NATIONAL COMPANY LAW APPELLATE TRIBUNAL,NEW DELHI
(APPELLATE JURISDICTION)
Company Appeals (AT)(Insolvency)294-295 of 2020

(Appeals filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 against the orders dated 25.6.2019 and 10.1.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in CA(IB)No.87(CTB)2019 arising out of IA(IB) NO.21/CTB/2019 in T.P.No.40/CTB/2019 arising out of CP(IB)No.24/KB/2018.

In the matter of:

State Bank of India ....Appellant
Registered Office :
Stressed Assets Management Branch-I,11 & 13
Shakespeare Sarani (Nagaland House),
Kolkatta 700 071.

V.

Visa Steel Ltd. ...Respondent
(through Vishal Agarwal, vice-Chairman and
Managing Director),
Regd.Office : "Visa House", 11 Ekamra Kanan, Nayapalli,
Bhubaneshwar, Odisha 751 015

Present :

For Appellant: Mr.Arun Kathpalia, Mr.Mukul Rohatgi Sr.Advocates
with Mr.Siddhartha Datta, Mr.Deepanjan Dutta Roy,
Ms.Misha and M.S.Suhani Diwedi, Ms.Diksha Gupta
and Ms.Moulshree Shukla, Advocates.

For Respondent : Mr.S.N.Mookherjee, Sr.Advocate
with Sabyasachi Chaudhury,
Ms.Nikita Jhunjhunwala, Advocates

JUDGEMENT

Venugopal M.J

Preamble (Company App.(AT)(Ins)294-295 of 2020

The Appellant/State Bank of India has filed the instant Appeals being dissatisfied with the Orders dated 25.6.2019 (First Impugned Order) and the Order dated 10.1.2020 (second Impugned Order) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Cuttack Bench) in Company Appeal (AT) (Insolvency)No.294-295 of 2020 (Arising out of Orders dated 25.6.2019 and 10.1.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in CA(IB) No.87/CTB/2019 in IA(IB)No.21/CTB/2019 in TP No.40/CTB/2019 arising out of CP(IB)No.24/KB/2018.

2. The 'Adjudicating Authority' (National Company Law Tribunal, Cuttack Bench), while passing the Impugned Order (First Order) dated 25.6.2019 in IA No.21/CTB/2019 in TP No.40/CTB/2019 [CP (IB) No.24/KB/2018] among other things at Paragraphs 15 to 19 observed as under :

Para 15. "It is seen from the perusal of the Order of Hon'ble Orissa high Court dated 25.03.2019 that the Hon'ble High Court on the basis of contentions of the bank observed that, "Opposite party no.2(SBI) being public sector bank is obliged under law to adhere to the provisions and guidelines/policies claimed by opposite party no.1(RBI) from time to time. In reply to the averments made by the petitioner in Paragraph No.5 to the Writ Petitions, SBI has stated in its counter affidavit that RBI has issued directions as per annexure 2 of the Writ Petition and instructions of RBI are complied with".

Para 16. Above evidence is enough to hold that this proceeding Under Section 7 of the Insolvency and Bankruptcy Code, is filed

against Corporate Debtor by SBI, is not filed independently but it is filed as per instructions of the RBI as contemplated Under Section 35 AA of the Banking Regulation Act, 1949.

Para 17. Ld.Counsel for the SBI submitted that the initiation of proceeding Under Section 7 of IBC, against the Corporate debtor was taken by the bank independently which is reflecting in minutes and joint lender forum's meeting dated 4th August, 2017. As against this Ld.Counsel for the Corporate debtor pointed out that in fact initiation of proceeding Under Section 7 of IBC against Corporate Debtor was taken by the bank in meeting dated 28.11.2017 on the basis of RBI circular dated 28.07.2017 as appears from the minutes of joint lenders meeting dated 25.11.2017.

Para 18. I have gone through both minutes of meetings. In meeting dated 4th August, 2017 there were subject about filing application in National Company Law Tribunal, under Insolvency and Bankruptcy Code, 2016. But it is seen from the minutes that one Mr.Gurupada Chakravorty Assistant General Manager, SBI apprised the member of lenders about the Bank's stand for referring the matter to National Company Law Tribunal, under IBC 2016 as per instructions their competent authority has approved the proposal for referring the Company to National Company law Tribunal. But officer of PNB inquired about resolution plan. Sh.Gurupada Chakravorty stated that resolution plan submitted by the

company has been circulated amongst the lenders. To this the lenders have opined that the plan submitted by the company need improvement as the similar resolution plan was not considered by the earlier lender and the bankers request for the company to submit an improved resolution plan that induction funds by selling of non-assets. (in short, in that meeting no decision was taken to file proceeding Under Section 7 IBC against the Corporate debtor. It cannot be said that SBI filed this proceeding independently as per their stand in meeting dated 4th August 2017. As against this the minutes of meeting dated 28.11.2017 are more speaking and clear wherein it is mentioned that "Sh.Gurupada Chakravorty SBI further apprise the house that matter of referring the company to NCLT, is approved. Decision of referring the Company to NCLT was also conveyed to the promoters in joint lender Visa Steel Limited held on Saturday 18th November, 2017 at Hotel Park Prime, AJC Bose Road, Kolkatta-20". The suit shall be filed against company before 31.12.2017 which is also directed by RBI Circular dated 28.08.2017. All the representative of the other major lenders present in the meeting."

Para 19. Above minutes make it abundantly clear that the SBI has initiated this proceeding under Insolvency and Bankruptcy code, against the corporate debtor on the basis of RBI directions dated 28.08.2017 Circular dated 28.08.2017 is also

on record at Page 142. RBI has directed State Bank of India to initiate proceeding under Insolvency and Bankruptcy Code, against some of the defaulters including the Corporate Debtor. RBI now in view of the interpretation of Hon'ble Apex Court of Section 35-AA of Banking Regulation Act, 1949 in case of Dharani Sugar & Chemicals Limited, cannot issue such instructions without concurrence of the Central Government. It appears to me from evidence on record that this proceeding is initiated by the State Bank of India against the Corporate Debtor as per instructions of the RBI

*and, u*ltimately allowed the Interlocutory Application No.21/CTB/2019 filed by the 'Corporate Debtor' and dismissed the CP(IB)No.24/KB/2018(TP No.40/CTB/2019).

3. The Learned 'Adjudicating Authority', while passing the 'Impugned Order' dated 10.1.2020 in CA No. 87/CTB/2019 (arising out of CA(IB).CTB/2019 (arising out of IA(IB) NO.21/CTB/2019 in TP No.40/CTB/2019 (arising out of CP(IB) No.24/KB/2018)
at Paragraphs 11 and 12 had observed the following :

Para 11."The Hon'ble Supreme Court and Hon'ble NCLAT has time and again held and also under the provisions of IBC, 2016, that there is no provisions under the IBC, 2016 nor under the NCLT Rules to review its own order. Hence, the

Order of the Hon'ble Supreme Court dated 29th July, 2019 cannot be interpreted as a direction given to this Adjudicating Authority to review the Order. With due respect to the Hon'ble Supreme Court while permitting the applicant to withdraw its application has only granted liberty to explore and exhaust the remedies available under the statute.

Para 12. Since, there is no provisions under the Act, Rules of Insolvency and Bankruptcy Code, 2016, nor any judgements precedents, this application for review/recall is not maintainable."

and consequently dismissed the Application.

Appellant's Contentions (Comp.App(AT)No.294 and 295 of 2020)

4. According to the Learned Counsel for the 'Appellant', the 'Adjudicating Authority' (National Company Law Tribunal) passed the First 'Impugned Order' based on an erroneous appreciation of the judgement of the Hon'ble Supreme Court in 'Dharani Sugars case.

5. The Learned Counsel for the 'Appellant' submits that the 'Adjudicating Authority' (National Company Law Tribunal) had wrongly applied the decision of 'Dharani Sugars' case which struck down the 'Reserve Bank of India' Circular dated 12.2.2018, when in fact, the said 'Circular' had no application in the present case. Moreover, the proceedings under Section 7

of the 'Insolvency & Bankruptcy Code' were initiated prior to the issuance of 'Reserve Bank of India Circular' dated 12.2.2018.

