

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

IA No.380/2023 IN CP (IB) NO.81/ALD/2019

In the matter of

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016)

In the matter of:

M/S PARAS BUILDERS AND PROMOTERS

.... Applicant

Versus

M/S ASREC INDIA LTD.

...Respondents

In the matter of

M/S ASREC INDIA LTD.

Financial Creditor

Versus

M/S HARIG CRANKSHAFT

Corporate Debtor

Order pronounced on : 02.02.2024

Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances :

Sh. Srijan Mehrotra alongwith : *For Applicant*
Sh. Anuj Kumar, Adv. : *in IA No.380/2023*

Sh. Anand Chhibbar, Sr. Adv. : *For FC/ Res. No.1 in*
assisted by Sh. Suraj Prakash, *IA No.380/2023*
Adv.

Sh. Abhishek Anand alongwith : *For Res. No.3/ RP Mr. Saurabh*
Ms. Jasleen Singh Sandha, *Chawla present in person*
Adv. : *in IA No.380/2023*

ORDER

1. This Application has been filed by M/s Paras Builders and Promoters through its Executive Partner, Sh. Pradeep Singh (hereinafter referred as “**Applicant**”) on 09.08.2023 u/s 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “**I&B Code 2016**”) read with Rule 11 of the NCLT Rules 2016 against M/s ASREC (India) Ltd. (as “**Respondent No.1**”) on whose application filed u/s 7 of the I&B Code 2016, Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) was initiated against the Corporate Debtor, M/s Harig Crankshafts Ltd. vide the order dated 31.03.2023 of this Tribunal appointing Sh.

Saurabh Chawla as Interim Resolution Professional, who was later confirmed as Resolution Professional (hereinafter referred as “**RP**”) by the Committee of Creditors (hereinafter referred as “**CoC**”) comprising of only one Financial Creditor i.e. M/s ASREC(India) Ltd. Financial Debt in respect of which the CIRP has been initiated against the Corporate Debtor was due for payment to Bank of India that initially filed the application CP (IB) no.81/2019 u/s 7 on 12.03.2019 (hereinafter referred as the “**Captioned Petition**”) but later, it was assigned to M/s ASREC(India) Ltd vide assignment agreement dated 30.03.2022 (duly registered on 18.05.2022) and hence, vide order dated 11.07.2022 of this Tribunal, passed in respect of IA No. 153/2022, M/s ASREC (India) Ltd was substituted as Financial Creditor in place of Bank of India. Bank of India is “**Respondent No.2**” and Sh. Saurabh Chawla is “**Respondent No.3**” in this Application.

2. The substantial prayers inter alia made in this

Application are for setting aside the admission order dated 31.03.2022 as well as the order dated 11.07.2022, issuing direction for initiating proceeding against Respondent No. 1 and 2 under section 65 of I&B Code 2016, directing the Respondent No.3 to put on hold the CIRP of the Corporate Debtor in view of the alleged default on the part of the Respondent No.1 and 2 that certain facts regarding pendency of a suit in Commercial Court, Gautam Budh Nagar Uttar Pradesh challenging the assignment of the debt to Respondent No.1 by Respondent No2, and interim order dated 20.07.2022 passed by the said Court in this respect, were not brought before this Tribunal while passing the order dated 11.07.2022 substituting the Respondent No.1 as Financial Creditor and passing of the order dated 31.03.2023 for initiation of CIRP against the Corporate Debtor.

- 3.** The Applicant in the present Application is a Firm that offers services to companies whose accounts have been classified as Non-Performing Assets by safeguarding the

rights and interests of both the bank and the borrower by identifying buyers for the borrower's property, which is pledged with the bank.

4. In the instant case, when the Respondent No. 2, initiated legal action by filing an Original Application [OA No. 247/2011] against the Corporate Debtor and the Guarantors of the Corporate Debtor under Section 19(1) of the Recovery of Debts and Bankruptcy Act, 1993, before the Debt Recovery Tribunal (DRT) in Lucknow, to recover the outstanding debt of Rs. 38,96,76,930, the Applicant submitted a proposal vide its letter dated November 11, 2012, to the Respondent No. 2, seeking for repayment of loan of the Corporate Debtor by offering to purchase properties of the Corporate Debtor for a sum of Rs. 34 crore and the same was accepted by the Respondent No. 2 vide letter GBZ/ADV/479 dated 08.12.2012, confirming the sale of the assets of the Corporate Debtor by way of a private treaty under SARFESI Act 2002 for a sum of Rs. 35 crores subject to certain terms and conditions as enumerated in the said letter of the Respondent No.2.

5. Subsequently, vide letter dated 30.08.2014, the

Respondent No.2 informed to the Applicant that the contract made through the letter GBZ/ADV/479 dated 08.12.2012 has been cancelled as terms and conditions of the said contract could not be fulfilled by the Applicant. As stated in the Application, this termination letter was disputed by the Applicant alleging to be forged as having not been received by it and put entire blame on the Respondent No. 2 for non-fulfilment of the terms and conditions of the contract and prejudice being caused to it due to termination of contract as it has invested a huge sum of amount to pay the dues of the Corporate Debtor by the time the contract was terminated. Therefore, as stated in the Application, it instituted a Civil Suit No. 488 of 2015, which was renumbered and re-registered as Suit No. 1867 of 2019 after being transferred before the Civil Judge (Senior Division), Gautam Budh Nagar, for declaring the aforementioned communication letter dated 30.08.2014 as null and void. Subsequently, this suit was dismissed for non-prosecution but as stated in the Rejoinder Affidavit filed later, it has been informed that the same was restored by the Court of Civil Judge (Senior Division) Gautam Budh

Nagar vide order dated 23,11,2023 and it is still pending in the Court.

