

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
03-07-2024 AT 10:30 AM**

**CP(IB) No. 269/9/HDB/2018
AND
Rst. A (IBC) 23/2023 in CP(IB) No. 269/9/HDB/2018
u/s. 9 of IBC, 2016**

IN THE MATTER OF:

Monitoring Committee through State Bank of India **...Operational Creditor**

AND

Ghanshyam Surajbali Kurmi **...Corporate Debtor**

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

O R D E R

Rst. A (IBC) 23/2023

Orders pronounced. In the result, **this Rst. A (IBC) 23/2023 is dismissed. No costs.**

**Sd/-
MEMBER (T)**

**Sd/-
MEMBER (J)**

**THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH - I, HYDERABAD**

**Rst.A. No. 23/2023
IN**

**I.A. No. 531/2019
IN**

C.P. (IB) No.269/9/HDB/2018

Under Section 60(5) read with Section 66, 67 and 69 of The Insolvency and
Bankruptcy Code, 2016

BETWEEN

State Bank of India

SAM Branch, Secunderabad,
5-9-76, 2nd Floor, Prabhat Towers, Opp. Amaravathi LHO,
Chapel Road, Gunfoundry, Hyderabad-500001

...Applicant

VERSUS

1. Ghanshyam Surajbali Kurmi

(Director – powers suspended) Apex Drugs Limited,
210, 2nd Floor, Ram's Enclave,
Erragadda, Hyderabad, Telangana – 500018.

2. Sandeep Kumar Verma

(Director – powers suspended) Apex Drugs Limited,
210, 2nd Floor, Ram's Enclave,
Erragadda, Hyderabad, Telangana – 500018.

3. Kapil Dev Taneja

Erstwhile Resolution Professional of Apex Drugs Limited
56-C, BB-Block, Janakpuri, New Delhi – 110058.

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Applicant : Mr. VVSN Raju, Counsel

For Respondents : NA

PER BENCH

ORDER

1. This is an application filed by State Bank of India (hereinafter referred as 'Applicant') under Section 60(5) read with Section 66, 67 and 69 of 'The Insolvency and Bankruptcy Code, 2016' (hereinafter referred as 'IBC') against the suspended directors and erstwhile Resolution Professional of 'M/s. Apex Drugs Limited' (hereinafter referred as 'Corporate Debtor').

The reliefs sought for in the present application are as follows:

- a. To recall the order dated 08.09.2021 and corrigendum orders dated 17.09.2021 and 07.10.2021 passed in I.A. No. 531 of 2019.
- b. To direct the Respondents No.1 and 2, to jointly and severally contribute a sum of Rs.145,80,08,452/- to the assets of the Corporate Debtor without loss of time.
- c. To direct Respondent No.1 and 2 to pay the interest @18% per annum on the said amount from 08.09.2021 till date of payment.

2. It is stated that the Corporate Debtor was put into 'Corporate Insolvency Resolution Process' (hereinafter referred as 'CIRP') by an order of this Tribunal dated 06.09.2018 in C.P. (IB) NO. 269/9/HDB/2018. By an order dated 26.11.2018, this Tribunal appointed Respondent No.3 herein as Resolution Professional of the Corporate Debtor.
3. It was submitted that the erstwhile RP of the Corporate Debtor, after being directed by the Committee of Creditors (CoC), filed an application vide I.A. No. 531 of 2019 in C.P. (IB) NO. 269/9/HDB/2018 under Section 66 of IBC against the promoter directors of the Corporate Debtor seeking appropriate reliefs basing on the transaction audit report of the Corporate Debtor.
4. It was submitted that this Tribunal vide order dated 08.09.2021 in I.A. No. 531 of 2019 in C.P. (IB) NO. 269/9/HDB/2018 (**Annexure 6**) held that as per the transaction audit report for the financial year 2015-16, the Corporate Debtor had written off assets worth Rs.140,65,13,323/- which resulted in a loss to the Corporate Debtor and the same was continued in the following financial years of 2016-17 and 2017-18. That the written-off amount was to the tune of Rs.5,14,95,129/- during the years 2016-18. That the total amount written-off by the Corporate Debtor for the period 2015-18 came to a tune of Rs.145,80,08,452/-. It was submitted that this Tribunal at Para 14 of the order dated 08.09.2021 held that the written-off done by the Corporate Debtor was to defraud the creditors.