6. The Learned Counsel for the 'Appellant' comes out with a plea that the 'Adjudicating Authority' (National Company Law Tribunal) had wrongly extended the judgement of the Hon'ble Supreme Court in 'Dharani Sugars' by holding that it also vitiated the 'Reserve Bank of India' letter dated 28.8.2017 when the Hon'ble Supreme Court took note of the said Letter of the 'Reserve Bank of India' in its judgement, but had not quashed the same.

7. It is represented on behalf of the 'Appellant' that the 'Adjudicating Authority' (National Company Law Tribunal) had failed to appreciate that the Central Government Notification dated 5.5.2017 had already authorised the 'Reserve Bank of India' to issue directions in regard to the 'specific defaults' and to pass specific directions in relation to such 'default'.

8. The Learned Counsel for the 'Appellant', forcefully comes out with an argument that the 'Adjudicating Authority' (National Company Law Tribunal) failed to appreciate that the constitutional validity of Sections 35-AA and 35-AB of the 'Banking Regulations Act, 1949' was considered and upheld in the decision of Hon'ble Supreme Court in 'Dharani Sugars' case and hence, actions of the 'Reserve Bank of India' taken thereunder stood valid except the 'Reserve Bank of India' Circular dated 12.2.2018 which was struck down.

9. It is the version of the 'Appellant' that the 'Adjudicating Authority' (National Company Law Tribunal) had acted beyond his jurisdiction and in

violation of the Hon'ble Supreme Court's order dated 29.7.2019 in dismissing the 'Review Application' on the ground of 'Lack of Jurisdiction' without examining its merits, when the liberty to file 'Review Petition' was expressly granted by the Hon'ble Supreme Court.

10. The Learned Counsel for the 'Appellant' contends that the 'Adjudicating Authority' (National Company Law Tribunal) erroneously had interpreted the order of the Hon'ble Supreme Court dated 29.7.2019 to the effect that it has no power of 'Review', inspite of the said order, because of the fact, the order dated 29.7.2019 of the Hon'ble Supreme Court could not be interpreted as a direction given to the 'Adjudicating Authority' (National Company Law Tribunal) to 'Review' the first 'Impugned Order' dated 25.6.2019.

11. The Learned Counsel for the 'Appellant' points out that the order of the Hon'ble Supreme Court dated 29.7.2019 is binding on the 'Adjudicating Authority'((National Company Law Tribunal) and the said 'Authority' had no jurisdiction to question the maintainability of the 'Application for Review' which was filed in terms of the said order.

12. The Learned Counsel for the 'Appellant' submits that the 'Impugned Order' dated 25.6.2019 was passed by the 'Adjudicating Authority' (National Company Law Tribunal) by erroneously interpreting the Hon'ble Supreme court decision in 'Dharani Sugars' and the order of the 'Adjudicating Authority' (National Company Law Tribunal) is a perverse one because of the fact that the said order proceeds on the notion that the

proceedings were filed under instructions of the 'Reserve Bank of India' without the permission of the Central Government and hence ought to be dismissed.

13. The Learned Counsel for the 'Appellant' contends that the decision of the Hon'ble Supreme Court in 'Dharani Sugars' pertains to the direction passed generally against the 'Debtors' to initiate the 'Insolvency Proceedings'. But in specific case, the 'Reserve Bank of India' is held to have the power in terms of Sections 35-AA and 35-AB to pass directions for attempting resolution and to initiate 'Insolvency Proceeding' in case such Resolution has failed.

14. The Learned Counsel for the 'Appellant' brings to the notice of this 'Tribunal' that the Hon'ble Supreme Court in the judgement of 'Dharani Sugars' took cognizance of the 'Reserve Bank of India' letter dated 28.8.2017, but had not set aside the same because it would not be contrary to the powers granted under Sections 35-AA and 35-AB of the 'Banking Regulations Act, 1949'.

15. The Learned Counsel for the Appellant submits that the 'Reserve Bank of India' Letter dated 28.8.2017 was expressly mentioned in the judgement of the Hon'ble Supreme Court in 'Dharani Sugars', wherein at Paragraph 20, the specific accounts were mentioned in the said letter and that if the 'Banks' failed to finalise and implement viable 'Resolution Plan' by 13.12.2017, the 'Banks' would be required to file applications under the 'Insolvency & Bankruptcy Code', before 31.12.2017.

16. The Learned Counsel for the Appellant contends that the 'Impugned Order' dated 25.6.2019 (first order) of the 'Adjudicating Authority' proceeds on the incorrect assumption that no prior authorisation of the Central Government was taken for issuance of instructions to the Appellant by the 'Reserve Bank of India'. Continuing further, it is projected on the side of the Appellant that as per the 'Reserve Bank of India' Affidavit in Writ Appeal and as mentioned in Para 21 of the Hon'ble Supreme Court judgement in 'Dharani sugars' case, the Central Government Notification dated 5.5.2017 authorise 'Reserve Bank of India' to identify specific cases on default for 'Resolution' and if 'Resolution' fails for initiation of the proceedings under the 'Insolvency & Bankruptcy' Code. Indeed, the Letter dated 28.8.2017 was pursuant to the authorised Notification dated 5.5.2017 which provided a list of specific details.

17. The Learned Counsel for the Appellant emphatically points out that the First 'Impugned Order' dated 25.6.2019 of the 'Adjudicating Authority' was passed contrary to the order of the Hon'ble Supreme Court of India in Civil Appeal No.3169 of 2019 dated 14.3.2019 and the order of the Hon'ble High Court dated 25.3.2019 in Writ Petition No.2511 and against the ratio passed by the Hon'ble Supreme Court in 'Dharani Sugars' case**.**

18. The Learned Counsel for the Appellant submits that the order dated 14.3.2019 of the Hon'ble Supreme Court was passed in Writ Appeal No.237 of 2019, which arose out of the order dated 2.5.2018 which clearly was in regard to the 'Reserve Bank of India" Circulars/Letters and dealing with the

contention under section 35-AA and 35-AB of 'the Banking Regulation Act, 1949'. As such, it is the contention of the Appellant that inspite of the direction of the Hon'ble Supreme Court dated 14.3.2019, the 'Adjudicating Authority' had wrongly entertained an inadmissible Application filed by the 'Respondent'/'Corporate Debtor' on the basis of 'Dharani Sugars' judgement, on an erroneous pleading that the 'Reserve Bank of India' Letter dated 28.8.2017 also falls foul of the Law laid down by the Hon'ble Supreme Court in 'Dharani Sugars' case, because there was no 'Authorisation' of the Central Government.

19. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had no jurisdiction to examine the validity of the 'Reserve Bank of India' Letter dated 28.8.2017 and render as one issued without the authorisation of the Central Government and therefore it was invalid.

20. The Learned Counsel for the Appellant adverts to the fact that the 'Respondent'/Corporate Debtor' owes more than Rs.3500 Crores to the Banks and more than Rs.1036 Crores to the Appellant and took advantage of filing numerous 'Writ Petitions, Writ Appeal and defied the Hon'ble Supreme Court order dated 14.3.2019 by filing an Application on false basis that in terms of 'Dharani Sugars' judgement, that the Petition under Section 7 of the 'Insolvency & Bankruptcy' Code was dismissed.

21. The Learned counsel for the Appellant argues that the Reserve Bank of India's Counter Affidavit in Writ Appeal No.201 of 2019 was not disclosed by the 'Respondent'/Corporate Debtor' before the Learned 'Adjudicating

Authority' in view of the 'Review Application' proceedings which amounts to suppression of material facts and playing fraud upon the Court. Also that, the 'Respondent'/'Corporate Debtor' had not disclosed the 'Adjudicating Authority' in regard to the hearing of 'Review Application' which took place on 5.11.2019, that on 4.11.2019, it had withdrawn the Writ Appeal in WA No.201 of 2019 which was filed against the order dated 25.3.2019.

