IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

IA 133 of 2023 In CA 653 of 2022
In
CA(CAA) 153 of 2022

Application under Rule 11 of the NCLT Rules, 2016

IN THE MATTER OF

ICICI Bank Limited

ICICI Bank Tower, Near Chakli Circle, Old Padra Roiad, Vadodara, Gujarat – 390007.

Corporate Office at: ICICI Bank Tower, Bandra-Kurla Complex, Mumbai – 400051.

… Applicant

V/s.

Supreme Infrastructure India Limited

Supreme House, Pratap Gadh, Plot No. 94/C, Opp. IIT, Powai, Mumbai, Maharashtra - 400076.

… Respondent

IN THE MATTER OF

Supreme Infrastructure India Limited

Supreme House, Pratap Gadh, Plot No. 94/C, Opp. IIT, Powai, Mumbai, Maharashtra - 400076.

… Applicant Company

Order delivered on :- 05.03.2024

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Applicant : Sr. Adv. Gaurav Joshi a/w Anamica Singh and Nassir Shirkh

For the Respondent : Sr. Adv. J P Sen a/w Ashish Pyasi

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. The present Application has been filed by the Applicant seeking modification/vacation of the order dated 23.12.2022, more particularly part (d) of the order passed by this Tribunal in the captioned matter to the extent to enable the Applicant to pursue Company Petition (IB) no. 1312 of 2020 filed against the Respondent. The relevant portion of the said Order dated 23.12.2022 is reproduced herein below:

> "(d) The proceedings filed/initiated by any Financial Creditors of the Applicant Company before this Tribunal is pending is stayed till the time results of the meeting with Financial Creditors is placed before this Tribunal and the scheme is finally heard and disposed of.

Brief facts of the Application:

2. It is submitted by the Applicant that the Respondent has filed the captioned Company Application thereby proposing a Composite Scheme of Compromise and Arrangement ("Scheme") under Section 230 of the Companies Act. The Respondent had filed the Company

Application No. 653 of 2022 ("said Application") for an extension to call a meeting of the financial creditors as directed by the Order dated 29 July 2022 passed by this Tribunal in the captioned matter amongst other reliefs. This e Tribunal while allowing the extension for holding the meeting in the said Application also stayed the hearing in the applications filed by the financial creditors, including the Applicant herein until the results of the voting on the Scheme are not produced before this Hon'ble Tribunal. It is submitted that the said direction was passed ex parte without providing any opportunity of hearing to the financial creditors including the Applicant herein as the said Application was never served upon the Applicant.

3. The Applicant is one of the financial creditors of the Respondent and has a valid and subsisting debt due and payable by the Respondent, which has been defaulted by the Respondent. In view of the default, the Applicant had filed the Company Petition under Section 7 of the Insolvency & Bankruptcy Code, 2016 ("Code") on 26 August 2022. The Respondent had approached the Applicant for grant of certain credit facilities to be utilized for the takeover of the existing term loans and investing in Project Special Purpose Vehicle ("SPV") for built operate transfer projects in the form of redeemable preference shares issued by the Project SPV. The said request was acceded to by the Applicant and the Applicant issued Credit Arrangement Letter ('CAL') dated 29 June 2011 bearing reference no. CBG/2010-2011/CMOG No. 12/W45MUM/34624. By the said CAL, the Applicant sanctioned a Rupee Term Loan ("RTL") of an amount of Rs. 200 crores in favour of the Respondent. Thereafter, the Applicant issued an amendatory CAL on 30 June 2011 bearing reference no. CMOG No. 12/W45MUM/34692 and revised the rates of interest of

the RTL. The Applicant craves leave to refer and rely upon the CALs as mentioned above.

4. The Applicant and the Respondent executed Rupee Loan Agreement dated 1 July 2011 to define the terms and conditions of the RTL. The Applicant craves leave of this Tribunal to refer and rely upon the said Rupee Loan Facility Agreement dated 1 July 2011.

5. In or around 2015, the Respondent started facing financial stress and requested its lenders including the Applicant for restructuring the credit facilities (which includes the RTL of an amount of Rs. 125 crores). Pursuant to the request made by Respondent, the lenders held a Joint Lenders Forum ("JLF") meeting on 26 February 2015. In the said meeting, the JLF held a meeting and approved a restructuring package under which the lenders of the JLF agreed to restructure and reschedule the payment schedule of the outstanding dues under the respective credit facilities, including the RTL.