- 6.** The Applicant has further stated in the Application that it filed another Suit in the Commercial Court i.e. **Suit No. 183 of 2022 ; M/s Paras Builders and Promoters vs ASREC (India) Ltd, Bank of India and M/s Harig Crank Shaft Ltd.** when it came to its knowledge that the Respondent No.1 was trying to auction the concerned property of the Corporate Debtor vide publication of an Auction Notice dated 15.06.2022 and realizing that the Respondent No.2 has assigned its rights to the Respondent No.1, wherein the Applicant prayed for setting aside any illegal contract entered between Respondent no. 1 and 2 in respect of auction for the Corporate Debtor's property.
- 7.** Though, in the Application, it has been mentioned that Suit No.183 /2022 was filed against assignment of rights of Respondent No.2 to Respondent No.1, in the written submission filed later, it has been clarified that the Applicant has not made the specific prayer regarding the cancellation of the assignment dated 30.03.3022, however, the relief for the cancellation of the contract has been

sought therein, which in view of the Applicant would also include the relief for the cancellation of the Assignment Deed dated 30.03.2022.

- 8.** Thereafter, in the aforementioned suit, an interim order dated 20.07.2022 was passed by the Commercial Court, prohibiting the defendants (Respondent No. 1 and 2 in the present Application) of the above-mentioned lawsuit from auctioning the concerned property of the Corporate-Debtor or to create any third-party interests over the Corporate-Debtor's property in contravention to the rights of the Applicant's Firm.
- 9.** It has been vehemently pointed out by the Applicant that this interim order was in the knowledge of Respondent No 1 as well as No. 2 as both have moved an application praying thereby, inter-alia, for setting aside the aforementioned interim order dated 20.07.2022, however, the same was never informed by the Respondent No.2 or No. 1 to the Adjudicating Authority of this Tribunal before passing the admission order dated 31.03.2023.

- 10.** It has also been stated that the aforementioned interim order dated 20.07.2022 has continuously been extended from time to time and the same is still operative.
- 11.** In Justification of filing the present Application praying for setting aside the admission order dated 31.03.2023 u/s 7 of the I&B Code, the Applicant stated that it became aware of the admission order dated 31.03.2023 only on 26.05.2023 when Respondent No.3 moved to the Commercial Court for staying the proceeding in respect of Suit No. 183/2022 in terms of section 14 of the I&B Code, 2016 informing the Commercial Court about the aforementioned admission order dated 31.03.2023. Subsequently, necessary steps were taken by it to file the present Application to challenge this order.
- 12.** As stated in the Application, the Applicant after acquiring all pertinent documents related to the Captioned Petition learned that Respondent No. 1 had submitted one IA No. 433/2022 dated 26.11.2022 in the aforementioned Company

Petition placing certain documents before this Tribunal but the crucial information regarding Suit No. 183 of 2022 pending before the Commercial Court and the interim order dated 20.07.2022 passed in this respect was not placed before this Tribunal and it is alleged that the admission order dated 31.03.2023 was illegally obtained by deliberately concealing the above facts/documents.

13. In view of the Applicant, as the Respondent No.1 was aware about the aforementioned interim order dated 20.07.2022 but it consciously chose to hide the said fact from this Adjudicating Authority, thereby playing fraud over the court by filing the misconceived IA No. 153/2022 and IA No. 433/2022 before the Adjudicating Authority to get the aforementioned admission order dated 31.03.2023.

14. As per the Applicant, the Respondent No. 2 also, despite being aware about the fact that the aforesaid assignment agreement was being contested in the Commercial Court through the ongoing Original Suit No. 183/2022, and having

knowledge regarding the interim order dated 20.07.2022, deliberately chose not to apprise this Tribunal of these crucial developments.

15. The Applicant further avers that it was the duty of Respondents No. 1 and 2 to implead the Applicant in the aforesaid captioned petition since the interim order dated 20.07.2022 categorically directs that the Applicant's right with respect to the Corporate Debtor's property is not to be affected anyhow.

16. It has also been contended by the Applicant that it should have been heard in the aforesaid captioned petition as necessary party before passing of the aforesaid admission order dated 31.03.2023 by the Adjudicating Authority but the same was not done as it was not impleaded by the Respondents in aforesaid captioned petition, and as such, it is argued by the Applicant that the aforesaid admission order dated 31.03.3023 passed by the Adjudicating Authority without hearing Applicant as being a necessary party, if looked upon the touchstone of law, is liable to be set aside.

17. As regards the order dated 11.07.2022 in IA No. 153 of 2022, which substituted Respondent No. 1 for Respondent No. 2, the Applicant contended that it should also be nullified because the aforementioned assignment of the loan of the Corporate Debtor, done by the Respondent No.2 to Respondent No.1, is also under challenge in the aforementioned original suit no. 183 of 2022 before the Commercial Court and the same is pending.

18. As contended by the Applicant that the purpose of the CIRP is to revive the company, which in his view can be done by creating a third-party right over the assets of the Corporate Debtor. However, as pointed out by the Applicant that despite there being a restrain on the Respondent No.1 by the interim order dated 20.07.2022 for creating any such third party right, it has still gone ahead with the admission of the aforesaid Captioned Petition and is now calling upon the Resolution Plan, so that the assets can be sold/ transferred to any third party, which is in total disregard to the aforementioned

interim order dated 20.07.2022 passed by the Commercial Court.

19. After presenting the above facts and explaining the overall situation, the Applicant contended that the admission order dated 31.03.2023 should be recalled, and the aforementioned Captioned Petition ought to be dismissed.

20. The Applicant has also tried to explain about delay in filing of the present application stating that it came to its knowledge only on 26.05.2023 as made aware by the Respondent No.3 and thereafter, due to illness of local counsel and certain defects pointed out by the Registry in earlier application filed, which was withdrawn and then the present interlocutory application has been filed on 09.08.2023. Prayer for condonation of delay (if any) has also been made and instant IA has been prayed to be treated as filed within time.

21. The Application further asserts that this application falls within limitation period and is thus maintainable. In view of these averments, the

applicant has prayed for the relief as stated from page nos. 30 to 31 of the petition.