22. It is the submission of the Learned Counsel for the Appellant that once the Writ Appeal, i.e. WA No.201 of2019 was withdrawn, the order dated 25.3.2019 becomes final and binding on the 'Adjudicating Authority' had no jurisdiction to disregard the judgement of the Hon'ble High Court of Orissa dated 25.3.2019.

23. The Learned Counsel for the Appellant contends that the 'Respondent'/'Corporate Debtor's position before the Hon'ble High Court was recorded to the effect **'**however it is not disputed that the bank has jurisdiction to approach the 'Tribunal' under the 'Insolvency & Bankruptcy' Code, that in the order dated 25.3.2019 in WP No.2511 of 2018 on the file of Hon'ble High Court of Orissa, detailed 'Counter Affidavit' was filed by the Appellant/Reserve Bank of India and the matter was decided on merits, especially it was recorded and decided in the said order that the 'Resolution as per 'Reserve Bank of India' Circular dated 13.6.2017 had failed and it was only after such failure, the Petition under Section 7 of the 'Insolvency and Bankruptcy' Code was filed by the Appellant.

24. The Learned Counsel for the Appellant submits that the First 'Impugned Order' dated 25.3.2019 passed by the 'Adjudicating Authority' quotes the extracts from 'Dharani sugars' judgement at Paragraphs 11 and 12 selectively but completely ignores the contents of Paragraphs 20, 21 and 66 and the ratio in the last Paragraph of 'Dharani Sugars' judgement.

25. The Learned Counsel for the Appellant contends that upon a perusal of the 'Reserve Bank of India' 'Counter Affidavit' filed in Writ Appeal No.201 of 2019, it is clear that there is no ground for not admitting the 'Application' under Section 7 of the Code, in view of the fact that 'Dharani Sugar' judgement of the Hon'ble Supreme Court had no applicability to the present case and all actions were taken legally and with due authorisation by the 'Reserve bank of India' and the Appellant.

26. The Learned Counsel for the Appellant submits that the Hon'ble Supreme Court in 'Dharani Sugars' judgement at Paragraph 21 extracts Gazette Notification issued by the Ministry of Finance dated 5.5.2017 under Section 35-AA of 'The Banking Regulation Act, 1949' and further that the Notification issued by the Ministry of Finance dated 5.5.2017 was also extracted at Paragraph 21 of the said judgement. Besides this, on behalf of the Appellant, it is pointed out that genesis of identifying the first 12 Accounts and thereafter the 'Reserve Bank of India' letter dated 28.8.2017 was expressly recorded in Paragraph 20 in terms of "it is pertinent to note that on 28.8.2017, the 'Reserve Bank of India' issued a letter directing the

Banks to admit Resolution of Accounts in the second list by 13th December 2017".

27. The Learned Counsel for the Appellant contends that the filing of the Application by the 'Respondent'/'Corporate Debtor' without disclosing that the judgement of the Hon'ble Supreme Court in 'Dharani Sugars' only relates to quashing the Circular of 'Reserve Bank of India' dated 12.2.2018 and in fact, the judgement clearly clarified that 'as a result, all cases in which the Debtors have been proceeded against by Financial Creditor under section 7 of the 'Insolvency & Bankruptcy Code' 2016, only because of the operation of the 'Impugned Circular' will be proceedings which, being faulted at the very inception, are declared to be non-est."

28. The Learned Counsel for the Appellant points out that the 'Respondent'/'Corporate Debtor' had not disclosed before the 'Adjudicating Authority' that it was simultaneously pursuing to sanction the 'Scheme of Demerger' while the 'Proceedings' under Section 7 of the 'Insolvency & Bankruptcy Code' were pending. That apart, it is the stand of the Appellant that pendency of Section 7 proceeding of the 'Insolvency & Bankruptcy Code' were not disclosed in the proceedings for the demerger while obtaining the sanction order dated 8.7.2019 from the 'Tribunal' which was without notice to the Creditors of the 'Respondent' and it was stayed by the Hon'ble Supreme Court of India.

29. The Learned Counsel for the Appellant submits that when prejudice results from an order attributable to the 'mistake', 'error', or 'omission' of

the 'Tribunal', then it is the duty of the 'Tribunal' to set right the same and further that in the present case the 'Tribunal' cannot ignore its prime duty to correct its 'mistake 'which is an 'error' apparent from the material on record.

30. The Learned counsel for the Appellant contends that the Hon'ble Supreme Court through order dated 29.7.2019 permitted the Appellant to move a 'Review' before the 'Adjudicating Authority' for 'Review' of order dated 25.6.2019 and that the Appellant filed the 'Review Application' on 20.8.2019 and a period of 55 days was spent between the first 'Impugned Order' dated 25.6.2019 and filing of Application for 'Review' constituent with the order dated 29.07.2019 of the Hon'ble Supreme Court in Civil Appeal No.3169 of 2019. Subsequently, the Appellant pursued the Application for 'Review' diligently before the 'Adjudicating Authority', which was dismissed on 10.1.2020.

31. The Learned Counsel for the Appellant submits that the time spent in 'Legal Proceeding' is not disputed and the time spent by the Appellant in prosecuting its proceedings with bonafide and diligence before the Hon'ble Supreme Court and the 'Tribunal' has to be excluded as per Section 14 of the Limitation Act, 1963 and the broad Principles recognised by the Hon'ble Supreme Court in the decision in M.P.Steel Corporation V. Commissioner of Central Excise reported in (2015) 7 SCC 58 (vide Paragraphs 35,49 and 52 at Page 86,94 and 96 respectively) while condoning the delay.

32. The Learned Counsel for the Appellant contends that the 'Review Application' was filed immediately on 20.8.2019 (which was the 22nd day from the date of order dated 29.7.2019) and such filing of the 'Review Application', based on liberty granted by the 'Hon'ble Supreme Court, cannot be termed as an act which lacked bonafides.

33. The Learned Counsel for the Appellant submits that the National Company Law Tribunal under the Companies Act, 2013, "has power to rectify the mistakes apparent on the face of record under section 420 of the Companies Act, 2013". Moreover, the 'Review Application' was filed before the National Company Law Tribunal, since the 'error' in the First 'Impugned Order' was one apparent on the fact of record and also that, a huge sum of public money was involved.

34. The Learned Counsel for the Appellant submits that the filing of the 'Appeal' against the 'Impugned Order' is within 'Limitation', after the Appellant is granted the benefit of exclusion of period for prosecuting prior proceeding, in terms of Section 14 of the 'Limitation Act' and in fact, the Appellant/Applicant has prayed for an exclusion of 193 days from the total period of 223 days from 26.6.2019 to 14.2.2020.

35. Appellant's Citations:

(a) The Learned Counsel for the Appellant relies on the decision of Hon'ble Supreme Court in 'Dharani Sugars and Chemicals Ltd. Vs. Union of India and others reported in (2019) 5SCC 480 at Spl.Pg.502 to 504 wherein at Paragraph 19 to 21, it is observed as under:

19. "At this stage, as a first step, the Internal Advisory Committee ("IAC") decided to consider the stressed assets within the top 500 exposures of the banking system as on 31-3-2017. This set of 500 accounts was arrived at as per the statement generated from the Central Repository of Information on Large Credits ("CRILC") database. On the said top 500 exposures, it was noted that 71 accounts had been partly or wholly classified as NPAs while the other 429 were not classified as NPA by any bank. For the purpose of this first list, the following criteria were applied :

(a) Accounts where the funded plus non-funded outstanding was more than INR 5000 crores;

(b) Accounts where more than 60 per cent of the total outstanding by value was NPA as on 31.3.2016.

Consequently, 12 accounts which met the above criteria were referred for resolution under the Insolvency Code vide RBI's direction dated 15-62017. It is pertinent to note that the accounts in the First List constituted around 25 percent of the NPAs in the system and the cumulative fund-based and non-fundbased outstanding therein amounted to INR 197,769 crores.