6. Pursuant thereto, the Applicant restructured the RTL of an amount of Rs.125 crores in the manner as set out herein below and issued CAL bearing reference no. 45/CBGMUM/81859 on 26 March 2015, the terms of which were accepted by Respondent:

Nature of facility	Amount
RTL	Rs. 115.61 crores
Fund Interest Term Loan ('FTL')	Rs. 19.80 crores
Total	**Rs. 134.69 crores**

The restructured credit facilities i.e., the RTL and FITL (collectively

referred to as "restructured credit facilities") were to be repaid as per the repayment schedule provided in Annexure I of the CAL dated 26 March 2015. The Applicant craves leave to refer and rely upon the CAL dated 26 March 2015.

7. In view of the restructuring of the credit facilities, inter alia, by CAL dated 26 March 2015, the JLF (including the Applicant) and Respondent executed a Master Restructuring Agreement (MRA) dated 30 March 2015 ("MRA"). The terms and conditions of the MRA were revised by the Amended and Restated Master Restructuring Agreement dated 12 June 2015 ("Amended MRA"). The terms and conditions of the MRA and Amended MRA also record the repayment of the restructured credit facilities to be secured by the *second pari passu* charge over the said Property. The Applicant craves leave of this Tribunal to refer and rely upon the Amended MRA.

8. In view of the restructured credit facilities, disbursements were made by the Applicant in he following manner:

Nature of the facility	**Dates of disbursement**
Restructured RTL	31 March 2015
FITL	Between 1 October 2014 and 31 March 2016

9. After availing of the restructured credit facilities, the Respondent began defaulting in the payment of the restructured credit facilities since 30 April 2016 and pursuant to the same, the account of Respondent was classified as Non-Performing Asset on 31 July 2016.

10. In view of the defaults committed by Respondent, the Applicant issued the Loan Recall Notice dated 4 August 2016 and thereby recalled the restructured facilities. The Applicant, by the said Recall Notice, also invoked the guarantee furnished by Mr. Bhawanishankar Sharma, Mr. Vikram Sharma. The Applicant by the Recall Notice, called upon the addressees there to make payment of outstanding dues of Re 140.83 cores, payable 31 July 2016. The Applicant craves leave to refer and rely upon the Loan recall notice dated 4 August 2016 as and when required.

11. Despite the receipt of the Recall Notice and Invocation Notice, no payments were made by either Respondent or SHHPL to the Applicant.

12. It is submitted that the Respondent is also a corporate guarantor for the credit facilities granted to another group entity of the Respondent ie., Supreme Vasai Bhiwandi Tollways Private Limited ("SVBPTL"). SVBPTL has availed of the corporate term loan of Rs. 35,00,00,000/- (Rupees Thirty-Five Crores only), out of which an amount of Rs. 22,00,00,000/- (Rupees Twenty-Two Crores only) was disbursed. The repayment of the said corporate term loan was secured by several securities, including the corporate guarantee of the Respondent.

13. Upon the default committed by SVBPTL, the Applicant issued Recall Notice on 10 February 2017 and also invoked the corporate guarantees provided by the Respondent and SHHPL. The Applicant invoked the corporate guarantee provided by the Respondent by its Notice dated 31 May 2018. The Applicant craves leave of this Tribunal to refer and reply upon the Notice dated 31 May 2018.

14. Owing to the defaults committed by the Respondent and its group

entities, the Applicant has filed the following proceedings against them.

i. Company Petition bearing no. 1312 of 2022 against the Respondent before the Hon'ble NCLT, (Mumbai Bench) under section 7 of the Code.

ii. Company Petition bearing no. 348 of 2022 against SHHPL before the Hon'ble NCLT (Mumbai Bench) under section 7 of the Code.

iii. Company Petition (I. B.) No. 321 of 2022 against Mr. Bhawanishankar Sharma before NCLT (Chandigarh Bench) under Section 95 of the Code. iv. Company Petition (I. B.) No. 322of 2022 against Mr. Vikram Sharma before NCLT (Chandigarh Bench) under Section 95 of the Code.

iv. Original Application No. 757 of 2020 against the Respondent and its mortgagors and guarantors before the Debt Debts Recovery Tribunal, Delhi.

v. Intervention Application bearing no. 356-359 of 2023 against SHHPL before the National Company Law Appellate Tribunal, New Delhi ("NCLAT").

15. It is pertinent to note that while the abovementioned proceedings are pending before the respective forums, the Respondent approached this Tribunal under 230 of the Companies Act for a Scheme between itself and its creditors by filing the captioned Company Application. Upon filing the captioned Company Petition, this Tribunal was pleased to allow the convening of the lenders' meeting for voting on the Scheme, by its Order dated 29 July 2022.