REPLY BY RESPONDENT 1

22. Respondent No. 1 i.e. M/s ASREC (India) Ltd to whom financial debts of Bank of India payable by the Corporate Debtor have been assigned for Rs. 26.25 crores vide assignment agreement dated 30.03.2022 and consequent to it, its name was substituted in place of Bank of India vide order dated 11.07.2022 of this Tribunal in IA 153 of 2022 and in whose favour as being Financial Creditor, the admission order u/s 7 of I&B Code dated 31.03.2023 against the Corporate Debtor was passed, filed its reply countering all the contentions raised in the Application and contending that the Applicant is neither a necessary party nor the proper party in view of the fact that no impleadment application was ever filed by it during the proceeding u/s 7 of I&B Code 2016 before this Adjudicating Authority hence, the admission order u/s 7 dated 31.03.2023 passed by this Adjudicating Authority cannot be challenged before the same Adjudicating

Authority praying for its recall and if the Applicant was really aggrieved by the admission order dated 31.03.2023, it could have challenged the same under section 61 of IBC within the prescribed time limit. Therefore, dismissal of this Application has been prayed. The relevant facts and legal position concerning this case as brought before us by the Respondent No.1 in the Reply, are discussed in paras as follows.

23. The Applicant in present case i.e. M/s. Paras Builders and Promoters came into picture during the pendency of Original Application (OA) filed by the Respondent No.2 i.e. Bank of India before the Debts Recovery Tribunal, Lucknow for recovery of its dues from the Corporate Debtor, when it allegedly approached Bank of India for purchase of assets of the Corporate Debtor. However, when the said M/s. Paras Builders and Promoters failed to pay for alleged purchase of assets of the Corporate Debtor, the Bank of India terminated the purported Agreement vide communication dated 30.08.2014.

24. A Suit filed by M/s. Paras Builders and Promoters in 2015

as Civil Suit No. 488/2015 in Ghaziabad Court and subsequently being transferred to Gautam Budh Nagar Court and renumbered as Suit No. 1867/2019 for declaring the communication dated 30.08.2014 (in which the Bank of India terminated the Agreement) as null and void, was dismissed due to non-prosecution and has not yet been restored.

25. Thereafter, the Original Financial Creditor i.e. Bank of India assigned its financial debt recoverable from the Corporate Debtor to Respondent No. 1 for a sum of Rs. 26.25 crore vide agreement dated 30.03.2022, which amount has also been duly paid to Bank of India.

26. Subsequent to aforesaid agreement, M/s Paras Builders and Promoters filed Commercial suit No. 183/2022 in the Commercial Court at Gautam Budh Nagar for setting aside the contract between the Original Financial Creditor, i.e. Bank of India and the Respondent No.1. In this suit, an interim restraint order dated 20.07.2022 was also passed by the Commercial Court, restraining the Respondent No.1 from auctioning the property or establishing any third-party interests till the next hearing in the said commercial suit. It

is further stated that though the answering respondent has filed an application for vacation of the said interim restraint order in the Gautam Budh Nagar Commercial Court, the same is yet to be heard and thus, the said restraint order is still continuing.

27. It is further contended that application u/s 7 of the I&B Code 2016 has been admitted vide order dated 31.03.2023 in terms of section 7(5) of the I&B Code, 2016 after this Tribunal was satisfied as there being “*Financial Debt*” and “*Default*” on the basis of the order of the Debt Recovery Tribunal and also a Recovery Certificate got issued thereafter, and also the Corporate Debtor gave its no objection for admission of the Application under section 7 of I&B Code by way of an Affidavit. A moratorium in terms of section 14 has also been declared and IRP/RP has been appointed who has been taking all necessary steps for resolution of the Corporate Debtor in terms of the provisions of the I&B Code, 2016.

28. While dealing with the main grievance of the Applicant regarding non-disclosure of the restraint order issued on 20.07.2022 by the learned Commercial Court, Gautam

Budh Nagar, in Commercial Suit No. 183/2022, it is submitted by the Respondent No.1 in the reply that the restraint order dated 20.07.2022 restrained the Respondent from auctioning the property or creating any third-party interest, is not a relevant fact having any bearing on the admission of the Application under section 7 of the I&B Code, 2016 or the ongoing proceedings.

29. The Respondent No.1 further contends that even assuming for the sake of argument that if the answering respondent had brought the restraint order to the attention of this Tribunal, the tribunal would have still admitted the Application under Section 7 of the I&B Code, 2016, since there was undisputed default committed by the Corporate Debtor in payment of financial debt exceeding the threshold limit towards the Bank of India. Therefore, it is forcefully stressed that aforementioned restraint order dated 20.07.2022 was not relevant during the admission process of the captioned petition under Section 7 of the I&B Code.2016 and is still not relevant with regard to the instant application.

30. It is alleged by the Respondent No. 1 that instead of filing

appeal against the admission order dated 31.03.2023 if the Applicant is really aggrieved, it is trying to do something which is not permitted to be done directly, which is against the well settled principle of law that says that what cannot be done directly cannot be done indirectly either.

- 31.** The Respondent contends that since the applicant is not a creditor/stakeholder of the Corporate Debtor, he has no locus to file the present application. This is also the reason why the Applicant was not impleaded in the captioned section 7 Petition.
- 32.** The Respondent No.1 also avers that there is no provision in the Code wherein a tribunal can modify/review or recall its own order. In such a case, the only remedy left with the applicant is to contest the admission order in a higher forum within limitation period but in the present case the limitation period to do so has already elapsed.
- 33.** In view of these averments, the respondent contends that the current Application under Section 60(5) of the IBC is liable to be rejected with heavy costs.