Para 20. The IAC subsequently met again and decided, on 25-8-2017, that out of the 59 remaining NPA accounts of the top 500 exposures, accounts which are materially NPA (i.e., where 60 per cent of the total outstanding has become NPA by 30-6-2017) may be given time till 13-12-2017 for resolution. If the banks fail to finalise and implement a

viable resolution plan by the said date, banks will be required to file applications under Insolvency Code before 31-12.2-2017. The IAC noted that applying this criterion will cover 29 NPA accounts, with total outstanding of INR 135,846 crores and total fund-based NPAs of INR 111,848 crores as on 20-6-2017. It is pertinent to note that on 28.0-8-2017, RBI issued a letter directing banks to attempt resolution of the accounts in this Second List by 13-12-2017. As regards the residual accounts, out of the initially identified 71 NPA accounts, the IAC recommended that such accounts may be addressed through a steady-state framework for resolution of stressed assets in a time-bound manner and failing such resolution, the accounts be referred to for resolution under the Insolvency Code. Accordingly, RBI formulated and issued the revised framework vide its Circular dated 12-2-2018.

21. Meanwhile, the Ministry of Finance issued a Notification dated 5-5-2017 under Section 35-AA as follows:

"**MINISTRY OF FINANCE**
(Department of Financial Services)
ORDER
New Delhi, 5-5-2017

S.O 1435(E) – In exercise of the powers conferred by Section 35-AA of the Banking Regulation Act, 1949 (10 of 2949), the Central Government hereby authorises Reserve Bank of India to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of a

default, under the provisions of the Insolvency and Bankruptcy Code, 2016."

This happened to be on the very next day on which the Bank Regulation (Amendment) Ordinance, 2017 introduced Sections 35-AA and 35-AB as amendments to the Banking Regulation Act. A Press Note of the Ministry of Finance of 5-5-2017 explains the genesis of the Ordinance thus :

"**Press Information Bureau**
Government of India
Ministry of Finance

5-5-2017

The promulgation of Bank Regulation (Amendment) Ordinance, 2017 will lead to effective resolution of stressed assets, particularly in consortium or multiple banking arrangements. The Ordinance enables the Union Government to authorise Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets.

The promulgation of the Baking Regulation (Amendment) Ordinance, 2017 inserting two new Sections (viz., 35-AA and 35-AB) after Section 35-A of the Banking Regulation Act, 1949 enables the Union Government to authorise Reserve Bank of India (RBI) to direct banking companies to resolve specific stress assets by initiating insolvency resolution process, where required RBI has been empowered to issue other directions for resolution, and appoint or approve for appointments, authorities or committees to advise banking companies for stressed asset resolution.

The action of the Union Government will have a direct impact on effective resolution of stressed assets, particularly in consortium or multiple banking arrangements, as RBI will be empowered to intervene in *specific cases of resolution of non-performing assets,* to bring them to a definite conclusion.

The Government is committed to expeditious resolution of stressed assets in the banking system. The recent enactment of Insolvency and Bankruptcy Code(IBC), 2016 has opened up new possibilities for time-bound resolution of stressed assets. The SARFAESI and Debt Recovery Acts have been amended to facilitate recoveries. *A comprehensive approach is being adopted for effective implementation of various schemes for timely resolution of stressed assets"*.

36. Further in the aforesaid decision, at Page 530 at Paragraph 66 it is observed as under:

66. "This is clear also from the Press Note dated 5-5-2017, which introduced the Ordinance which specifically referred to resolution of "specific" stressed assets which will empower RBI to intervene in "specific" cases of resolution of NPAs. The Statement of Objects and Reasons for introducing Section 35-AA also emphasises that directions are in respect of a "a default". Thus, it is clear that directions that can be issued under Section 35-AA can only be in respect of specific defaults by specific debtors. This is also the understanding of the Central Government when it issued the Notification dated 5-5-52017, which authorised RBI to issue such

directions only in respect of "a default" under the Code. Thus, any directions which are in respect of debtors generally, would be ultra vires Section 35-AA".

a) The Learned Counsel for the Appellant refers to the decision of Hon'ble Supreme Court in Sunitha Devi Singhania Hospital Trust V Union of India, reported in (2008)16 SCC 365 at Spl.Pg.366, wherein at Paragraph 19,20, it is observed as under:

19. "It is true that the period of limitation specified in terms of Section 129-B(2), Customs Act, 1962 is required to be observed but the Tribunal failed to notice that it has inherent power of recalling its own order if sufficient cause is shown therefor. The principles of natural justice, which in a case of this nature, envisage, that a mistake committed by the Tribunal in not noticing the facts involved in the appeal, which would attract the ancillary and/or incidental power of the Tribunal necessary to discharge its functions effectively for the purpose of doing justice between the parties, were required to be complied with.

20. While the Judges' records are considered to be final, it is now a trite law that when certain questions are raised before the court of law or tribunal but not considered by its, and when it is brought to its notice, it is only appropriate authority to consider the question as to whether the said contentions are correct or not. For the aforementioned purpose, the provisions of limitation specified in Section 129-B(2) of the Customs Act would not be attracted. However, such an application cannot be filed at any time. If

such an application is filed within a reasonable time and if the court or tribunal finds that the contention raised before it by the applicant is prima facie correct, in order to do justice, which is being above law, nothing fetters the Judges' hands from considering the matter on merit."

Added further, in the aforesaid decision at P.366, it is observed as under :

"In a matter of this nature the Tribunal was required to consider the application (for rectification) filed by the appellants which was filed within a reasonable time. It should have also considered that the appellants had been bona fide pursuing their remedies before the Supreme Court where permission to withdraw appeal was granted with the liberty to the appellants to take recourse to the remedy of filing an appropriate application before the Tribunal"

[Para 25,26 and 10]

b) The Learned Counsel for the Appellant points out the decision of the Hon'ble Supreme Court in ACIT Rajkot V. Sourashtra Kutch Stock Exchange Limited reported in (2008) 14 SCC 171 Spl.Pg.173, wherein it is observed and held as under **:**

"A patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to be travel beyond the record to see whether the judgment is correct or not. An error

apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. It has, however, been conceded in all leading cases that it is very difficult to define an "error apparent on the face of the record" precisely, scientifically and with certainty. If the view accepted by the court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record." [Para 26 and 30]

c) The Learned Counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court in Honda Siel Power Products Ltd. V Commissioner of Income Tax, Delhi, reported in (2007) 12 SCC 596 at Spl.Pg.597, wherein at paragraph 13 it is observed and held as under :

"Rule of precedent" is an important aspect of legal certainty in the rule of law. That principle is not obliterated by Section 254(2)of the Income Tax Act, 1961. When prejudice results from an order attributable to ITAT's mistake, error or omission, then it is the duty of ITAT to set it right. Atonement to the wronged party by the court or tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, ITAT was justified in exercising its powers under Section 254(2) when it was pointed out to ITAT that the judgment

of the coordinate Bench was placed before ITAT when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. ITAT acknowledged its mistake, it accordingly rectified its order. The Court was not justified in interfering with the said order".

d) The Learned Counsel for the Appellant adverts to the judgement of this 'Tribunal' in the matter of Santhosh Vasanth Walocar V Vijayakumar V. Iyer, Resolution Professional, Mumbai and Another in Company Appeal (AT)(Ins) No.871-872 of 2019 dated 24.1.2020 wherein at Para 30(iv) it is observed as under:

"Whether the Adjudicating Authority has power to modify its own order?

Section 420(2) of the Companies Act, 2013 provides as under:

The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

Rule 154 of the NCLT Rules, 2016 provides that:

Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on Application of any party by way of rectification.

According, the NCLT does not have power to modify its own order but can only correct mistake apparent from the record. The Hon'ble Supreme Court has held in "Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited" that a patent, manifest and self-evident error which does not require elaborate discussion of evidence 26 or argument to establish it, can be said to be an error apparent on the face of record and can be corrected. An error cannot be said to be apparent on the face of the recorded if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. This does not include the power to modify any substantial part of the judgment which determines rights of one party or the other".

e) The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court in Union of India and others V. West Coast Paper Mills Ltd. And other reported in (2004) 3SCC at P.458 at Spl.P.463 to 465 wherein at Para 14 and 15, it is observed as follows

14 "In the submission of Mr Malhotra, placing reliance on CST v. Parson Tools and Plants (1975 4SCC 22) to attract the applicability of Section 14 of the Limitation Act, the

following requirements must be specified: (SCC p.25, page6)

6. (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party.