16. It is submitted that on a bare perusal of the Scheme, it will be apparent that the terms of the Scheme, if implemented, will lead to gross injustice and cause severe prejudice to the rights of the Applicant. The Applicant submits that the Scheme is one of the myriad attempts deployed by SIIL and its group concerns to defeat the recovery of the legitimate dues by the Applicant. The Respondent has craftily attempted to evade its obligations to pay the huge outstanding dues and also to take away the security created in favour of the Applicant to secure such payment obligations. The Scheme lacks the rationale for classifying the different brackets of the creditors within the same and has apportioned the amounts from the proceeds of such securities without considering the nature of the charge created in their favour, which essentially dilutes the securities created in favour of the Applicant.

17. It is reiterated that the Applicant has been objecting to the Scheme since the inception of the Scheme owing to its perversity. It is to be noted that the Respondent failed to consider the objections and revised the Scheme which continues to contain several anomalies. Furthermore, the Scheme has been devised with the sole intent of diluting and releasing the securities of the Respondent as well as its other group concerns on the basis of which the credit facilities were given. Moreover, various portions of the revised Scheme cannot be read together being mutually destructive and arbitrary or are drafted in a manner to defraud the Financial Creditors of the Respondent without considering the contractual rights of the Financial Creditors.

18. It is pertinent to note that the Respondent, in the garb of the Scheme, is not only trying to disentitle the secured creditors of their rights over the secured assets such as the said Property but has also been able to

stall the hearing in the applications filed under Section 7 of the Code by securing ex-parte direction by way of the Order dated 23 December 2022. Despite several opportunities provided to the Respondent, and a lapse of more than 6 months from the date of the passing of the said Order, the Respondent has failed to revise the Scheme in a manner which protects the rights of the lenders and now the same is to be put to vote in its current form. The Respondent has been able to achieve its objectives by securing protection under the said Order. It is submitted that the proceedings of the Scheme have no bearing, whatsoever, on the proceedings under the Code. It is, submitted that the Applicant was under a bona fide belief that after the objections taken by the Applicant and persistent requests, the Respondent would revise the terms of the Scheme and recognise the rights of the Applicant and other lenders as secured creditors. However, the Respondent has failed to do so.

19. Thus, it is imperative in the interest of justice that the direction passed in the said Order be vacated.

Submissions made by Respondents

20. In reply, the Respondent has submitted that the present Application taken out by the Applicant is frivolous and has been filed in order to create obstacle in the bona-fide attempt of the Respondent to satisfy its existing obligations towards financial creditors and derail the scheme of operational creditors already approved under section 230 of the Companies Act, 2013 vide order dated 16 June 2022 in CP (CAA) 18 of 2022 in CAA 401 of 2022. It is further submitted that the Applicant has been trying to do forum shopping and present Application is another attempt to extort the Respondent and the

other financial creditors.

21. It is further submitted that Supreme Infrastructure India Limited, a public listed entity, is one of the promising companies in India and had a turnover of Rs. 231.79 crores as of 31/03/2021. The Company undertakes engineering works of unrestricted value with most of the Government departments, public and private sector organizations. It is tribute to the company's outstanding performance that national and international contractors have expressed their interests for partnership on equal footing for mega size projects and it has received several awards and accolades for the work done by it.

22. The Respondent company's downturn has arisen due to several factors. As the Respondent Company is in Engineering Procurement and Construction business for government and semi government agencies and cash flow mis-match accrued due to the following:

    i. The Company subsidiaries have been awarded concession for road projects which are on Build Operate and transfer basis and the cash flow from these projects had suffered due to overnight change in PWD Maharashtra tolling policy pursuant to which certain class of vehicles were overnight added to toll- exempt category thus creating a shortfall in the revenue from projects to an extent that it created a revenue to obligation mis- match.

    ii. It is pertinent to mention that the Government agreed to compensate the Company for the loss incurred for change in tolling policy, however, there has been a substantial delay in receipt of compensation in lieu of stoppage of toll from Government of Maharashtra.

iii. The Company's further source of cash flow is from working on EPC basis with various agencies and a substantial delay in realization of payment from Government agencies like PWD, MCGM, MMRDA, CIDCO etc for the work done on contractual basis for them, has led to a cash crunch situation which otherwise would not have arisen.