REPLY BY RESPONDENT 3

34. Mr. Saurabh Chawla, the RP of the Corporate Debtor being Respondent No.3, has also filed Reply countering all the contentions raised in the instant application and giving details of steps taken so far in respect of CIRP of the Corporate Debtor in compliance of the admission order dated 31.03.2023 by publishing Form A, holding various meetings of CoC for getting approval for the implementation of CIRP, publishing Form G, circulating Request For Resolution Plan (RFRP) as a result of which Expression of interest from 8 Prospective Resolution Applicants (PRAs) have been received and thus, it has been contended that he is conducting the insolvency proceedings of the Corporate Debtor in terms of the provisions of the I&B Code, 2016. In its Reply, apart from advertizing on the facts of the case as has already been discussed while dealing with the Reply of the Respondent No.1 in foregoing paras, the Respondent No.3 has opposed the present

Applications raising the contentions that the Applicant does not have locus before this Adjudicating Authority to challenge assignment agreement dated 30.03.2022 executed between Respondent No.1 and Respondent No.2. He has also pointed out that the Adjudicating Authority has not been vested with the power to recall or review and modify its own order, instead it can only be exercised in exceptional circumstances where any procedural error has been committed in delivering of the earlier judgment/order and the Applicant is neither a creditor nor a stakeholder of the Corporate Debtor as admittedly no claim has been filed by the Applicant. While raising these contentions, following submissions have been made: -

- i.** As regards to the letter dated 08.12.2012 of the Respondent no. 2 issued in response to proposal of the Applicant dated 11.11.2012 for purchasing the property of the Corporate Debtor, the Applicant alleged that there was an understanding with Respondent No. 2 by way of an Assignment Agreement, however, the

Applicant has nowhere annexed the same with the present application to substantiate its allegation. Further, on bare perusal of the letter dated 08.12.2012 from Respondent No. 2 to the Applicant, it can be clearly inferred that there is no indication whatsoever that Respondent No. 2 in no manner whatsoever executed any agreement with the Applicant to take over and settle all the statutory liabilities arising out of the accounts of the Corporate Debtor.

- ii.** That the Assignment Agreement cannot be challenged before this Adjudicating Authority, particularly by a third party who has no knowledge of its existence. Reliance is placed upon the judgment of "**Lalan Kumar Singh, Executive Director (Under Suspension) Shareholder of M/s GPI Textiles Limited V/s 111/s Phoenix ARC Pvt. Ltd. & Anr. (CA) (AT) (INS) No. 485 of 2018**", wherein, it was held by Hon'ble NCLAT that *"The assignment cannot be challenged in the petition under Section 7 and too by a party which had knowledge of 'assignment deed' as back in the year 2012, and when the same was never challenged before a court of*

competent jurisdiction".

- iii.** That the Applicant has not assailed Assignment Agreement dated 30.03.2022 before the Court of any Competent Jurisdiction.
- iv.** The validity of Assignment Agreement being challenged by the Applicant before this Adjudicating Authority is misconcieved as this Adjudicating Authority is neither appropriate Court of law nor has been vested with such jurisdiction to look into the veracity or validity of the Assignment Agreement in view of the law laid down by the Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd & Ors. v Union of India & Others (2000) (4) SCC 311** in addition to decision of the NCLAT in **Lalan Kumar Singh (supra)**
- v.** That this tribunal does not possess the power to recall an order. The respondent states that the Applicant submitted the current application seeking recall of the order dated 11.07.2022 issued by this Adjudicating Authority in IA. No. 153 of 2022 in C.P.(IB) No. 81 of 2019, and this request was made more than a year after the above mentioned order. Further, the Applicant was

not even a party to the Assignment Agreement, which served as the basis for I.A. No. 153 of 2022 presented before this Adjudicating Authority.

- vi.** That on mere reading of the contents of the present IA No. 380/2023 clearly indicates that although in the preamble it is mentioned as a "Recall Application", yet it is only an "Application" praying for "Review" of the orders dated 11.07.2022 and 31.03.2023 passed in the Company Petition (IB) No. 81 of 2019 by this Adjudicating Authority, in the strict sense of the provisions of the Code.
- vii.** That there is no express provision for a "Review" under the National Company Law Tribunal Rules, 2016. Moreover, the Applicant cannot fall back upon Rule 11 of the NCLT Rules, 2016, which provides "inherent powers."
- viii.** That this Adjudicating Authority has not been vested with power to review and modify its own order, as duly held by the Hon'ble Appellate Tribunal in the matter of **Dinesh Goyal v. DCB Bank Ltd., Company Appeal (AT) (Insolvency) No. 702 of 2019.**

- ix.** That the power of review is not an inherent power and even Rule 11 of the. National Company Law Tribunal Rules of 2016 cannot be invoked to confer the power of review upon this Adjudicating Authority, which has not been conferred by the legislature as duly held by the Hon'ble Appellate Tribunal in the case of **Mallina Bharathi Rao Vs Gowthami Solvent Oils Ltd & Ors in Company Appeal(AT) No.387 of 2018.**
- x.** That the Power of Recall is not the power of the Tribunal to rehear the case on merits, instead, it can only be exercised in exceptional circumstances where any procedural error has been committed in the delivery of the earlier judgment or order. Reference is made to the case of "**Union Bank of India v Dinkar T. Venkatasubramanian and Others, 2023 SCC Online NCLAT 283,**" wherein the Hon'ble NCLAT held that *"there is a distinction between review and recall. The power to review is not conferred upon this Tribunal but power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal as has been*

declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example; necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. There may be other grounds for recall of a judgment. Well known ground on which a judgment can always be recalled by a Court is ground of fraud played on the Court in obtaining judgment from the Court. We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised."