(2) the prior proceedings had been prosecuted with due diligence and a in good faith;

(3) the failure of the prior proceedings was due to a defect of jurisdiction or other cause of a like nature;

(4) both the proceedings are proceedings in a court". In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be defect of jurisdiction or other cause of a like nature" within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression "other cause of like nature" came up for the consideration of this Court in Roshanlal Kuthalia V. R. B. Mohan Singh Oberot(1975 4SCC 628) and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or

factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.

15. The issue as to the legality and reasonability of the rates charged by the Railway Administration having been finally adjudicated upon by this Court, there is nothing wrong in the respondent West Coast Paper Mills Limited having proceeded on an assumption that what had remained to be done was a simple direction to the Railway Administration to refund the amount of freight to which it has already been adjudged not entitled to recover. However, the High Court was not inclined to grant such relief in exercise of its writ jurisdiction and, therefore, left open the remedy of civil suit available to the respondents. By no stretch of imagination, it can be said that West Coast Paper Mills Limited was actuated by mala fides of want of good faith in instituting the writ proceedings. In our opinion, the period lost during the pendency of the writ proceedings is liable to be excluded from computing the period of limitation under Section 14(2) of the Limitation Act. Not only we have independently arrived at this finding on the submissions made by the learned counsel for the appellant, but we may also refer to the finding recorded by the three-Judge Bench vide paragraphs 17 and 18 of the judgment dated 5-2-2004 (2004 2 SCC 747)wherein it has been specifically held that the respondents were also entitled to get the period during which the writ petition was pending excluded from computing the period of limitation and in that view of the

matter, the civil suit was filed within the prescribed period of limitation. The finding recorded by the trial court as also the High Court that the respondents were entitled to the benefit of Sections 14 and 15 of the Limitation Act, 1963 has been expressly upheld by the three-Judge Bench holding, "We have no reason to take a different view".

f) The Learned counsel for the Appellant refers to the decision in Ayisu and 6 others V Saidu 6 others reported in (2015) 1 KLJ at P.755 wherein at Para 16 and 17, it is observed as under:

> **16.** "It is crucial to note that Section 14(1) of the Limitation Act makes no reference to the pendency of suit or appeal or other proceedings in a court of law. The Legislature had used the words of general import and of widest amplitude If only pendency of a proceeding in a court would be deducted in computing the period of limitation, the time taken for issuing certified copies of the judgment which is essential to decide future course of action, has to be disregarded for the purpose of Section 14. It would certainly result in an anomaly. That time covered for taking steps absolutely necessary for initiating proceedings in a court should be included in calculating the period of limitation. The section does not make any distinction between the steps which a litigant has to take to initiate proceedings in a court and the actual pendency of those proceedings in the court. In other words, Section 14 of the Limitation Act excludes not only the period of pendency of infructuous proceedings in a court of law, but also the time occupied for taking indispensable and preparatory steps to institute further

proceedings like obtaining certified copies of the judgments and orders.

17. In the instant case, the reliefs claimed in DROPS under Section 9 of Agricultural Debt Relief Act, 1970 and the reliefs claimed in the suits are the same. Parties are also same in both the proceedings. The subject matter is also the same. The appellants has been prosecuting the DROPS and CMAS thereby diligently and bona fide. In such a benefit of Section 14 of the Limitation Act. Therefore, the finding of the court below to that effect is wrong and has to be interfered with."

g) The Learned Counsel for the Appellant adverts to the decision in Thirumareddi Raja Rao and Others V State of Andhra Pradesh, Represented by District collector, Visakhapatnam and others reported in AIR 1965 P 388 (FB), wherein at Para 61, it is observed as under:

37. The Full Bench has now pronounced its opinion thus:

"What follows on this discussion is that both on authority and on the language of section 14, there is no scope for limiting the ambit of section 14 to pendency of infructuous proceedings in a Court of law and to disregard the time taken for taking the indispensable and preparatory steps to institute proceedings which ultimately prove to be fruitless. In these circumstances, the question is answered accordingly".

h) The Learned Counsel for the Appellant relies on the decision of Hon'ble Supreme Court in Bank of Bihar V Damodar Prasad & Another reported in AIR 1969 SC P.297, wherein at Para 6, it is interalia observed as under :

Para 6 . . . . . "The trial court gave no reasons for this extraordinary direction. The Court rejected the prayer of the principal debtor for payment of the decretal amount in instalments as there was no evidence to show that he could not pay the decretal amount in one lump sum. It is, therefore, said that the principal was solvent. But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under Order 20 Rule 11(1). Assuring that apart from Order 20 Rule 11(1) the Court had the inherent power under Section 151 to direct postponement of execution of the decree, the ends of justice did not require such postponement".

RESPONDENT'S SUBMISSIONS (Comp App(AT) (INS) No.294 & 295/2020)

38. The Learned Counsel for the Respondents submit that section 35AA of the Banking Regulation Act, 1949 makes it clear that dehors the authorization of the Central Government, the Reserve Bank of India has no power to issue directions on its own unlike section 35 of the Act.

39. The Learned Counsel for the Respondent contends that the appellant/financial creditor had admitted that the proceedings were filed before the 'Adjudicating Authority' (National Company Law Tribunal, Cuttack Bench) because of the Reserve Bank of India circulars which among other things had granted time only upto 13.12.2017 to work out any resolution dehors the Insolvency and Bankruptcy Code' and filed proceedings before 31.12.2017 (vide corrigendum dated 13.06.2017 issued by Chief General Manager of Reserve Bank of India).

40. The Learned Counsel for the Respondent points out that the Appellant/Bank had acted as per the Reserve Bank of Letter dated 28.08.2017 whereby and where under, it was made clear that the time was granted till 13.12.2017 for resolution outside the Code and thereafter, the "Insolvency Proceedings" where directed to be initiated before 31.12.2017.

41. The Learned Counsel for the Respondent emphatically takes a plea that the direction issued by the Reserve Bank of India through its letter dated 28.08.2017 addressed to the Chairman of the Appellant's Bank did not have any 'authorization' from the Central Government in respect of a 'default', pertaining to the Respondent company and the

direction given by the Reserve Bank of India was of a general nature covering all 'debtors' "those which are materially NPA as on 30.06.2017 i.e. where more than 60 percent of the total outstanding is classified as NPA on CRILC".

42. It is represented on behalf of the Respondent that the circular dated 12.02.2018 issued by the Reserve Bank of India was challenged in Dharani Sugars and Chemicals Limited case before the Hon'ble Supreme Court, reported in (2019) 5 Supreme Court Cases at page 480 and it was held that the same was of a general nature, as it covered a class of debtors whose dues where more than INR 2000 Crores. As such it is the stand of the Respondent that the letter dated 28.08.2017 of the Reserve Bank of India generally covered all debtors in the broad class of debtors and not in respect of 'a default' or a specific default of a specific debtor. In fact, the list enclosed along with the said letter mentioning the name of the Respondent Company at Sl. No 20 (vide Volume I page 159 of Paper Book ' List of Accounts State Bank of India') was primarily a compilation of the accounts where the Appellant/Bank is the Lead Bank, categorized in terms of a general direction identifying the class of debtors.

43. The Learned Counsel for the Respondent projects a legal plea that the Minutes of 28.11.2017 of the Major Lenders' meeting of VISA Steel Limited (Respondent in the present appeals) clearly records that the proceedings shall be filed before the National Company Law Tribunal against the Company before 31.12.2017, which is also directed (vide RBI's circular dated 28.12.2017) and that the direction of the Reserve Bank of India was not only in respect of the Respondent/Company but entire class of debtors and was of a general nature and not falling within the expression 'a default' within the meaning of section 35AA of the Banking Regulation Act, 1949.