5. It was submitted that this Tribunal vide corrigendum order dated 17.09.2021 (**Annexure 7**) under Rule 154(1) of The NCLT Rules, 2016, modified the earlier order dated 08.09.2021 in respect of Para 14 as follows:

“Although it is contended by the Resolution Professional that an amount of more than Rs.145 crores appears to be siphoned off by the Respondents but during submission, the learned counsel for the Resolution Professional restricted prayer of contribution to the extent of Rs.5,14,95,129/- only stating that this much is the amount due and payable to the Creditors of the Corporate Debtor. We appreciate and accept his gesture. Hence, although we noted that an amount of more than Rs.145 Crores appears to be siphoned off; we pass the following order subsidizing contribution amount to the extent of Rs.5,14,95,129/-.”

6. It was submitted that the Ld. Counsel for the erstwhile RP during the hearing of I.A. No. 531 of 2019 never made any submission as recorded in the corrigendum order dated 17.09.2021. It was submitted that the Ld. Counsel for the erstwhile RP filed a MEMO dated 01.10.2021 (**Annexure 8**) before this Tribunal wherein it was stated that the erstwhile RP prayed for a total amount of Rs.145,80,08,452/- to be contributed by the Respondents therein.
7. It was submitted that pursuant to this MEMO dated 01.10.2021, this Tribunal vide additional corrigendum order dated 07.10.2021 (**Annexure 9**) held that it has no hesitation in accepting the claim made by the RP that the written-off done by the Respondents during the relevant period is

fraudulent and for defrauding the creditors. It was submitted that this Tribunal in the same corrigendum order dated 07.10.2021 held that although it is contended by the Counsel for the RP that an amount of more than Rs.145 crores appears to be siphoned off, an order was passed subsidizing contribution amount to the extent of Rs.5,14,95,129/-.

8. It was submitted that aggrieved by this corrigendum order dated 07.10.2021, an appeal was preferred before The Hon'ble NCLAT, Chennai vide Company Appeal (AT) (CH) (Ins.) No. 71 of 2022 and the same was withdrawn by an order dated 08.03.2022 (**Annexure 10**) with the leave of the Hon'ble NCLAT to freshly challenge the corrigendum order dated 07.10.2021. It was submitted that the Applicant filed an appeal before The Hon'ble NCLAT vide Company Appeal (AT) (CH) (Ins.) No. 338 of 2022 and the same was dismissed as withdrawn vide order dated 10.10.2022 (**Annexure 11**) with a leave to approach this Tribunal in accordance with law.
9. It is further submitted that while passing the order for contributing an amount of Rs.5,14,95,129/-, this Tribunal took into account only the amounts payable to the creditors of the Corporate Debtor and have ignored other claims of the stakeholders of the Corporate Debtor. It is also contended that the submissions made by the Ld. Counsel for RP in I.A. No. 531 of 2019 that the liability of the Corporate Debtor in respect of the

creditors is Rs.5,14,95,129/- was incorrect, ill-conceived and that the same cannot be the basis of the order.

10. It was submitted that in addition to the creditors, the interests of other stakeholders of the Corporate Debtor is also involved in the matter. It was submitted that the siphoning off of Rs.145 crores by the creditors of the Corporate Debtor was clear and keeping in view of the law that the Corporate Debtor being a separate legal entity wherein interests of stakeholders is involved, the impugned corrigendum order dated 07.10.2021 limiting the amount of contribution to Rs.5,14,95,129/- instead of Rs.145,80,08,452/- from the Respondents therein towards the assets of the Corporate Debtor would be detrimental to the interests of other stakeholders.
11. It was submitted that in view of the above stated facts and law, the order dated 08.09.2021 and corrigendum orders dated 17.09.2021 and 07.10.2021 passed in I.A. No. 531 of 2019 may be recalled.
12. Though served with a notice, the Respondents No.1 to 3 did not make an appearance before this Tribunal and hence were set *ex parte*.
13. Having perused the application and the documents filed by the Applicant, the following point emerges for the consideration of this Tribunal:

Whether the sufficient grounds exist in the application for restoration of I.A. No. 531 of 2019 in C.P. (IB) 269/9/HDB/2018?

