this case, general power of attorney is in favour of Shri Srinjoy Bhattacharjee which was given on 20.10.2014 to commence and institute any proceedings before any Court of Law including National Company Law Tribunal, but this power of attorney cannot be treated as specific power of attorney to initiate Corporate Insolvency Resolution Process under the Insolvency & Bankruptcy Code, 2016. The law laid down by the Hon'ble High Court is relating to the winding up cases which were moved under the Companies Act, 1956 and the provisions of IBC, 2016 are quite different. But in Corporate Insolvency proceeding also, the lis is not only between the Financial Creditor and the Corporate Debtor. Once the petition is admitted, the creditors, contributors, shareholders, etc. seek redress in the proceedings and even oppose proceedings. Upto this extent, insolvency proceedings are also like winding up proceedings which not only restrict the proceedings to the parties alone and its range is widened and all steps taken in insolvency proceedings are in public interest. A power of attorney must be strictly construed the rationale behind the principle being that the powers given are not abused by the agent and its actions are restricted within and only to the extent the power is indicated or given.*

*In the above circumstances, in my view, specific authorisation to initiate Corporate Insolvency Resolution Process is needed. It also appears from the application that the applicant has not filed any affidavit in support of the application. Therefore, the applicant has also to submit affidavit in support of the application. Notice be issued to the applicant petitioner to ratify the defect in the application within seven days of receipt of such notice. List on dated 15/2/17 for FO."*

**Order by : Member) (T)**

*I beg to differ from the Ld. Judicial Member in this respect proceedings made under Section 7 of the Insolvency & Bankruptcy Code, 2016 does not necessarily lead to liquidation of the Corporate Debtor. Under sub-section (1) of Section 20, the Interim Resolution Professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. It may lead to liquidation or winding up, in case no viable Insolvency Resolution Plan could be evolved in consultation with the Committee of Creditors. Moreover, in this case, the applicant is a bank which necessarily deals with huge number of loan accounts. The power of attorney mentioned above clearly mentions that the Legal Manager is empowered to initiate proceedings under the NCLT which automatically includes its role as an Adjudicating Authority under I.B.C. In case, this is insistent upon in every petition under the IBC, involving a Financial Creditor that the petition be filed*



*on the basis of a specific power of attorney on a Board's Resolution, it will defeat the very purpose of the IBC Code; which is for speedy resolution of insolvency cases.*

*The facts of the outstanding loan and the defaults have been established by the petitioner as evidenced by the records. The Ld. Counsel for the Corporate Debtor had not expressly denied these facts and as such the petition deserves to be admitted.*

*In my view, the petition is to be admitted and the Interim Resolution Professional (IRP) may be appointed as per section 16 of the Insolvency & Bankruptcy Code, 2016. The applicant may also proceed with the compliance of section 13 and 14 of the IBC pertaining to declaration of moratorium and public announcement.*

*The judgment of the Hon'ble High Courts referred to by Ld. Counsel for the Corporate Debtor specifically deal with the winding up proceedings under the Companies Act only".*

16. Following such divergence of opinions between the learned Members of NCLT, Kolkata, the Hon'ble President, NCLT was pleased to constitute a special Bench to decide the aforesaid point over which the learned Members of NCLT, Kolkata were in disagreement. For ready reference, the relevant part of the letter dated 20.02.2017 from Registrar NCLT, New Delhi addressed to the Hon'ble Members is reproduced below:

*"I am directed to convey that Hon'ble President is pleased to constitute following Bench to decide the matter regarding passing of different orders in Company Petition 37/2017 under section 7 of the Insolvency & Bankruptcy Code 2016 by Shri Vijai Pratap Singh, Member (Judicial) and Shri S.Vijaraghavan, Member (Technical) NCLT Kolkata.*