23. It is pertinent to mention that the Company loan account with the Financial Creditors with the lead bank State Bank of India were classified as Non-performing Asset due to technical reasons and not payment related issues. It was pursuant to Reserve Bank of India conducted AQR audit of State Bank of India as during the said audit, the auditors of the Bank took a view that the restructuring of the Company done under the Joint Lenders Forum (Corrective Action Plan) was deemed to be double restructuring and hence the account was classified as Non Performing Asset with retrospective effect from January 2015 in spite of the fact that there existed no payment default February 2016 by the Company. This brought the Company to a complete standstill as the limits which otherwise were available to the Company were suddenly withdrawn by the bankers. The Company's attempts thereafter to resolve the stress by implementing the S4A scheme (under the relevant circular of RDI) were put to a sudden death in spite of Company doing all required to be done on its part in accordance with the RBI circular dated 12/02/2018. Thereafter, the further actions taken by the Company under the 12/02/2018 circular were again put to a mid-way death as the said circular was declared as Non-Est by the Hon'ble Supreme Court of India. The lenders of the Company having regard to the fact that the Company has at all times been willing to do all that is required to resolve the stress

backed by the fact that the forensic audits got conducted by the lenders did not have any siphoning or misappropriation comments .

24. All the lenders in their meeting held in July 2019 agreed and accordingly signed the Inter-Creditor Agreement. In-spite of explicit mandate given by RBI under the June 7, 2019 circular that if during review period, the mandate of majority is to restructure the account, all lenders must sign the ICA, ICICI Bank is delaying signing ICA on the pretext of changes in language of ICA. Exhibit "A" is copy of the Inter-Creditor Agreement entered into between the financial creditors of the Company which is annexed with the Company Petition.

25. It is pertinent to mention that the Applicant herein has attended and still continues to participate in all the Joint Lenders Meetings held for the purpose of considering the Scheme under the chairman appointed by this Tribunal.

26. Thereafter considering the COVID and post COVID circumstances, the lenders were of the considered view that in place of restructuring, the lenders should be given an early exit from the exposure to the Company.

27. it is also the case of the Applicant Bank that the resolution will take place under the IBC and it is also trying to create a conflict between the Companies Act, 2013 and IBC, 2016 by suggesting that the scheme can be considered only at the stage of liquidation and not CIRP. Therefore, the order should be vacated to the extent that the Applicant be permitted to proceed with its petition under section 7. If the above contentions and the stand of the Applicant bank is examined closely, it will clearly show that the present application as well as section 7 application is nothing but an attempt by the

Applicant to derail the scheme and arm twist the Respondent Company to succumb to its tactics. If the attempt of the Applicant is to realize the securities or recover its dues, then the same cannot be maintained before the NCLT as repeatedly the hon'ble Supreme Court in multiple cases has held that the IBC and NCLT cannot be used as a tool for recovery. Further, if the case of the Applicant is further tested with regard to its share of securities, which are created by different group company, then it is always open to the Applicant to realise them or enforce them. Further, the Scheme is only for the debt of the Respondent Company and qua other group companies, steps are being taken by the group companies. Therefore, the case of the Applicant falls on this ground as well.

28. The Respondent submits that the present Application filed by the Applicant Bank is premature as the voting is not yet to take place and therefore the contention of the Bank that it is greatly prejudiced by the contents of the scheme and it is affecting it adversely is completely misplaced. The scheme is pending for the approval by the lenders and it will not be binding upon the lenders if same is not approved by the lenders in the voting. The Applicant has repeatedly alleged that the scheme is bogus and sham and the Respondent does not want to pay the dues is incorrect, false and misleading as the Respondent has deposited the upfront amount as proposed by it and the scheme of the operational creditor has also been implemented so that the category of operational creditors also have a resolution and the lenders who are sitting in JLM can have their resolution through the present scheme. However, the Applicant in order to arm twist the Respondent Company and other creditors have moved the present petition.

29. It is further submitted that for the sake of arguments, if the scheme is prejudicial to the interests of the Applicant, the Applicant bank can always raise its objection at the time of sanction by this Tribunal. The Respondent submits that the Applicant, who is admittedly a creditor of the Respondent Company, is not holding more than 5% of the total debt of the respondent company and, therefore, the Application is not maintainable under section 230 of the Companies Act, 2013.

30. It is further submitted that the Applicant has been participating in all the Joint-lenders' meetings and stalling the same by raising some concern or the other even though its concern has been taken care of by the Lead Banker under the ICA, more particularly mentioned in clause 5.2 of the ICA. Besides, the Applicant is not signing the ICA which is mandatory requirement under the RBI guidelines. Therefore, the Applicant is trying to circumvent the RBI guidelines and the Scheme under the guise of an order passed by the Hon'ble Bombay High Court.