14. We have heard Mr. VVSN Raju, Ld. Counsel on behalf of the Applicant, perused the record and the written submissions.

POINT:

Whether the sufficient grounds exist in the application for restoration of I.A. No. 531 of 2019 in C.P. (IB) 269/9/HDB/2018?

The Submissions

15. Ld. Counsel for the Applicant submitted that this Tribunal vide order dated 08.09.2021 in I.A. No. 531 of 2019 in C.P. (I B) No. 269/9/HDB/2018 directed the Respondents therein to pay Rs.5,14,95,129/- as against a claim of amount of Rs. 145,80,08,452/-, in respect of a fraudulent transactions. It was submitted that, subsequently a corrigendum to this order was also passed on 17.09.2021 stating that the Ld. Counsel for erstwhile RP (Applicant therein) restricted claim to Rs.5,14,95,129/- payable to the creditors. The record discloses that, pursuant to this corrigendum dated 17.09.2021, a 'MEMO' dated 01.10.2021 was filed by the Ld. Counsel for erstwhile RP (Applicant therein) seeking correction and alteration to the corrigendum dated 17.09.2021 submitting that no submission was made by the Ld. Counsel for erstwhile RP restricting the claim to Rs.5,14,95,129, and pursuant to MEMO dated 17.09.2021 yet another corrigendum dated 07.10.2021 was ordered wherein the amount has been mentioned as Rs.5,14,95,129/- though there appears that Rs.145,80,08,452/- was

siphoned off by Respondents, but the said amount was subsidised to Rs.5,14,95,129/-.

16. Ld. Counsel for Applicant submitted that against this corrigendum dated 07.10.2021, an appeal was filed before The Hon'ble NCLAT, Chennai Bench vide Company Appeal (AT) (CH) (Ins.) No. 71 of 2022 and the same was later withdrawn by an order dated 08.03.2022 with a liberty to file a fresh appeal. Ld. Counsel submits that subsequently, Company Appeal (AT) (CH) (Ins.) No. 338 of 2022 was filed before Hon'ble NCLAT, Chennai Bench and the same was also withdrawn by an order dated 10.10.2022 with a liberty to approach this Tribunal to seek redressal of grievances in accordance with law. Hence the present application was filed before this Tribunal on 30.10.2023 seeking for recall of order dated 08.09.2021 and corrigendum orders dated 17.09.2021 and 07.10.2021 passed in I.A. No. 531 of 2019 in C.P. (IB) No. 269/9/HDB/2018 by this Tribunal.

17. Ld. Counsel for the Applicant, in support of the contentions raised, relied on Union Bank of India vs Dinkar T. Venkatasubramanian & Ors., 2023 SCC Online NCLAT 283 and Indian Bank vs M/s. Satyam Fibres India Pvt. Ltd., (1996) 5 SCC 550, wherein it was held that,

In Union Bank of India (supra), it was held as follows:

“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.”

In *Indian Bank (supra)*, it was observed as follows:

“22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.”

Our Analysis and Findings

18. Having carefully considered that the submissions made by the Ld. Counsel for the Applicant, at the outset we intend to examine whether the relief as prayed in this application tantamount to review or recall of the impugned orders. In order to decide the same we usefully refer to the ruling in *Asit Kumar Kar vs State of West Bengal & Ors., 2009 (2) SCC 703*, wherein it was observed as follows:

“6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.”

This above observation was quoted by The Hon'ble Supreme Court in Vishnu Agarwal vs State of Uttar Pradesh and Anr., 2011 (14) SCC 813 which is as follows:

“7. Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the order dated 2-9-2003 and not for review. In Asit Kumar Kar v. State of W.B., this Court made a distinction between recall and review which is as under:

“6. There is a distinction between ... a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees' Assn. v. Raghendra Singh [(2007) 11 SCC 374] cancelling certain licences was passed without giving an opportunity of hearing to the persons who had been granted licences.”

Therefore, the difference between the recall and review being as above stated, we wish to examine whether the Applicant under the guise of the present recall application is actually seeking review of the orders of this Tribunal or not?. For this purpose the relevant part of the impugned order of this Tribunal dated 08.09.2021 at Para 14 is extracted, which is as follows:

“14. In the light of the above we have no hesitation in accepting the claim made by the Resolution Professional that the written off done by the respondents during the relevant period is fraudulent and it is for defrauding the creditors of the corporate debtor.