*NCLT, Special Bench at Guwahati.*

*Justice Shri P.K.Saikia, Member (Judicial)*

17. This is how the present proceeding cropped up before NCLT, Guwahati Bench.

18. The counsel for the parties, I find, reiterated the arguments which had they advanced before the learned members of the NCLT, Kolkata Bench. Mr R. Banerjee, learned Sr. Counsel for the financial creditor, has vehemently contended that the power of attorney, under which one *Shri Srinjoy Bhattacharjee* was constituted as attorney of ICICI Bank had given him unqualified and absolute power



to do various acts which obviously included the power to initiate corporate insolvency resolution proceeding under section 7 of the Code of 2016 as well. A very careful reading of the power of attorney in question makes it abundantly clear.

19. In that connection, it has been stated that the power of attorney is required to be read as a whole in order to understand true intent, meaning and purport of such power of attorney. In support of his contention, the learned counsel for financial creditor has relied on the decision of Hon'ble Privy Council in the case of Bank of Bengal vs. R. Chetty, reported in PC 1915 reported in 1915 PC 527.

20. In the aforesaid case, it was held that where an act purporting to be done under the power of attorney is challenged as being in excess of the authority to confer the power of attorney, it is necessary to show that on fair construction of the whole instrument, the authority in question is to be found within the four corners of the instruments either in express terms or by necessary implication. The relevant part of the judgment is reproduced below:

*"Applying to the power in the present case the canon of construction laid down in Bryant, Powis and Bryant, Ltd. V. La Banque du Peuple (1) viz. - "that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication," their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.*

21. According to Mr. Banerjee a harmonious reading of various clauses in the power of attorney, more particularly, clauses 3, 4 and 5, would undoubtedly show that under the power of attorney in question, the financial creditor gave his attorney full and complete authority to file any suit/ winding up proceeding, and, more importantly, the **"proceeding of any kind whatsoever"**, and that too, before any Court/ Tribunal including the NCLT.

22. Referring to clause 9 of the power of attorney, it has also been submitted that under the power, the donor thereof had also authorized the donee to initiate insolvency/ bankruptcy proceeding even before the NCLT. Being so, when one reads the power of attorney in question taking into account all the facts and



circumstances, specified therein in their proper perspective, there cannot be any escape from the conclusion that *Shri Srinjoy Bhattacharjee* (donee) had required competence or authority to initiate a proceeding even under the Section 7 of the Code of 2016.

23. It is also the case of the financial creditor that there was no provision in the Code of 2016 requiring the Tribunal to issue notice to the corporate debtor giving the later an opportunity to object the initiation of a proceeding under section 7 of the Code and as such, the corporate debtor has no right, whatsoever, to point out any defect in the petition, so filed by financial creditor before the NCLT under Section 7 of the Code aforesaid.

24. As stated above, such contentions were strenuously disputed by Mrs Manju Bhutoria, the learned counsel appearing for the corporate debtor stating that the argument advanced from the side of petitioner is structured entirely on surmises and conjectures, and not, on law and logic. In that connection, it has been pointed out that the Code of 2016 was brought into existence in 2016 whereas the power of attorney, aforesaid was executed on 20.10.2014.

25. Learned counsel for the corporate debtor further submits that Code of 2016 contemplated a regime for recovery of debt etc which is fundamentally different from all the regimes which had been holding the field before coming into operation of the Insolvency and Bankruptcy Code of 2016. Therefore, on the date of execution of the power of attorney in favour of *Shri Srinjoy Bhattacharjee*, the donor could not have contemplated, even distantly, about authorizing the donee to initiate action under the Code of 2016. In support of such contention, the counsel for the corporate debtor has relied on the decisions, which were already placed before the learned members of NCLT, Kolkatta Bench

26. Replying to the contention that the corporate debtor has no right of hearing at the stage of initiation of a process under section 7 of the Code, it has been contended that since with the initiation of the proceeding under section 7 of the Code, the corporate debtor stands to suffer a whole lot difficulties of enormous size and nature, the process under section 7 of the Code cannot be initiated without giving the corporate debtor an opportunity of hearing, more particularly, to show that no debt, as contemplated in law, was not due from such debtor.