31. It is submitted that the present application is nothing but an appeal against the order dated 23 December 2022 and the same is not permissible. Since the Applicant is aggrieved by the order dated 23rd December 2022, it ought to have challenged the same. However, it did not and since the period of limitation has expired, as prescribed under section 421 of the Act, 2013, the Applicant has come up with the present application which is nothing but an appeal.

32. In view of the above, it is evident that the Applicant has made not out a case for the grant of the reliefs sought therein and the entire Application being misconceived, deserves to be dismissed with costs in the light of the foregoing contentions.

Findings:

33. We have heard the Counsel for the parties and have gone through the records.

34. It has been pointed out by the Counsel for the Applicant that SIIL is a principal debtor in respect of certain credit facilities availed of from the Applicant. SIIL has also provided a corporate guarantee to secure the repayment of the credit facilities granted by the Applicant in favour of Supreme Vasai Bhiwandi Tollways Private Limited **("SVBTPL")**. Since both SIIL and SVBPTL started committing default in respect of the credit facilities granted to them, the Applicant issued a Recall Notice and, also invoked the guarantee provided by the Corporate Debtor. However, no payments were made. No report was given by the Borrowers or the Corporate Guarantor. The total liability of both the entities is about Rs **282,93,61,613.25/-** as on 31.07.2022.

35. It has been argued by the ld counsel for the applicant that as per Section 238 of the Code, the provisions of the Code override the provisions of the Companies Act 2013, as has been held by the Hon'ble Supreme Court of India in the matter of ***Navinchandra Steels Private Limited v. SREI Equipment Finance Limited*** whereby it has been held that IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. It has further been held that vis-a-vis the Companies Act, which is a general statute dealing with companies including the companies in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non-

obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail. According to the ld. Counsel for the Applicant in the light of the unequivocal findings of the Hon'ble Supreme Court in the cited case, the proceedings filed by the Applicant u/s 7 of the Code, 2016 could not have been stayed.

36. It has further been argued by the Counsel for the Applicant that the Code does not contain any provision with respect to a scheme of compromise or arrangement under Section 230 of the Companies Act, 2013 at the stage of the Corporate Resolution Insolvency Process **("CIRP")** under the Code. Neither are such provisions contained in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 **("CIRP Regulations").** The courts in various cases have also highlighted the circumstances under which the compromise or arrangement can be sanctioned but only at the stage of liquidation under Section 33 of the Code. Thus, according to the counsel for the applicant, a scheme of arrangement or compromise is only recognized and can be considered at the stage of liquidation under the Code and not at the stage of CIRP as any scheme under Section 230 of the Companies Act, 2013 and CIRP is designed to achieve a common objective viz. the revival of the corporate debtor with the exception that the reins of the concerned company or corporate debtor does not remain in the hands of the promoters of such corporate debtor. In this regard, the Ld. Counsel for the applicant has pointed out that if the legislature intended to stay the proceedings under Section 7 of the Code in view of a Scheme under Section 230 of the Companies

Act, 2013 the Code would have contained such stipulations. However, to the contrary, the Code (being a special statute) contains a non-obstante clause as Section 238 of the Code overriding any other provisions.

37. The ld. counsel for the applicant has further argued that SIIL filed an application under Rule 11 of the NCLT Rules, 2016 under the guise of seeking an extension on the meeting to vote on the Scheme and sought an *ex parte* stay from this Hon'ble Tribunal on the proceedings filed by the financial creditors of SIIL under Section 7 of the Code until the results of the meeting are placed before the Tribunal.

38. The ld. counsel for the applicant has further contended that although the Tribunal has an inherent power under Rule 11 of NCLT Rules, 2016 but the said inherent power applies only to procedural law and not to decide the substantive law. Therefore, the said Order which stays all the proceedings filed by the financial creditors could not have been passed. It is submitted that a co-ordinate bench of this Tribunal does not have the power to stay proceedings before another co-ordinate bench. Therefore, by staying the proceedings under Section 7 of the Code by the said Order, the Tribunal has stayed proceedings before another bench and, therefore, the said Order deserves to be modified to the extent that the Applicant can pursue the Company Petition u/s 7 of the Code, 2016. The ld counsel for the applicant has further contended that SIIL has obtained the said Order *ex parte* without giving any notice to the Applicant and has been enjoying the protection of the said Order for over more than 9 months now while the Scheme is yet to be put to vote on 21 October 2023.