- xi.** That the above judgment passed by the Hon'ble NCLAT has been affirmed by the Hon'ble Supreme Court in the matter of “ **Union Bank of India vs Financial Creditor of M/s Amtek Auto Limited & Ors. Civil Appeal No. 4620 of 2023**”

xii. That the Applicant neither being a stakeholder nor a creditor to the Corporate Debtor, has no locus standi to prefer the instant Application seeking or raising any grievance against the CIRP admission order of the Corporate Debtor hence, the contention of the Applicant that this Adjudicating Authority could not have decided the admission of insolvency proceeding without rendering the opportunity to Applicant of being heard is contrary to very object and intent of the Code.

xiii. That contention of the Applicant that the proceedings filed by the Applicant before the Commercial Court in Original Suit No. 183 of 2022 should not be vitiated is not only misconceived but the same is contrary to the intent and object of the Code. As per the Code, upon commencement of CIRP of the Corporate Debtor, a moratorium as declared by this Tribunal is in force and therefore, any proceeding including the proceeding filed by the Applicant against the Corporate Debtor before the Commercial Court in Original Suit No. 183 of 20.22 cannot be continued or proceeded with in terms of moratorium as declared by this Tribunal

REJOINDER IN RESPONSE TO RESPONDENT 1's REPLY

35. In response to Reply filed by the Respondent No. 1, the Applicant filed Rejoinder reiterating its contentions earlier raised in its Application and also explaining and countering various arguments taken and contentions raised by the Respondent No. 1 in its Reply. All the points further raised in the Rejoinder are briefly discussed in paras as follows:-

36. The Applicant informed that the dismissal order dated 30.03.2022 in suit no. 488 of 2015 that was registered as Original Suit No. 1867 of 2019 in the District Court, Gautam Budh Nagar after transfer, challenging the letter dated 30.08.2014 of Bank of India terminating the contract with Applicant entered into with letter dated 08.12.2012, has now been recalled on 23.11.2023 by the same Court. The Applicant has attached a copy of the order from November 23, 2023, marked as ANNEXURE, NO. RA-1. Accordingly, it has been stressed by the Applicant that the said issue of for enforcement of its right under the agreement with Respondent No.2 is now lis pedens before the concerned court, as such, the Applicant is proper and a necessary party, which in view of the Applicant should have

been impleaded by the Respondents No.1 and 2 in the aforesaid Captioned Petition before the disposal of the the aforesaid Captioned Petition.

37. The Applicant submits that the interim order dated 20.07.2022 of the Commercial Court, has continuously been extended by the concerned Court and the same was in operation at the time of the admission of the aforesaid Captioned Petition vide order date 31.03.2023. As the suit no. 183/2023 was filed for setting aside the concerned contract executed between the Original Financial Creditor (Bank of India) i.e. Respondent No. 2 and M/s ASREC(India) Ltd. i.e. Respondent no.1 in respect of which the interim order dated 20.07.2022 was passed restraining the Respondent No.1 (substituted as Financial Creditor in Captioned Petition u/s 7), it goes to the root of the issue involved in the aforesaid IA 153/2022, and such, the aforesaid Captioned Petition u/s 7 could not have been disposed off finally till the outcome of the aforementioned Commercial Suit No.183/2022. Therefore, in view of

the Applicant, the Respondent No. 1 has played a fraud over the court concerned by not informing the aforementioned interim order dated 20.07.2022 at the time of the final hearing of the aforesaid Captioned Petition u/s 7 before this Tribunal, even though it was in its knowledge.

38. The Applicant has also questioned the Director of the Corporate Debtor, Shri Himmat Singh filing an affidavit dated 21.01.2023 stating therein to an effect that the Corporate Debtor/Harig Crankshaft Limited does not wish to contest the aforesaid Captioned Petition u/s 7 and has no objection to it being admitted to CIRP, though initially he was disputing/ objecting to the admission of the same. The Applicant submits that Shri Himmat Singh is not eligible to file the said affidavit as being an independent director and also contended that the sudden change in the opinion of Mr. Singh raises suspicion and the Applicant prayed this tribunal to inquire the same under Section 65 of the Code.

REJOINDER IN RESPONSE TO RESPONDENT No. 3's REPLY

39. As regards the Reply filed by the Respondent No.3, the Applicant filed a Rejoinder but stated that Respondent No.3 has no locus to object the present Application and it was added in the array of parties for the reason that the Respondent No.3 being RP was objecting the continuance of the Commercial Suit No. 183/2022 and as CIRP of the Corporate Debtor was initiated, the Applicant thought it proper to include RP as Respondent No.3 in the array of parties. In its Rejoinder, the Applicant countered the contentions of the Respondent No.3 making similar averments as it has made in the Application justifying filing of the present Application taking the plea that it was earlier not aware about the proceeding before this Tribunal initiated by Respondent No1 and 2 for starting of CIRP against the Corporate Debtor and when he became aware of the orders dated 31.03.2023 and 11.07.2022 passed by this Tribunal affecting the interest of the Applicant contravening the interim order dated 20.07.2022 of the Commercial Court passed to protect its interest during the pendency of Suit No. 183/ 2022 filed before the Commercial

Court, this Application has been filed for setting aside these two orders. According to the Applicant, these two orders could not have been passed in view of the interim order dated 20.07.2022 of the Commercial Court vide which transfer of assets of the Corporate Debtor or creating any third party rights in these assets was prohibited while under CIRP, the third part rights in the assets of the Corporate Debtor would be created affecting the right of the Applicant who has earlier made agreement with Bank of India (Respondent No.2) for purchasing those assets, which was later illegally cancelled and the same was challenged in the Court including challenging the contract between Respondent No.1 and 2 for assignment of debt pending in the Commercial Court in Suit No.183/2022 at present. Therefore, as per the Applicant, both the aforesaid orders passed by this Tribunal without the knowledge of the interim order dated 20.07.2022 deserves to be recalled and adjudicated a fresh after considering the above interim order.

FINDINGS AND ORDER

- 40.** We have heard the Ld. Counsel of the parties and perused the materials submitted on record.
- 41.** The issue for consideration before us is whether the admission order dated 31.03.2023 and the order dated 11.07.2022 needs to be set aside in terms of the prayers made in the Application. Entire facts of the Case have already been discussed in details in foregoing paras of this order and the issue before us is to decide whether the present Applicant is a necessary and proper party to have been impleaded while deciding the petition u/s 7 of I&B Code, 2016 and the interim order dated 20.07.2022 of the Commercial Court should have been considered by while passing the orders dated 11.07.2022 and 31.03.2023.
- 42.** In this regard, we have first examined the status of the Applicant as how it is related to Financial Debt owed by the Corporate Debtor for repayment, for which it committed default making it liable for initiation of CIRP in terms of the provisions section 7 because the IBC proceeding is a summary proceeding that has to be adjudicated strictly as per the provisions of I&B Code, 2016 and as interpreted by

the Hon'ble Supreme Court in two landmark decisions in cases of ***Innoventive Industries Ltd. vs ICICI Bank & Anr (Civil Appeal No 8337 of 20177)*** and ***Swiss Ribbons Pvt. Ltd. & Anr vs Union of India & Ors [Writ Petition (Civil) No.99 of 2018]*** and also keeping in view the provisions of section 238 that overrides provisions of other Acts as the orders under the provisions of the I&B Code, 2016 is to be passed in a time bound manner.