27. In support of such contention, my attention has been drawn to the decision of the Apex Court in the case of Automotive Tyre Manufacturers Association vs. Designated Authority & Ors., reported in (2011) 2 SCC 258. Both the sides have, however, submitted their written synopsis of arguments as well.

28. Since both the parties heavily relied on the power of attorney and since the power of attorney has been interpreted by the parties in their own way to advance their respective case, in order to appreciate the rival submission, I find it necessary to have a look at the relevant part of the Power of Attorney. For ready reference, the relevant parts of the same which have huge bearing on the question before this court are reproduced below:

*"4. To appoint pleaders, advocates and solicitors to appear and act on behalf of ICICI Bank in any Court of justice or Tribunal or Recovery Officer or before any revenue and/or Income-tax, Gift-tax, Wealth-tax, Recovery, Refund, Appellate, Assistant Commissioner, Income-tax, Tribunal, Company Law Board/ National Company Law Tribunal and/or before other forums and/or other officer or officers and to revoke such appointment and to substitute any others in their place and stead.*

*5. To sign, verify and execute all vakalatnamas, plaints, recovery applications, written statements, counter-claims, complaints, petitions, company petitions, winding up petitions, appeals, reviews, applications, affidavits, power of attorney and papers of every description that may be necessary to be signed, verified and for the purpose of any suit, proceeding for recovery or for enforcement of security or for preservation and protection of security, original application, interim applications, miscellaneous application, intervener application, notice of motion, action, appeals and proceedings of any kind whatsoever in any court of Law and/or Tribunal and/or Recovery Officer, including but not limited to High Court/National Company Law Tribunal/Company Law Board, whether of original, appellate, testamentary or revisional jurisdiction, established by lawful authority or before the Income-tax, Gift-tax, Wealth-tax, Recovery, Refund, Appellate, Assistant Commissioner or Income-tax Tribunal and to do all acts and appearances or applications to any such Court/Tribunal or Courts and forums aforesaid in any suits, action, appeals or proceedings and all information of complaints that it shall or may be had, brought or commenced and to defend, answer or oppose the same or suffer judgment or decrees to be had, given, taken or pronounced in any such suits, action, appeals, proceedings, bills, information or complaints as the said Attorney shall be advised or my think proper and to execute decrees/Recovery Certificates or any other certificate/order for recovery of dues and also to bid at auction sales or to authorize all agents or sub-agents to bid at auction sales and purchase the property of the said auction sales, to make withdrawals of decretal amounts or sale proceeds from any court/Tribunals or appoint authorized agents or sub-agents to do the same.*



6. To appear before all Civil, Criminal, revenue, judicial and quasi-judicial officer or officers exercising administrative functions and before all local and public or other bodies and authorities as the occasion may require.

7. To cause these presents to be registered in the books of any bank, company or corporation whatsoever or in any public or government office or elsewhere as occasion may require.

8. To concur in doing any of the acts and things hereinbefore mentioned in conjunction with any other person or persons or parties interested in the premises.

9. To attend meetings of creditors in insolvency or bankruptcy or winding up matters of any borrower or debtor and to vote at such meetings and to accept composition and to take such proceedings as the said Attorney shall or may think proper.

10. To exercise all rights and privileges and perform all duties which now or hereinafter may appertain to ICICI Bank as holder of debentures, shares or securities or as otherwise interested in any company or corporation".