According to the ld counsel for the applicant, the Scheme was proposed in June 2022 and the meeting for voting thereon was supposed to be held on 29 July 2022, however, admittedly the same has not taken place till this date. it is further, submitted that SIIL has not been diligent in pursuing the Scheme while it is enjoying the protection of an *ex parte* Order, creating serious prejudice to the statutory rights of the creditors including the Applicant to pursue their legal remedies. This is without prejudice to the contention that the Scheme in its current form is nothing but a mere facade to wriggle out from its liability to pay the dues and to find an escape route for its group concerns, to defeat the rights of its lenders.

39. According to the ld. counsel for the applicant, SIIL has also sought to rely upon the Inter Creditors' Agreement dated 28 June 2019. It is submitted that the Applicant is not a signatory to the same and therefore, the same does, in no manner, binds the Applicant. According to the Counsel for the Applicant, if the said Order is not modified to enable the Applicant to pursue the Company Petition, it will set a wrong precedent for borrowers to file applications under Section 230 of the Companies Act, 2013 as and when the application under Section 7 of the Code is filed against them and then obtain a stay. This will not only defeat the statutory rights of the creditors initiating proceedings under the Code but will also defeat the objectives of the Code.

40. It is further argued that the Scheme is one of the many devious ways adopted by SIIL and its group companies to obliterate the proceedings initiated by its creditors. Therefore, even assuming without admitting that if clause (d) of the said Order was passed

within the powers exercisable by the Hon'ble Tribunal, the same cannot be allowed to sustain any further and deserves to be vacated. It appears that the said direction was passed by the Hon'ble Tribunal on a *bonafide* belief that the Scheme was to be put to vote. However, SIIL, taking undue advantage of the said Order, has failed to showcase any diligence and seriousness in pursuing the Scheme. It is submitted that the protection granted to SIIL as per clause (d) of the said Order cannot be continued indefinitely, to the detriment of the rights of the creditors.

41. It has further been contended by the counsel for applicant that the Applicant has approached this Tribunal under Rule 11 of the NCLT Rules. This Tribunal has the inherent power to recall its own order in cases where any procedural error has been committed. In this connection, the Applicant has relied upon the judgment in the case of ***Union Bank of India v. Dinkar T. Venkatasubramanian-1,*** whereby the Hon'ble NCLAT has held that this Tribunal under Rule 11 of the NCLT Rules, 2016 has the power to recall if any procedural error has been committed in delivering such order or judgment.

42. On the other hand, the counsel for the Respondent has argued that the applicant was aware of the order in question which was passed on 19.01.2023, and now at this belated stage, the applicant cannot be allowed to maintain the instant application to recall the said order which was never challenged by way of filing an appeal.

43. The Counsel for the Respondent has further argued that none of the other creditors have pressed their respective petitions in the light of the pendency of the proceeding under section 230 compromise under

the Company Act. Moreover, the Respondent has not been at fault and the delay, if any, in the finalization of the scheme is not attributable to the Respondent. Rather the same is attributable to the creditors.

44. The Counsel for the Respondent has further argued that the primary object is to revive or resolve the company in distress and the objects of section 230 of the Companies Act are not very different from that of the Code. The impugned order was passed to give an opportunity to the Financial Creditors to the structure and resolve the outstanding debts and no prejudice can be said to have been caused to the applicant. Once the scheme with the creditors is finalized and approved, the grievance of the applicant would also get redressed. The counsel for the Respondent has further contended that in case the petition filed by the applicant under section 7 of the Code gets admitted, the scheme would not fructify which would be counterproductive. The order of stay simply grants an opportunity to the creditors to vote on this scheme. Moreover, Petition under Section 7 of the Code was filed by the applicant subsequent to the filing of the application under section 230. All the other Financial Creditors except the applicant have signed the Intercreditor Agreement. The counsel for the Respondent further contends that Rule 11 of NCLT Rules, 2016 permits passing an order staying other proceedings over the coordinate Benches. Besides, no irreparable loss or prejudice would be caused to the applicant if the proceedings of the scheme are allowed to continue. In support of his contentions the counsel for the Respondent has relied upon NUI Pulp and Paper Industries Private Limited Vs M/s Roxcel Trading GMBH (Company Appeal (AT)(Insolvency)No. 664/2019 decided on

17.07.2019) whereby the Hon'ble NCLAT held that under Rule 11 of NCLT Rules 2016, which deals with inherent powers of NCLT, the Tribunal can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