- 43.** The Corporate Debtor in this case, availed various loans from the Original Financial Creditor i.e. Bank of India but couldn't repay the same hence, its accounts were classified as NPA by the said Financial Creditor. Thereafter, the Bank also filed Original Application before DRT, Lucknow for recovery of the same. During the pendency of this suit, the Applicant came into picture, when it reportedly approached Bank of India for purchase of assets of the Corporate Debtor and entered into an agreement with the Bank vide letter dated 08.12.2012 issued by the Bank. However, when Applicant failed to pay for alleged purchase of assets of the Corporate Debtor, the Bank of India terminated the purported Agreement vide communication dated

30.08.2014.

Though a suit against such termination letter is pending with the Gautam Budh Nagar Court as being recalled vide its order dated 23.11.2023 after being initially dismissed due to non prosecution, such pendency of suit would not have any bearing on the CIRP of the Corporate Debtor as this suit is between the Applicant and the Bank of India being Respondent No.2 that has already received the consideration in lieu of assigning of debt of the Corporate Debtor vide agreement 30.03.2022 to M/s ASREC (India) Ltd. (Respondent No.1) and now, M/s ASREC India Ltd. is the Financial Creditor and in the CIRP of the Corporate Debtor, it is sole member of the CoC. Bank of India is nowhere in the picture as far as the CIRP of the Corporate Debtor is concerned and also, the Bank was not a party while passing the admission order dated 31.03.2023. Therefore, pendency of the aforesaid suit in Gautam Budh Court would not have any bearing on the validity of the admission order dated 31.03.2023.

44. Bank of India subsequently entered into an Assignment Agreement dated 30.03.2022 with M/s ASREC(India)Ltd. by

which financial debt recoverable from the Corporate Debtor was assigned to M/s ASREC India (Respondent No. 1) for a sum of Rs. 26.25 Crores duly paid to Bank of India.

45. Applicant claimed to have filed Commercial Suit No. 183/2022 in the Commercial Court at Gautam Budh Nagar after learning that the Respondent No.2 (Bank of India) wants to get the suit property (assets of the Corporate Debtor) auctioned through Respondent No.1 (ASREC) for the dues of the Corporate Debtor (as mentioned in pra 30 of the suit) and prayed *inter-alia* for issuing of declaration for continuing the letter/agreement dated 08.12.2012 and during such continuation, the contract or agreement entered into between Respondent no. 1 and 2 to auction the property of the Corporate Debtor is to be declared totally illegal and Respondent No.2 has no legal right to enter into such contract or agreement contrary to the rights of the Applicant, also prayed for issuing of permanents injunction against the defendants in suit (Respondents No.1 and 2 in the present Application and the Corporate Debtor) regarding the assets of the Corporate Debtor in continuation of letter agreement dated 08.12.2012 for its

auctioning or by creating third party interest in any other way [prayers in (a) and (b) of para no.40 of the suit].

46. We find that no where in the above suit, any plea or any ground has been taken challenging the assignment agreement dated 30.03.2022, rather prayer is made restraining the contract or agreement entered into between Respondent no. 1 and 2 to auction the property of the Corporate Debtor. The assignment agreement is governed by section 5 of the SARFAECI Act 2002, which reads as under:

5. Acquisition of rights or interest in financial assets.—

(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any 2[asset reconstruction company] may acquire financial assets of any bank or financial institution—

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

1[(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with

the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899):

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.]

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the 2[asset reconstruction company], such 3[asset reconstruction company] shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

1[(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).]

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the 3[asset reconstruction company], as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, 3[asset reconstruction company], as the case may be, had been a party thereto or as if they had been

issued in favour of 3[asset reconstruction company], as the case may be.

(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the 3[asset reconstruction company], as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the 3[asset reconstruction company], as the case may be.

4[(5) On acquisition of financial assets under sub-section (1), the 3[asset reconstruction company], may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the 3[asset reconstruction company] in such pending suit, appeal or other proceedings.]

47. In terms of the above provision, by entering into an assignment agreement, with a bank or financial institution, an Asset Reconstruction Company (**ARC**) acquire financial assets of a bank or financial institution. Financial asset is defined as “*debt or receivable*” in section 2(l) of the SARFAESI Act, 2002. Therefore, under the assignment agreement dated 30.03.2022, ASREC (INDIA) Ltd. being

an ARC has acquired debt recivable by the Bank of India from the Corporate Debtor and there is no agreement between them to auction the property of the Corporate Debtor as being suspected by the Applicant while filing the Suit No. 183/2022 because it was not aware about the true nature of agreement between the Respondent No. 1 and 2, which the Applicant itself has admitted in the written submission (page no 5) that at the time of the institution of the said Suit No. 183/2022, it was not aware about the exact date of assignment agreement dated 30.03.2022, however, since the Applicant had realised regarding **some contract** being entered upon between the parties, therefore, the same was referred to in relief sought in the Suit No. 183/2022. It is further stated by the Applicant that in the aforesaid Suit No. 183 of 2022, it has not made the specific prayer regarding the cancellation of the assignment deed dated 30.03.2022, however, the relief for the cancellation of the contract has been sought therein, which in view of the Applicant would also include the relief for the cancellation of the Assignment Deed dated 30.03.2022.