29. However, before proceeding further, I find it necessary to have a look at the decision, rendered by Hon'ble Madras High court in the case of *P.M.Desappa Nayanam Varu and Ors Vs Ramabhaktula Ramiah and ors* where Hon'ble Madras High court, amongst other things, had the occasion to consider the law relating to interpretation of power of attorney. For ready reference the relevant part is reproduced below: -

**Para 3.** ----- The principle governing the construction of a power of attorney are succinctly stated in Bowstead on Agency (sixth edition). The learned author says as follows as Page 73, "Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:

1. The operative part of the deed is controlled by the recitals.

2. Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

3. General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary and only when necessary for that purpose.

4. The deed must be construed so as to include all medium powers necessary for its effective execution".

30. Now, the question is "whether the power of attorney in question had ever bestowed upon the attorney holder the necessary authority to initiate a



proceeding U/s 7 of the Code." In order to reply such a query, one needs to take into consideration several facts and circumstances which occurred soon before and after the execution of power of attorney in question since all those facts and circumstances have huge bearing on the outcome of the present proceeding.

31. In this connection, one may note here that when the power of attorney was executed on 20.10 2014, the Companies Act 2013 has already been in operation. One may also note here that the Companies Act 2013 has brought numerous changes to the Act of 1956. Thus, the abolition of CLB and substitution of it by NCLT is one of such important changes brought about by the Act, 2013.

32. It is also worth noting that under the Companies Act, 1956, the matters pertaining to arbitration, compromise, arrangement and reconstruction and winding up of the companies etc. were entrusted to High Court/District Court whereas some other matters, such as, oppression and mismanagement etc were left to be decided exclusively by the CLB.

33. However, with the repeal of the Act of 1956, the matters, such as, arbitration, compromise, arrangement and reconstruction and winding up of the companies, which were earlier dealt with by the High Court/District Court, are entrusted to NCLT for disposal in accordance with the procedures, prescribed therein or the Rules, framed there-under. Similarly, with enactment of Act of 2013 and on the abolition of the CLB, the matters, triable by CLB, are also entrusted to NCLT for disposal.

34. But then, in so far insolvency of corporate debtor or liquidation thereof as well as insolvency and bankruptcy individual and partnership firm are concerned, the situations have undergone sea change following the enactment of the Insolvency and Bankruptcy Code, 2016. This is because of the fact that a complete new regime in respect of insolvency /bankruptcy of corporate debtor, individual and partnership firm has been put in place under the Code of 2016. More importantly, such a regime establishes detailed procedures for realisation of purposes for which such a system was brought into existence.



35. Equally importantly, the Code of 2016, amongst other things, constituted different Adjudicating Authorities to deal with the matters incorporated therein. Thus, for the adjudication of corporate insolvencies /liquidation etc, an Adjudicating Authority is constituted. Similarly, for the adjudication corporate insolvencies/bankruptcy of individual/partnership firm, another Adjudicating Authority is also created.

36. Quite significantly, the Code of 2016 also prescribes detailed but separate procedures for each of such Authorities for realisation of such conceptions/ objects etc which were, however, almost unknown to the old regime. A careful perusal of various provisions in the aforesaid Code makes such a conclusion inevitable.

37. One may note here that though the procedures for adjudication of insolvency and liquidation for corporate person etc, or the procedures for adjudication corporate insolvencies/ bankruptcy of individual/ partnership firm under the Code of 2016 have some resemblances to some of the procedures, prescribed for winding up of the companies under the Companies Act, 1956, yet, in many other respects, procedures, prescribed there-for, under the Code of 2016, are radically different from the procedures, prescribed under the old Act.

38. Situations being such, in my considered opinion, the procedures for adjudication of insolvency and liquidation for corporate person etc, or the procedures for adjudication of corporate insolvency/bankruptcy of individual/partnership firm under the Code of 2016 can never be equated with the proceeding for winding up/ insolvency/liquidation of the companies under the Act of 1956. In other words, the procedures vis-à-vis winding up/insolvency/liquidation of the companies etc. under the Act of 1956 and the procedures for insolvency/liquidation etc under the Code of 2016 are not one and same.