44. The Learned Counsel for the Respondent brings to the notice of this Tribunal that the demand notice prior to the filing of the proceedings before the 'Tribunal' was issued on the last date, i.e 13.12.2017, as per the direction of the Reserve Bank of India (vide Volume I of the Paper Book, Annexure A-12, pages 190-192) and that the proceedings was filed before the Tribunal in CP (IB) No.24/KB/2018 on 21 December 2017 keeping in tune with the RBI Circular/direction.

45. The primordial stand of the Respondent is that in view of the judgment of Hon'ble Supreme Court in Dharani Sugars and Chemicals case report in (2019) 5 SCC at page 480 the directions given by the Reserve Bank of India in its circular dated 13.06.2017 and the letter dated 28.08.2017 being general in character and admittedly without having any authorization from the Central Government is also ultra vires of the section 35AA of the Banking Regulation Act, 1949.

46. The Learned Counsel for the Respondent contends that the "IBC proceedings' being initiated by the Bank after 13.12.2017 and prior to 31.12.2017 in terms of the ingredients of the letter dated 28.08.2017 of the Reserve Bank of India is also resultantly affected by the ratio laid down in 'Dharani Sugars and Chemicals case' and being faulted from the beginning, is to be declared to be non-est.

47. The Learned Counsel for the Respondent submits that in any event, the circular dated 05.05.2017 is general in nature and does not pertain to 'a default' of 'a specific' account.

48. It is the version of the Respondent that once the Appellant/ Bank took a stand that it had no other option but to act as per the mandate of the Reserve Bank of India in the circular dated 13.06.2017 and letter dated 28.08.2017, without there being any permission from the Central Government to Reserve Bank of India, both the circulars and

proceedings being non-est, main petition was liable to be dismissed and accordingly CP (IB) No.24/KB/2018 was dismissed and IA 21/CTB/2019 was allowed as per the order dated 25.06.2020 of the Tribunal.

49. The Learned Counsel for the Respondent points out that the Appellant/Bank had earlier filed proceedings under section 7 of the IB Code on 21.12.2017 for the 'same set of claims' against Visa International Limited in CP (IB)No.759/KB/2017 which was admitted on 07.08.2019 by the National Company Law Tribunal, Kolkata Bench. As such, when an application filed by the financial creditor is admitted against one of the Corporate Debtor's or Corporate Guarantor, the second application filed by the same 'financial creditor' for the 'same set of claim' and 'default' is not to be admitted against the 'corporate guarantor' or 'corporate debtor' and in support of the said contention the learned counsel for the Respondent refers to the following decisions-

(1) Dr. Vishnu Kumar Agarwal Vs Piramal Enterprises Limited, 2019 SCC on line NCLAT Page 81 (vide paragraph 31 and 32)
(2) (2) IFCI limited Vs Golf Technologies Private Limited and Cedar Infonet Private Limited, 2019 SCC Online NCLAT page 766 (vide paragraph 21 – 23)
(3) Bijay Kumar Agarwal Vs State Bank of India and another 2020 SCC Online NCLAT (vide paragraph 22-24)

50. The Learned Counsel for the Respondent submits that the I & B Code, 2016 does not have any statutory provision for 'Review'. Also, it is projected on the side of the Respondent that the jurisdiction of 'Review' cannot be derived and in the absence of specific statutory provisions, any order of 'Review' passed would be a nullity and without jurisdiction.

RESPONDENT'S CITATIONS

51. The Learned Counsel for the Respondent to lend support to the contention that in the absence of specific statutory provision, an order of 'Review' cannot be passed refers to the decision of Hon'ble Supreme Court Kalabharathi Advertising Vs Hemanth Vimalnath Narichania reported in (2010) 9 Supreme Court Cases at Page 437 at special page 445 wherein at paragraphs 12 to 14 it is observed as under:

"Para 12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha V Narayanarao Kanderao Jambekar (AIR 1965 SC 1457) and Harbhajan Singh V Karam Singh (AIR 1966 SC 641).

Para 13. In Patel Narshi Thakershi v Pradyuman Singhiji Aurnsinghji (AIR 1970 SC 1273(, Major Chandra Bhan Singh v Latagar Ullah Khan ((1979)1 SCC 321), Kuntesh Gupta (Dr) v Hindu Kanya Mahavidyalaya (AIR 1987 SC 2186), State of Orissa v Commr. Land Records and Settlement ((1998) 7 SCC 162, and Sunita Jain v Pawan Kumar Jain((2008) 1 SCC(Crl)537) this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order in impermissible as review is a creation of statute.

Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

Para 14. Therefore, in view of the above , the law on the point can be summarized to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible."

52. The Learned Counsel for the Respondent cites the decision Perfect Enterprises and others v National Highway Authority of India and others reported in MANU/UP/1302/2012 wherein at paragraph 4 and 5 it is observed as under:

"4. In any event, we find that the present writ petition was dismissed on contest at the stage of admission and being aggrieved and/or dissatisfied therewith, the applicants herein filed a special leave petition before the Supreme Court which was dismissed as withdrawn. However, they obtained a liberty to file a review application. But the Supreme Court had made it clear that no observation has been made with regard to merits of such review application, if any, file before the High Court.

53. According to us, long standing practice of this High Court is that filing of review, recall, restoration applications etc. by the newly engaged counsel after passing the order, will be seriously noted. This is because of the reason that stand of one Advocate might be different from the other and the new argument might be developed by new counsel from different outlook. If it is allowed, then there would be no end of the litigation. Moreover, engagement of new counsel to make his argument raising a new ground in a different view, cannot be valid ground for the purpose of review.

Following such practice, the Stamp Reporter of this Court has submitted a report at the time of filing the review application. However, no explanation is available with regard to the same. The only explanation as given with regard to the condonation of delay is that as because the Supreme Court decided that matter on 29th November, 2011 directing to file the review application, therefore, there was delay on part of the applicants/petitioners in filing the same. However, no new question of fact or law is available before us."

54. The Learned Counsel for the Respondent points out the judgment of this Tribunal in Comp. App (AT) (Ins) No. 295/2017 dated 30.11.2017 in Amod Amladi Vs Sayali and others reported in MANU/NL/0189/2017 wherein at paragraph 6 it is observed as under:

"6. In absence of any power of review or recall vested with the Adjudicating Authority, we hold that the Adjudicating Authority rightly refused to recall the order of admission dated 2nd May, 2017."

55. The Learned Counsel for the Respondent refers to the decisions (a) Bablu Ghosh Vs Amrit Fresh Private Limited reported in 2016 (3) CHN (Cal) 214 wherein at paragraph 21 and 22 it is observed as under:

"21. The applicant respondent No. 1 filed a Special Leave Petition in the Supreme Court being SLP No. 22419 of 2014 challenging the judgment and order dated 18th February, 2014 of the Division Bench, of which review has been sought. It appear that on 15th September, 2014 Counsel appearing on behalf of the applicant respondent No. 1 in the Supreme Court, sought permission of the Supreme Court, to withdraw the Special Leave Petition, with liberty to approach the High Court by filing an appropriate review petition. Such leave was granted.

56. The averment in this review petition that the Supreme Court directed the applicant respondent No. 1 to file a review petition in this Court, is

misleading. On the prayer made on behalf of the applicant respondent No. 1, the Supreme Court granted leave to respondent No. 1 to withdrawn the Special Leave Petition filed in the Supreme Court, with liberty to file an application for review in this Court. The Supreme Court did not consider the question of maintainability of an application for review of the judgment and Order of the Divison Bench of A.K. Banerjee and A. K.Mondal, J.J. allowing the appeal against the order of Nadira Patherya."