48. From the above submissions made by the Applicant, it is

clear that it was not aware about the nature of the agreement entered into between Respondent No.1 and 2 and therefore, the term “**some contrcat**” has been used and nature of contract for which relief was sought from the Comercial Court in the aforementioned suit is mentioned as “*agreement entered into between Respondent no. 1 and 2 to auction the property of the Corporate Debtor*” and relief has been sought to restrain such agreement.

49. We find that the interim injunction order dated 30.07.2022 of the Commercial Court in respect of the Suit No. 183/2022 was passed in the above background of restraining the agreement entered into between Respondent no. 1 and 2 to auction the property of the Corporate Debtor till the Suit No. 183/2022 was decided in which the Applicant had claimed right/interest over the assests of the Corporate Debtor by virtue of an agreement reportedly made made with the Bank of India (Respondent No2) vide letter dated 08.12.2012 of the Bank which though terminated by the Bank vide its letter dated 30.08.2022 but the same was challenged by the Applicant in Gautam Budh Nagar Court, which is still pending.

50. The background of filing of the Suit No.183/2022 as being against any contract for purported sale giving right of auction to the Respondent No.1 in respect of the property of the Corporate Debtor, can become very clear by reading the interim order dated 20.07.2022, english version of which is placed from page no 282 to 284 of the paper book of the Application. In the said interim order on page no 283 of the paper book, it is written that the plaintiff-firm has come to know that the sale amount has been fixed at Rs. 26 crores by the defendant/respondent no.2 giving the right of auction to respondent no. 1 in respect property of the Corporate Debtor while the plaintiff firm was ready to pay Rs. 27.73 Crores in favour of the defendant bank. It was also stated that the date of the said auction was fixed on 27.07.2022 as per Annexure A 12 and if the above auction is implemented, then the plaintiff firm will suffer huge economic mental and social damage, which is not possible to be compensated in any way, in respect of which it is sought by them before the court to restrain from affecting/ interfering with the rights of the plaintiff firm arising out of the agreement dated 08.12.2022- related to

the property of the Corporate Debtor by auctioning it or creating third party interest in any other way. Then, it is observed in the said interim order that prima facie, if defendant/respondent no.2 auctions the said property with the help of defendant/respondent no 1, then there was definitely a possibility of causing irreparable damage to the plaintiff and then it is stated in the said order that it was not possible to pass any order at that stage on Order 39, Rule 1 & 2 of CPC under the application without hearing the defendants and therefore, an interim injunction order dated 20.07.2022 has been passed by the Commercial Court in the above background stating that on finding the weightage in the application of the plaintiff, the defendants are prohibited from auctioning the property in question C-49, Phase -2, Noida, District Gautam Budh Nagar or in any other way creating third party interest or in any way affecting/interfering with the rights of the plaintiff-firm arising out of the agreement dated 08.12.2022 till next date, which as informed by the Applicant as being extended during subsequent hearings.

51. It is pertinent to note here that the Applicant though

claimed to have come to the knowledge of some contract between Respondent No. 1 and 2 for auctioning of the property of the Corporate Debtor but at the time of filing of Suit No. 183/2022 or during the course of its hearing when the interim order was passed on 20.07.2022, it was surprisingly not aware about the proceeding going on in the NCLT for initiating CIRP against the Corporate Debtor under the provision of I&B Code, 2016 contrary to his knowledge of any auction being contemplated by the Respondent No.2 with the help of Respondent No.1.

In fact, no such auction was ever planned during the pendency of proceeding before NCLT, which was filed before the NCLT in 2019 by Bank of India much before filing of the suit no. 183/2022 by the Applicant in the Commercial Court. Later, vide order dated 11.07.2022, name of ASREC (INDIA) Ltd. (Respondent No.1) was substituted as Financial Creditor after assignment agreement dated 30.03.2022 was entered into between parties. Therefore, when the interim order was passed on 20.07.2022 by the Commercial Court seemingly on the wrong information provided by the Applicant that an auction was planned on 27.07.2022, the

proceeding for CIRP in fact was under progress before NCLT and no such alleged auction was planned. Our above findings clearly shows that allegations of the Applicant of any fraud played on the Court in obtaining admission order dated 31.03.2023 is not correct, rather we find the action of the Applicant being inappropriate in not presenting the correct facts before the Commercial Court when interim order dated 20.07.2022 was passed.

52. Under I&B Code, 2016, proceeding u/s 7 is initiated when a Corporate Debtor has a “*financial debt*” and commit “default” in its repayment for the purpose of its insolvency resolution in order to maximise value of its assets and to bring it back on its feet so that interests of all its stakeholders are taken care of and not for the purpose of auctioning of assets of the Corporate Debtor, which is resorted as a last option in case resolution process does not succeed. Therefore, we find that the interim injunction order dated 20.07.2022 was obtained by the Applicant from the Commercial Court by not providing correct information about the auction, which was never in the offing and therefore, such interim order would thus not be material in

our opinion, to disturb the validity of the order passed for initiation of CIRP of the Corporate Debtor on being satisfied with the existence of a “Debt” and “Default” in respect of the Corporate Debtor. In fact, the Applicant has never disputed existence of the debt and default on part of the Corporate Debtor except harping on protecting its own interest arising out of a contract purportedly entered into with Bank of India vide letter dated 08.12.2022, which is also reportedly cancelled by the Bank vide its letter dated 30.08.2014, however, being contested in the Court. Protection of such contractual interest of a third party is nowhere envisaged while initiating CIRP of the Corporate Debtor under section 7 of the I&B Code, 2016 except looking into the existence of “*Financial Debt*” and “*Default*” as settled in the landmark judgments of Hon’ble Supreme Court in case of ***Innoventive Industries Ltd. vs ICICI Bank, (supra)***. The relevant part of this decision is reproduced below:-

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of

even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records

required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. **The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.** Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

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30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, **the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date.** It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

[Emphasis Supplied]

53. In the present case, we at the time of passing of the order dated 31.03.2023 found that there was a financial debt and there was default as even admitted by the Corporate Debtor in an Affidavit filed and the debt was not interdicted by any law and also the application was complete in all respect, therefore, we are of considered opinion that the admission order dated 31.03.2023 was correctly passed by us for initiation of CIRP against the Corporate Debtor in terms of law laid down by the Hon’ble Supreme Court in above judgment.