39. One may note here that under the power of attorney in question, the author thereof had bestowed various power on the attorney appointed thereunder which included the power to initiate winding proceeding as well. But then, in view of our foregoing discussion, its needs to be concluded conclusively that the power, so given to the attorney under the instrument above, can never be stretched to embrace



the power to initiate a corporate insolvency resolution proceeding under section 7 of the Code of 2016.

40. The above conclusion of mine draws unfettered support if one views the dispute before us from a yet another angle. Section 5 (1) of the Code says that Adjudicating Authority for the purpose of the Part II of the Code means NCLT, constituted under Companies Act 2013. Similarly, Section 79 (1) of the Code says that Adjudicating Authority for the purpose of the Part III of the Code means DRT, constituted under the Recovery of Debts due to Banks and Financial Institutions Act 1993.

41. Thus, it is quite clear that Code of 2016 itself constituted two totally new classes of Adjudicating Authorities for purpose of adjudication of the matters, covered by the Code, aforesaid and such Authorities were even not in existence when the power of Attorney was executed on 20.10.2014. All these speak loud and clear that under no circumstances, the power of attorney in question can be said to have authorised the attorney, appointed there-under, to initiate a corporate insolvency resolution proceeding under section 7 of the Code.

42. It may also be stated here that the learned counsel for the financial creditor has laid enormous reliance on the clause 9 of the power of attorney to contend that under such power, attorney concerned, was clearly authorized to initiate *insolvency or bankruptcy* proceeding under the Code of 2016. But such contention is found to be too farfetched one. Our foregoing discussion has made it more than clear and it needs no further restatements.

43. Even otherwise too, such argument hardly holds any water. This is because of the fact that under the instrument in question, the attorney was authorized only *"to attend meetings of creditors in insolvency or bankruptcy or winding up matters of any borrower or debtor and to vote at such meetings and to accept composition and to take such proceedings as the said Attorney shall or may think proper"*.

44. Such authorization, therefore, can never be construed to mean that under the power, the attorney was also authorized to initiate *insolvency or*



*bankruptcy* proceeding, as contemplated in the code of 2016. In that view of the matter, the contention of the learned counsel for the financial creditor, premised on clause 9 of the power of attorney, being found without any substance, is required to be rejected.

45. In view of our foregoing discussion, I have no doubt, whatsoever, in my mind that when the financial creditor executed the power of attorney in question on 20.10.2014, he could not have visualized even remotely that the donee would be required, one day, to initiate a corporate insolvency resolution proceeding under the Code of 2016 which, as stated above, was not even in existence in 2014.

46. It may be stated here that the broad facts and circumstances in the case in hand are very similar to the facts and circumstances in *P.M. Desappa Nayanim Varu & Ors. vs. Ramabhaktula Ramiah & Ors.*, reported in AIR 1952 Mad 559. Therefore, one may also peruse profitably the decision, rendered by Hon'ble Madras High Court in the case of *P.M. Desappa Nayanim Varu (supra)*.

47. In *Desappa Nayanim Varu's* case (*supra*), the plaintiff had executed a power of attorney in favour of person empowering him to *institute a suit before the Court of Munsiff, Tirupathi*. Accordingly, a suit was filed before the court aforesaid. However, the Court of Munsiff had found that the suit was beyond pecuniary jurisdiction of the court and, therefore, it was returned to the plaintiff to file the same before the proper court.

48. Accordingly, attorney had filed a suit before the Court of Subordinate Judge at Chittoor on the basis of power of attorney, executed earlier. But the Court of Subordinate Judge at Chittoor dismissed the suit on holding that the attorney holder did not have requisite competence to institute a suit before *the Subordinate Judge's Court of Chittoor since the said power of attorney gave the attorney to authority to initiate a suit only before the Court of Munsiff, Tirupathi* and not beyond.