57. The Learned Counsel for the Respondent seeks in aid of the decision in Kitply Industries Vs Kotak Mahindra Primie Limited and Others reported in MANU/WB/0815/2018 wherein at paragraph 3 and 4 it is observed as under:

"3…. The review jurisdiction can only be exercised if the grounds enumerated under Order XLVII Rule 1 of the Code of Civil Procedure are fulfilled. The review application cannot be aimed for revisitation and rewriting of the judgment nor the Court should act as a appellate Court and sit over the judgment and to find out whether the same has been correctly decided or not. There is an apparent distinction between an order containing error apparent on the face of the record and the illegal and erroneous order. In former case, Court can exercise the review jurisdiction but in later case the remedy lies by moving the higher forum. The scope under Section 8 if the said Act is very limited and limited to the extent of the cause of action pleaded in the suit in relation to the arbitration clause or agreement. If the subject dispute is covered by an arbitration agreement, it is imperative on the Court to refer the parties to arbitration instead of venturing to proceed to decide the suit on merit. If an express embargo created under the statute, the Court cannot travel beyond it. The Court cannot pass such a direction which is not contemplated under Section 8 of the said Act and, therefore, the direction as sought for in the instant application is beyond the legal competence of the Court who was in seisin

of the suit and was exercising jurisdiction within strict parameters of section 8 of the said Act. "

58. The Learned Counsel for the Respondent refers to the decision of Hon'ble Supreme Court Manohar Shankar Nale and Others v. Jaipal Singh A/o.Shivlal Singh Rajput (2008) 1SCC Pg.520 at spl.Pg. 522 wherein , it is observed as under :

……." it is one thing to say that the respondent was entitled to file an application for review in terms of Section 114 read with Order 47 Rule 1 CPC, but it is another thing to say that the decree passed in favour of the respondent merged with the order dismissing the review application etc."

59. The Learned Counsel refers to the order dated 10.7.2019 of this Tribunal in Company App.(AT)(Ins) No.702 of 2019 in Dinesh Goyal v.DCB Bank wherein at Paragraph 5, it was observed that "in the present case, as there is no mistake apparent from the record and in the absence of any typogrophical error it was not open to the Adjudicating Authority to take any recourse of sub-section (2) of Section 420 of the Companies Act, 2013."

60. The learned Counsel for the Respondent while rounding up submits that in the absence of any power of "Review" or 'Recall' vested with the 'Adjudicating Authority', the order dated 10.01.2020 in dismissing the CA (IB)No. 87/CTB/2019 for 'Review' was correctly passed.

EVALUATION (Comp.App.(AT)(Ins)No.294 of 2020

61. It is the stand of the Appellant/Bank that the liability of the 'VISA International Limited/Corporate Guarantor' is co-extensive with that of the Respondent, the principal borrower and not alternatively. Further, it is represented on behalf the Appellant that 'Contract of Guarantee' is independent contract in itself and both the 'Corporate Guarantor' and the

Respondent ` are liable at the same time without recourse to Section 128 of the Indian Contract Act, 1872.

62**.** The Learned Counsel for the Appellant refers to the decision of the Hon'ble Supreme Court in Maharashtra State Electricity Board, Bombay v Official Liquidator, High Court, Ernakulam and another reported in (1982) 3 Supreme Court Cases at Page 358at special page 363 wherein it is observed as under:

> *"7……. Under Section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under section 134 of Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or mission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagnnath Ganeshram Agarwala V Shivnarayan Bhagorath (AIR 1940 Bom 247): see also In re Fitz Ex parte Robson (1905) 1 KB 462.)*

63. The Learned Counsel for the Appellant puts forward a plea that just because the 'Corporate Guarantor' has gone into Liquidation, the same would not in any way affect the vital obligation of the Respondent towards the Bank. Continuing further, it is the contention of the Appellant that the judgment of Piramal's case of this tribunal, is assailed before the Hon'ble Supreme Court of India in Civil Appeals No. 878 of 2019 and 1678 of 2019, which are pending for determination, together with 8 other Appeals. Also that the Civil Appeal No. 2807 of 2020 on the file of Hon'ble Supreme of Court of India in Shabad Khan v Nisus Finance and Investment case is

tagged with bunch of cases relating to the issues involved in Piramal's judgment.

64. The Respondent/Corporate Debtor had filed an IA/21/CTB/2019 in CP (IB) No.24/KB/2018 on the file of Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) and prayed for the issuance of necessary direction in dismissing CP (IB) No. 24/KB/2018 (filed by the Appellant/Financial Creditor/Bank) as the same as become non-est etc.

65. The main plea of the Respondent/Corporate debtor before the Tribunal as petitioner was that the Hon'ble Supreme Court had interpreted the provisions of Section 35AA and 35 AB of the Banking Regulation Act, 1949 in the decision Dharani Sugars Chemicals Limited reported in (2019)5 SCC at page 480 at special page 533 wherein in paragraph 72 it is observed and held as under:

> *"There is nothing to show that the provisions of Section 45-L(3) have been satisfied in issuing the impugned circular. The impugned circular nowhere says that RBI has had due regard to the conditions in which and the objects for which such institutions have been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets. Further, it is clear that the impugned circular applied to banking and non-banking institutions alike, as banking and non-banking institutions are often in a joint lenders' form which jointly lend sums of money to debtors. Such non-banking financial institutions are, therefore, inseparable from banking institutions insofar as the application of the impugned circular is concerned. It is very difficult to segregate the non-Banking financial institutions from banks so as to make the circular*

applicable to them even it is is ultra vires insofar as banks are concerned. For these reasons also, the impugned circular will have to be declared as ultra vires as a whole, and be declared to be of no effect in law."

66. In IA 21 of 2019 in CP (IB) No.24/KB/2018, the Respondent/Petitioner/Corporate Debtor had stated that the proceedings before the Adjudicating Authority (NCLT) was initiated by the 'Financial Creditor' and admittedly, as per the directions of the Reserve Bank of India, mentioned in the letter dated 28.08.2017 and therefore, the main proceeding before the Adjudicating Authority was to be dismissed.

67. The Respondent/Corporate Debtor/Petitioner in IA 21 of 2019 had averred that the Hon'ble Supreme Court had interpreted the provisions of section 35AA and 35AB of the Banking Regulations Act, 1949 and laid down the law with regard to the scope, power and ambit of the Reserve Bank of India to issue directions for filing of insolvency proceedings, in Dharani Sugars case and because of the law laid down, on the face of it, the letter of the Reserve Bank of India dated 28.08.2017 is ultra vires, since there was no prior approval/or consent of the Central Government.

68. In view of the above, according to the Respondent/petitioner/Corporate Debtor, the IA No. 21 of 2019 falls squarely under the ambit of the judgment passed by the Hon'ble Supreme Court of India in Dharani Sugars and Chemicals case and hence the main proceedings filed by the Appellant/Respondent/Financial Creditor had become non-est and was to be dismissed.

69. The Respondent/Appellant/Financial Creditor it is reply to the Interlocutory Application No. 21 of 2019 filed by the Respondent/Petitioner/Corporate Debtor had stated that the Hon'ble Supreme Court in Dharani Sugars and Chemicals Limited case had set-aside the circular dated 12.02.2018 of the Reserve Bank of India stating that the

same was not in accordance with section 35AA of the Banking Regulation Act, 1949 and the Hon'ble Supreme Court had not passed any orders on the circulars issued by the Reserve Bank of India prior to 12.02.2018. Furthermore, the Respondent/Appellant/Petitioner had initiated the 'CIRP proceedings' against the Corporate Debtor because of the default committed by it and further that the IA No 21 of 2019 filed by the Respondent/Petitioner/Corporate Debtor is to be dismissed because of the fact that the judgment of the Hon'ble Supreme Court in Dharani Sugars and Chemicals case has nothing to do with the CP (IB) No. 24/KB/2018 filed by the Financial Creditor.

70. It is to be pointed that the Ministry of Finance (Department of Financial Services) New Delhi on 05.05.2017 issued Gazette Notification which runs as under:

> "SO 1435 (E) – In exercise of the powers conferred by Section 35AA of the Banking Regulations Act, 1949 (10 of 1949), the Central Government hereby authorizes the Reserve Bank of India to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of a default under, the provisions of the Insolvency and Bankruptcy Code, 2016"

71. A cursory perusal of the Minutes of the Joint Lenders' meeting of Visa Steel Limited (Respondent) dated at 04.08.2017 (Annexure A-6- page 148 of Volume I of the Paper Book) indicates that a resolution was adopted at the meeting wherein it was decided by the lenders that the cut back amount from January, 2017 onwards will be appropriated against the VISA Steels loan taken over by SBI from IL&FS on behalf of the consortium and further that the lenders had decided to refer the company to NCLT under

IBC for 'Debt Resolution' and these were made prior to and dehors of any direction given by the Reserve Bank of India.