45. We have weighed the contention raised by the counsel for the parties and have gone through the records.

46. It is not disputed that before passing the order in question, no opportunity of being heard was afforded to the applicant. It is well settled that unless and until a party is given an opportunity of being heard, no order ought to be passed which may impinge upon the rights of such party. It is also not disputed that the applicant Bank is not a party to the inter creditor agreement. As per the Rule 11 of the NCLT Rules 2016, this Tribunal has inherent power to recall its own orders if some procedural error has been committed. In ***Union Bank of India vs. Dinkar T Venkatasubramaniam 2023 SCC Online NCLAT 283*** it was held that inherent power by a Court a Tribunal can be exercise to do justice with the parties. It was further held that the power of recall is not to rehear the case to find out any apparent error in the judgment which is the scope of a review. Power of recall of a judgment can be exercised by the Tribunal when any procedural error is committed in delivering the earlier judgment for example a necessary party has not been served or necessary party was not before the Tribunal when the judgment was delivered adverse to a party. In the context of the present case, it cannot be disputed that when the order in question was passed, no opportunity of being heard was afforded to the Applicant. Even as per the provisions of the Civil Procedure Code, if an ex-parte stay order is granted by a Court under order 39 Rule 1 and 2 of CPC, the affected party has a right to seek

setting a side of the said order in terms of order 39 Rule 4 of CPC. No doubt, as per the provisions Section 424 of the Companies Act, the procedure laid down in the Code of Civil Procedure 1908, is not strictly applicable and the Tribunal is to regulate its own procedure on the basis of principles of natural justice. Even then applying the yardstick of natural justice, it cannot be said by stretch of any imagination that the Applicant is estopped from seeking recall/modification of the order in question as no appeal was filed by the Applicant.

47. In ***Union Bank of India vs. Dinkar T Venkatasubramaniam*** (Supra) there is a reference to the law laid down by the Hon'ble Supreme Court in ***Asit Kumar Kar vs. State of West Bengal 2009(2) SCC 703*** whereby it was held that in a recall Petition, the Court does not go into merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. It is further held by the Hon'ble NCLAT in ***Union Bank of India vs. Dinkar T Venkatasubramaniam*** (Supra) that the courts have inherent power to recall and set aside an order, (i) obtained by fraud practiced upon the court, (ii) when the court is mislead by a party, or (iii) when the court itself commits a mistake which prejudices a party. It was further held that a Tribunal or a court may recall an order earlier made by it if the proceedings culminating into an order suffer from inherent lack of jurisdiction or there has been a mistake of the court prejudicing a party or a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. In the concluding part of the judgment, the Hon'ble NCLAT has held that the Tribunal may not be vested with any power to review the judgment, however, in exercise of its

inherent jurisdiction, this Tribunal can entertain an Application for recall of judgment on sufficient grounds.

48. Now in the context of whatever has been held by the Hon'ble NCLAT in ***Union Bank of India vs. Dinkar T Venkatasubramaniam*** (Supra), it can be safely held that the order in question was not passed in the presence of the Applicant nor an opportunity of being heard was afforded to the Applicant. Therefore, in our considered view, the Applicant is well within its right to seek the recall/modification of the order. Besides, the recall of the order is sought in respect of a procedural issue i.e. whether or not under the provisions of the Companies Act, 2013, the proceedings under IB Code, 2016 could be stayed. Thus, looking at the case from any angle, the right of the Applicant to seek recall of the order cannot be said to be beyond the scope of law, more particularly Rule 11 of the NCLT Rules, 2016.

49. Now the question arises as to whether the proceedings of a Petition u/s 7 of the Code, 2016 could be stayed in the wake of pendency of a Petition u/s 230 of the Companies Act, 2013 for restructuring of the financial debts of the company. In this regard, the Counsel for the Applicant has relied upon the law laid down in ***A Naveen Chandra Steels Pvt. Ltd. vs. SREI Equipment Finance Ltd. and Others (Supra)*** whereby it has been held by the Hon'ble Supreme Court that IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis, the Companies Act, which is a general statute dealing with companies, including companies that are in red, the IBC is not only special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238 which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

It has further been held in this very case by the Hon'ble Supreme Court that a Petition either u/s 7 or section 9 of the Code, 2016 is an independent proceeding which is unaffected by winding up proceeding that may be files qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company is in winding up and near its corporate death that no transfer of the winding up proceedings would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the Corporate Debtor in the larger public interest, which includes not only the workmen of the Corporate Debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the Appellant that given section 446 of the Companies Act, 1956/ Section 279 of the Companies Act, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through a section 7 or section 9 petition filed under the IBC. The Hon'ble Supreme Court has further held in this very case that section 7 is an independent proceeding which has to be tried on its own merits. Any suppression of the winding up proceeding would, therefore, not be of any effect in deciding a section 7 petition on the basis provisions contained in the IBC.