ORDER

- A. Accordingly, we hereby pass an order under Section 66 (1) and (2) of the code directing both the respondents to contribute in equal proportion of the amount defrauded which is to the tune of Rs.5,14,95,129/- during the relevant period to the assets of the corporate debtor within a period of 3 months from the date of this order.
- B. We are not inclined to pass any order under Section 73 of the code at this point of time. Accordingly, this application is disposed of.”

19. The corrigendum order dated 17.09.2021 reads as follows:

“In the light of the above we have no hesitation in accepting the claim made by the Resolution professional that the written off done by the respondents during the relevant period is fraudulent and it is for defrauding the creditors of the corporate debtor. Although it is contended by the Resolution Professional that an amount of more than Rs.145 crores appears to be siphoned off by the Respondents but during submission, the learned counsel for the Resolution Professional restricted prayer of contribution to the extent of Rs.5,14,95,129/- only stating that this much is the amount due and payable to the Creditors of the Corporate Debtor. We appreciate and accept his gesture. Hence, although we noted that an amount of more than Rs.145 Crores appears to be siphoned off; we pass the following order subsidizing contribution amount to the extent of Rs.5,14,95,129/-.”

20. The memo filed by Ld. Counsel for the Applicant is as below.

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH AT HYDERABAD

IA NO. 531 OF 2019
IN
C.P. (IB) NO. 269/9/HDB/2018

IN THE MATTER OF:
M/S ZHEIJANG TONGXIANG FOREIGN TRADE (GROUP) CO.

..... OPERATIONAL CREDITOR

VERSUS

APEX DRUGS LIMITED

..... CORPORATE DEBTOR

AND

IN THE MATTER OF:
MR. KAPIL DEV TANEJA
(RESOLUTION PROFESSIONAL)

..... APPLICANT

VERSUS

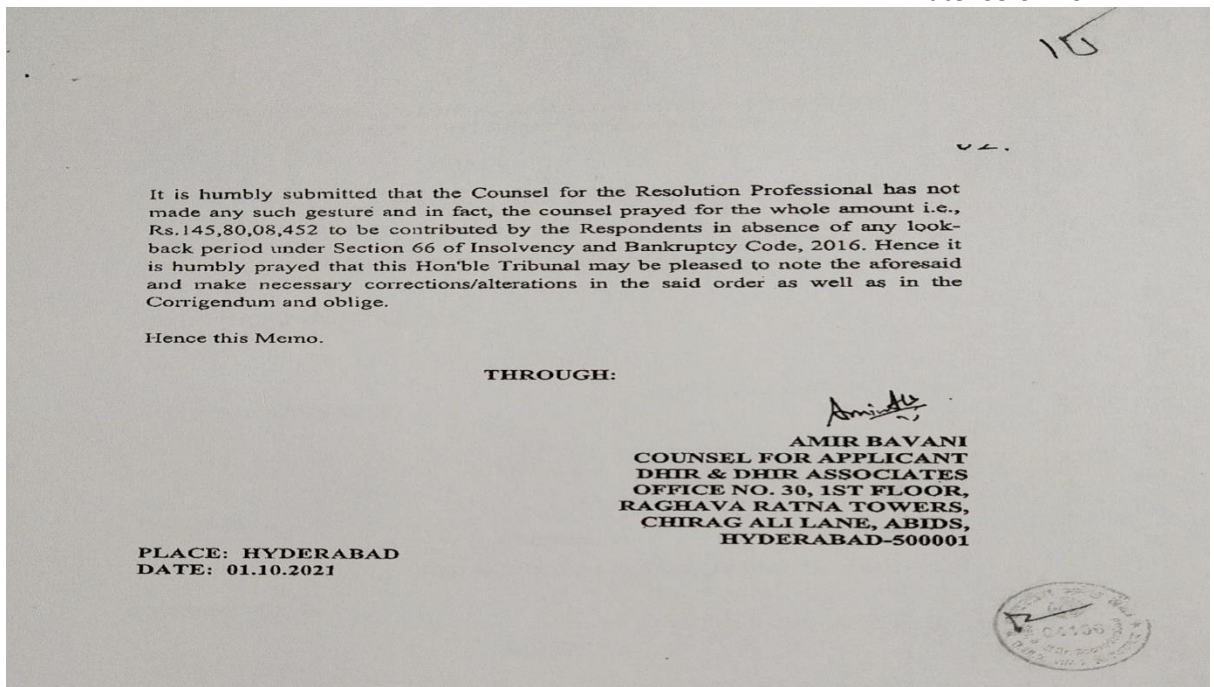
MR. GHANSHYAM SURAJBALI KURMI & ORS.