49. The matter was then carried to Hon'ble Madras High Court by the way of an appeal challenging the order of the Subordinate Judge's Court at Chittoor. On hearing the parties, Hon'ble Madras High Court had found reason to affirm the



decision of the *Subordinate Judge*. The relevant part of the judgment is reproduced below:

*"This power of attorney is a special power conferred on Narayanaswami Naidu for a particular purpose. It says that the plaintiffs filed O. S. No. 314 of 1943 on the file of the Court of the District Munsif of Tirupathi & as it was not possible for them to conduct the same personally they appointed Narayanaswami Naidu as an agent to conduct the said suit. He is also authorised to conduct the entire proceedings which, have to be taken in the said suit. The document therefore confers an express power on Narayanaswami Naidu to conduct a particular suit pending in a particular Court. It does not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule properties. But Mr. Ramaswami Ayyangar argued that such power must be inferred by necessary implication; as if the plaint is returned for want of jurisdiction or for any other similar reason, some such power is necessary to enable the power of attorney to re-present the plaint and conduct the suit in a proper forum. If that were the intention' of the parties, they would have expressly conferred such power also. Further it cannot be assumed that the parties contemplated any such contingency as when the plaintiffs filed the suit they must have filed it only on the basis that that Court had jurisdiction to entertain and dispose of the suit. If the contention put forward on behalf of the appellants is accepted, the Court will be introducing new words in the power of attorney and also confer a new power on him. When the plaintiffs expressly authorised Narayanaswami Naidu to conduct a suit in a particular Court. I cannot hold that they intended to empower Narayanaswami Naidu to conduct that suit in any other Court. I am therefore constrained to hold, on a fair construction of the express words used in the power of attorney, that Narayanaswami Naidu has no power, under the power of attorney, to institute and conduct the suit in the Subordinate Judge's Court of Chittoor. In my view the conclusion arrived at by the Subordinate Judge is correct.*

50. In my view, the law, laid down in P.M. Desappa Nayanam Varu's case (supra), is clearly applicable to our case since the fundamental facts of both the cases are very similar. Being so, I have no hesitation in holding that *Shri Srinjoy Bhattacharjee* did not have requisite authority to initiate the proceeding under section 7 of the Code, 2016 against the corporate debtor.

51. It may be noted here that the counsel appearing for corporate debtor contends that the proceeding in hand cannot be initiated without giving the Corporate Debtor a fair chance of hearing. Such opportunity, contends counsel for the



Corporate Debtor, is required to be given so that it can establish that no debt, as contemplated in 5(8) of the Code of 2016 remains outstanding from the side of Corporate Debtor on the dates, so specified in the application.

52. Such contention is opposed to by the learned counsel for the financial creditor stating that this Special Bench was constituted only to answer only one question and same being, if, under the power of attorney in question, the attorney holder had necessary competence to present an application under section 7 of the Code and nothing else. He, therefore, urges this court not to try such a query which does not fall for consideration of this Special Bench.

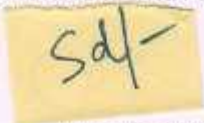
53. I have considered the rival submissions on this count and found the learned members of NCLT, Kolkata Bench rendered divergent opinions only on one point, same being, whether the power of attorney had given holder thereof the required competence to initiate a proceeding under section 7 of the code, and, on no other point. That being so, this Special Bench is required to decide only such a question and no others.

54. A perusal of the orders rendered by the learned Members of the NCLT, Kolkata Bench makes it clear. Therefore, this Bench has no occasion or the authority to embark upon the question which is sought to be presented before this court by the learned counsel for the corporate debtor.

55. In view of the foregoing discussions, I have found reason to concur with the finding arrived at by the learned Member (J) while differing respectfully from the conclusion, reached by the learned Member (T), NCLT, Kolkata Bench.

56. Resultantly, the reference is answered as stated above.

57. Registry is directed to send immediately the record along with a copy of the order to the NCLT, Kolkata Bench for doing further needful with intimation thereof to the President, NCLT, New Delhi.



Member (J)  
National Company Law Tribunal  
Guwahati Bench: Guwahati.

Samir