50. In this context, a further reference can be made to the law laid down in ***Arun Kumar Jagatramka vs. Jindal Steel and Power Limited and Another 2021(7) Supreme Court Cases 474*** whereby it has been held that provisions of IBC contain a comprehensive scheme, first, for initiation of CIRP at the behest of Financial Creditor u/s 7 or at the

behest of the Operational Creditor u/s 9 or the Corporate Debtor u/s 10. Chapter- II contemplates the submission of a Resolution Plan u/s 30 and the approval of the plan u/s 31. Liquidation forms a part of a distinct Chapter- III. Liquidation u/s 33 is contemplated in specific eventualities which are adverted to in sub-section (1) and sub-section (2). It was further held that at third stage of CIRP only a revival is contemplated through the modalities provided in section 230 of the Companies Act, 2013. A scheme of compromise or arrangement of u/s 230 in the context of a company which is in liquidation under the IBC follows upon an order u/s 33 and the appointment of a Liquidator u/s 34 and there is no direct recognition of the provisions of section 230 of the Companies Act, 2013 in the IBC. It was further held by the Hon'ble Supreme Court that in this backdrop, it is difficult to accept that section 230 of Companies Act, 2013 is a stand-alone provision which has no connect with the provisions of IBC. In this very case, it was further held by the Hon'ble Supreme Court that while proceedings u/s 230 of the Companies Act, 2013 are being resorted to during the Liquidation proceedings under the IBC, the ineligibilities envisaged u/s 29A r/w section 35(1)(f) of the Code, 2016 would apply in the same manner which are applicable at the stages of submitting a resolution plan, selling assets of the company in Liquidation and selling the company as a going concern during Liquidation. It has further been held in this case that there is no mechanism in the IBC for effecting a compromise or arrangement and since the only provision is contained in Section 230, there is no inconsistency with the IBC. Referring to the Insolvency Law Committee report of February, 2020, it has been observed that introduction of such schemes (u/s 230 of the Companies Act, 2013) into the framework of the IBC may be worrisome since it will alter

the incentives during the CIRP and lead to destructive delays, which often plagued the process under the Sick Industrial Companies (special provisions) Act, 1985. In the report, the Committee concludes by noting that such schemes, if at all they are to be brought in, should not be under the 2013 Act, but the IBC itself. The Hon'ble Supreme Court has further held in concluding part of the judgment that the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out peace of legislation which sought to shed away the practices of the past. Consequently, the need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the fundamental principles of the IBC.

51. In the light of the unequivocal findings rendered by the Hon'ble Supreme Court in the above cited cases, there remains no doubt about the fact that the IB Code, 2016 is a complete Code in itself and has an overriding effect on the other legislations in terms of section 238 of Code. The proceedings under the Code more particularly u/s 7 of the Code cannot be scuttled or circumvented merely on account of pendency of any proceedings under the Companies Act, much less u/s 230 of the Companies Act, 2013. It is further amply clear from the afore-cited case that a scheme of arrangement or compromise is only recognized and can be considered at the stage of Liquidation under the Code and not at the stage of CIRP. Even at that stage when a scheme u/s 230 is pursued, the company has to be protected from its management and a corporate death and the ineligibilities u/s 29A and Section 35(1)(f) will continue to be applicable. Therefore, in our considered view, under no circumstances, a situation can even be

imagined that proceedings pending u/s 230 of the Companies Act, 2013 can stall the proceedings u/s 7 of the Code, 2016, more particularly keeping in view the law laid down by the Supreme Court whereby it has been held in no one certain terms that IB Code is a complete legislation itself which overrides the other legislations.

52. As a result of the forgoing discussion, we are of the considered view that the order in question which has been interpreted to have the effect of stalling or staying the proceedings under the Code, 2016 needs to be modified/recalled as the same tends to impinge upon the rights of the Applicant to pursue proceedings filed by it u/s 7 of the Code, 2016. More particularly, when the Applicant was not even afforded an opportunity of being heard before the order in question was passed.

53. Resultantly, the Application is allowed to the extent that the impugned order dated 23.12.2022 is recalled/modified to the extent that it will not have the effect of staying the proceedings initiated by the Applicant u/s 7 of the IB Code 2016. The Application is, therefore, **allowed** and **disposed** of in the aforesaid terms.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)

ANKIT