.....RESPONDENTS

MEMO

May it please this Hon'ble Tribunal,

It is submitted that this Hon'ble Tribunal has passed an order dated 08.09.2021 in IA No.531 of 2019 in CP (IB) No.269/9/HDB/2018 in the matter of Apex Drugs Limited. Further to the said order, a corrigendum dated 17.09.2021 was passed by this Hon'ble Tribunal wherein it is mentioned that, "Although it is contended by the Resolution Professional that an amount of more than Rs.145 Crores appears to be syphoned off by the Respondents but during submission the learned counsel for the Resolution Professional restricted prayer of contribution to extent of Rs.5,14,95,129/- only stating that this much is the amount due and payable to the creditor of the Corporate Debtor. We appreciate and accept his gesture. Hence, although we noted that an amount of more than Rs.145 Crores appears to be siphoned off, we pass following order subsidising contribution amount to extent of Rs.5,14,95,129/-".



21. The impugned corrigendum order dated 07.10.2021 which reads as follows:

“In the light of the above we have no hesitation in accepting the claim made by the Resolution professional that the written off done by the respondents during the relevant period is fraudulent and it is for defrauding the creditors of the corporate debtor. Although it is contended by the Resolution Professional that an amount of more than Rs.145 crores appears to be siphoned off by the Respondents, we pass following order subsidising contribution amount to the extent of Rs.5,14,95,129/-.”

22. On a bare perusal of the order above we have no hesitation to hold that the impugned order allowing corrigendum was based on the memo filed by the then Resolution Professional thus on *factual* basis only. Moreover, in terms of section 66 of IBC which is as below;

“Section 66: Fraudulent trading or wrongful trading.

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner **shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.**

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a

director or partner of the corporate debtor, as the case may be, **shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit,**”

the Adjudicating Authority can direct the persons responsible for carrying on the business of the Corporate Debtor to pay such *amounts as deemed fit* and it is not at all mandatory that the Adjudicating Authority must direct the persons responsible to contribute all the amounts which the resolution professional claimed as payable under fraudulent transactions.

Therefore, the impugned orders since based on merits and as there is no error much less a legal error constituting sufficient cause, for recall the impugned orders, the application is liable to be dismissed. Moreover, in our considered view, the relief as prayed amounts ‘reviewing’ our order which power this Tribunal is not endowed with. In this regard, reliance may be placed on *Union Bank of India (supra)*:

“27. In view of the foregoing discussion, we answer the questions referred to this Bench in following manner:

27.1 I : This Tribunal is not 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.

27.2 II and III : The judgment of this Tribunal in Agarwal Coal Corporation P. Ltd. v. Sun Paper Mill Ltd. and Rajendra Mulchand Varma v. K.L.J. Resources Ltd. observing that this Tribunal cannot recall its judgment does not lay down the correct law.”

23. The above cited order was affirmed by The Hon’ble Supreme Court in *Union Bank of India vs Financial Creditors of Amtek Auto Ltd. and Others.*, (2023) SCC Online SC 1918:

“1. We are in agreement with the view taken by the five-Judges Bench of the National Company Law Appellate Tribunal and thus find no reason to interfere with the impugned judgment.

2. In so far as the endeavour of learned counsel for the appellant to urge on the facts of the case is concerned, that would be a matter to be considered, dependent on the fate when the matter is placed before the appropriate Bench, to be decided on merits.

3. The civil appeal is dismissed.”

24. In the above facts and circumstances, and also by placing reliance on the case laws cited above, we are of the view that *no sufficient grounds are not even spelt out in the application leave also making out, for considering the restoration of I.A. No. 531 of 2019 in C.P. (IB) NO. 269/9/HDB/2018*. The point raised is answered accordingly.

25. In view of the above, we are of the view that the present application is liable to be dismissed. Hence, the same is dismissed without costs.

SD

Charan Singh
Member Technical

SD

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Anil