54. Even otherwise considering the interim order of the Commercial Court dated 20.07.2022, we find that the said interim order restrained the respondents from auctioning or creating any third-party interest in the assets of the Corporate Debtor. Vide admission order dated 31.03.2023, the Corporate Debtor is put under CIRP for its insolvency resolution. During this process, the Corporate Debtor is run by the RP as a going concern as per section 20 of the I&B Code, 2016 by protecting its assets and there is still neither any transfer or auction of assets nor creation of third party interest in the assets of the Corporate Debtor. After passing of resolution plan, the management of the Corporate Debtor only changes from the ex-management that defaulted on payment of debt to new management constituted by the Successful Resolution Applicant (SRA) that provides a plan for repayment of debt and in this process, all the assets of the Corporate Debtor remain intact without any transfer/sale or third party right being created in the assets of the Corporate Debtor. Therefore, the plea of the Appellant that CIRP is done by creating a third party right over the assets of the Corporate Debtor, has not been found legally

correct as under CIRP, Corporate Debtor being a company is a distinct legal entity that remains under existence as going concern having ownership on its all assets intact and only the management changes for running of the company without sale of assets or creation of any third party right in the assets of the company. Thus, the interim order dated 20.07.2022 has no bearing on the CIRP process. Moreover, due to the moratorium imposed by Section 14 of the Code, any auction under SARFAESI is explicitly prohibited.

55. Nature of the proceeding under the I&B Code, 2016 has been analysed by the Hon'ble Supreme Court in its judgment in case of ***Swiss Ribbons Pvt Ltd. & Anr vs Union of India in Writ Petition (Civil) No. 99 of 2018*** as being first and foremost for reorganization and insolvency resolution of corporate debtors in time bound manner in order to enable it to run as going concern and to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions and strengthen the overall economy. The relevant part of this judgment is reproduced as under:

“ 10. The Preamble of the Code states as follows: –

An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an

effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are 39 not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/ those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through 40 its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

56. Thus, it can be seen that objective of the I&B Code, 2016 under which the order dated 31.03.2023 has been passed is for the purpose of revival of the Corporate Debtor to enable it to run its business and repay its debts and not for the purpose of recovery of debts by selling/auctioning its assets as being contended by the Applicant to protect its interest under a contract with the Bank of India, which is already terminated by the Bank. Irrespective of the fact that for protection of such contractual interest, the Applicant has filed the Suit No. 183/2022 in the Commercial Court by not providing the entire facts to the Court correctly as already discussed in paras 46 to 51 of this order, that is still pending in the Court, revival process of the Corporate Debtor cannot be vitiated in view of the overall objective of the I&B Code, 2016 under which the admission order dated 31.03.2023 has been passed. Therefore, prayer of the Applicant for setting aside the admission order dated 31.03.2023 is liable to be rejected on this count also.

57. As regards the prayer of setting aside the order dated 11.07.2022 is concerned vide which M/s ASREC (India) Limited has been substituted as Financial Creditor in view

of assignment agreement dated 30.03.2022, we find that this assignment agreement still exists and also not challenged in any Court of Law. Also, the Assignment Agreement cannot be challenged before the NCLT, particularly by a third party who has no knowledge of its existence in view of the judgment of NCLAT in case of **Lalan Kumar Singh, (supra)**. As validity of the assignment agreement is not under challenge in any court of law and we can also not examine validity of such assignment agreement in view of above judgment, the order dated 11.07.2022 passed by this Tribunal based on such assignment agreement remains valid hence, prayer of the Applicant for setting aside the order dated 11.07.2022 is also liable to be rejected.

58. In view of our findings and discussions in foregoing paragraphs, the main prayer of the Applicant to set aside the admission order dated 31.03.2023 and the order dated 11.07.2022 is hereby rejected.

59. As main prayer of the Applicant for setting aside the two orders dated 31.03.2023 and 11.07.2022 are rejected,

consequently prayer for initiation of proceeding against the Respondent No. 1 and 2 under section 65 of the I&B Code, 2016 and directing Respondent No.3 putting on hold the CIRP of the Corporate Debtor is also rejected. As regards the pending proceeding in Commercial Court in respect of Original Suit No. 183 /2022 against the Corporate Debtor is concerned, the Respondent No.3 RP may take necessary action in terms of the provisions of section 14 of I&B Code, 2016 hence, prayer made by the Applicant to issue any direction to Respondent No.3 not to vitiate this proceeding is also rejected.

- 60.** As far as the question of recall of the order dated 31.03.2023 and 11.07.2023 is concerned, a quick perusal of the NCLT Rules, 2016 shows that this power can only be exercised by the Adjudicating Authority in exceptional circumstances on finding of any procedural error committed in delivering the earlier judgment including fraud played on the Court in obtaining the judgment. The **Hon'ble NCLAT in "Union Bank of India v Dinkar T. Venkatasubramanian and Others, 2023 SCC online NCLAT 283 held that**

“.....the power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal as has been declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example; necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. There may be other grounds for recall of a judgment. Well known ground on which a judgment can always be recalled by a Court is ground of fraud played on the Court in obtaining judgment from the Court. We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised....”

This decision of the NCLAT was upheld by Hon'ble Supreme Court in **“Union Bank of India v Amtek Auto, Civil Appeal no. 4620 of 2023.**

61. In view of above judgments and considering our findings as discussed in foregoing paras that the order dated 31.03.2023 and 11.07.2022 were passed after considering all the relevant facts and as per the provisions of the I&B Code, 2016, we find no grounds for recalling our order dated 31.03.2023 for any fresh adjudication hence,

contention raised in the Application in this regard is also rejected.

62. Accordingly, the present application is dismissed, with no order as to the costs.

-Sd-

**(Ashish Verma)
Member (Technical)**

-Sd-

**(Praveen Gupta)
Member (Judicial)**

Dated : 02.02.2024