72. Based on the gazette notification issued by the Ministry of Finance dated 05.05.2017, the Reserve Bank of India had issued a letter dated 28.08.2017 (Annexure A-7, Volume I of Paper Book, page 156) to the Appellant/bank wherein 12 accounts were identified for immediate reference for resolution under the Insolvency and Bankruptcy Code, 2016 (IBC) and time was given till 13.12.2017 failing which, the Appellant was directed to commence insolvency action under the Code by 31.12.2017. In reality, the Respondent/Corporate Debtor was shown in Annex 1 of the Appellant Bank List of Account at Sl. No. 20 and in short the Reserve Bank of India had given a specific direction to it letter dated 28.08.2017 to proceed with insolvency proceedings under the Code against the Respondent identified as "specific defaulter".

73. It is to be significantly pointed out that Reserve Bank of India has powers' to issue certain directions to certain banks and Banking companies so as to see that there is proper recovery of public money or for any other such purpose. As a matter of fact, Section 3(11) definition of Insolvency & Bankruptcy Code, deals with 'debt' meaning a 'liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt'.

74. Any sum which is due and payable by the borrower/Corporate Debtor to the Bank is a 'Financial Debt' within the meaning of Section 5(8) of the Code. The 'CIRP' is to be initiated when a default is made in regard to the payment of 'Debt' by the 'Corporate Debtor'. In Law, a 'Creditor' is not to be restrained from filing such application in accordance with 'Law'. The trigger for initiating 'Insolvency Process' is the occurrence of 'default' by the 'Debtor'.

75. At this juncture it is worthwhile to recall and recollect the decision of the Hon'ble Supreme Court in Dharani Sugar and Chemicals Limited vs Union of India (2019) 5 SCC at special page 518 wherein it is observed and laid down as follows:

> 42. … "If a specific provisions of the Banking Regulation Act makes it clear that RBI has a specific power to direct banks to move under the Insolvency Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside of four corners of the statutes which govern them, namely, the RBI Act and the Banking Regulation Act."

76. In the case on hand resting upon the Gazette Notification of the Ministry of Finance dated 05.05.2017 whereby the Central Government had authorized the Reserve Bank of India to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of default under the provisions of the Insolvency and Bankruptcy Code, 2016, the Reserve Bank of India had issued a letter dated 28.08.2017 (Annexure A-7, Page 156 of Volume I of the Paper Book), whereby the Respondent/Company's name was shown at Sl No 20 in the List of Accounts of the Appellant /State Bank of India. Indeed, based on the recommendations of "internal advisory committee (IAC)" constituted pursuant to the Banking Regulation (Amendment) Ordinance, 2017 12 accounts were identified for immediate reference for resolution under the I&B Code etc.

77. In view of the above, by no stretch of imagination it can be said that there was no issuance of authorization by the Central Government to the Reserve Bank of India for issuance of such direction(s) to any banking company to initiate insolvency resolution process in respect of default under the I&B Code and added further, the Reserve Bank of India through letter

dated 28.08.2017 issued a specific list of accounts wherein the Respondent's name admitted figure at Sl No. 20. Viewed in that perspective, the contra views taken by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in allowing the IA No. 21/ CTB/2019 and also making an observation that the … 'proceeding' under section 7 of the IBC appears to be not maintainable and consequently dismissing CP (IB) No. 24/KB/2018 (TP No. 40/CTB/2019) are clearly unsustainable in eye of law. As logical corollary, the Comp Appl. (AT)(Ins) No. 294 of 2020 succeeds.

DISPOSITION (COMP. APP (AT) No. 294/2020):

78. In fine, the instant Comp Appl. (AT)(Ins) No. 294 of 2020 is allowed. No costs. The impugned order dated 25.06.2019 of the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) is set aside by this Tribunal for the reasons assigned in this Appeal. The IA No. 21/CGTB/2018 filed by the Respondent/Petitioner/Corporate Debtor is dismissed. The Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) is directed to restore CP (IB) No. 24/KB/2018 (TP No. 40/CTB/2019) to its file and to proceed further, of course, in the manner known to Law and in accordance with Law and to dispose of the same on merits, after providing adequate opportunities of hearing to the respective parties. Liberty is granted to both sides to raise factual and legal pleas (including the plea of maintainability/non maintainability of 'CIRP Process' under section 7 of the I & B Code, 2016)

APPRAISAL: (Comp. App. (AT) (Ins) No. 295/2020)

79. Be it noted, that before the Hon'ble High Court, Orissa, Cuttack, in Miscellaneous case No. 2216 of 2018 in WP (C) No. 2511 of 2018 filed by the Respondent/ VISA Steel Limited (As petitioner) against the (1) Reserve Bank of India, Mumbai and the Appellant/State Bank of India, an order of stay of further proceeding of C. P (IB) 24/KB/2018 pending before

the National Company Law Tribunal, Kolkata Bench was granted on 15.03.2018 till the next date of hearing . Moreover, on 02.05.2018 the Hon'ble High Court of Orissa, Cuttack in Miscellaneous Case No. 5353 of 2018 in WP (C) No. 2511 of 2018 had not extended the stay order passed on 15.03.2018 in Miscellaneous Case No. 2216 of 2018 and expressly recalled the order of the stay passed earlier.

80. It is brought to the fore that the Hon'ble Division Bench of Orissa High Court, Cuttack in WA No. 237 of 2018 filed by the Respondent/VISA Steel Limited (Appellant therein) on 27.06.2018 had directed that the interim order which was granted by the writ court on 15.03.2018 passed in the writ petition will continue to operate till next date of listing or final decision in the writ petition, whichever was earlier.

81. As a matter of fact the Hon'ble Supreme Court of India in Petition(s) for Special to Leave to Appeal (C) No. (s) 7009/2019 filed by the State Bank of India (as petitioner) (Appellant before this tribunal) against the Respondent/VISA Steel Limited and another against the impugned final judgment and order dated 27.06.2018 in WA No. 237 of 2018 passed by the High Court of Orissa, Cuttack wherein the operation of the order dated 27.06.2018 passed by the High Court of Orissa at Cuttack in WA No. 237 of 2018 was stayed. However, the Appellant was permitted to proceed with the proceedings initiated before the National Company Law Tribunal, Kolkata on 21.12.2017 in CP (IB) No. 24/KB/2018 etc.

82. On 25.03.2019, the Hon'ble High Court of Orissa, Cuttack in WP (C) No. 2511 of 2018 filed by the Respondent/VISA Steel Limited (petitioner) passed an order in dismissing the writ petition stating that it

was devoid of any merit, but without costs. Besides this, on 25.06.2019, the 'Adjudicating Authority' (National Company Law Tribunal, Cuttack Bench) dismissed the Appellant/Bank's section 7 application (filed under the I & B Code) holding that the same appears to be not maintainable.

83. The Hon'ble Supreme Court of India on 29.07.2019 in Civil Appeal No. 3169 of 2019 (filed by the Appellant/bank) against the Respondent/VISA Steel Limited and another permitted the Appellant to withdraw the Civil Appeal with liberty to approach the National Company Law Tribunal (NCLT) for review of the order under challenge and accordingly dismissed the Civil Appeal as withdrawn etc.

84. As matter of fact, on 02.09.2019 before the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) the Appellant/bank filed a Review Application in CA (IB) No. 87/CTB/2019, on 20.08.2019 and after the judgment being reserved by the Tribunal on 05.11.2019, the review application was dismissed on 10.01.2020 stating that there is no provision under I & B Code or under NCLT Rules, 2016 for the Tribunal to Review its own order.

FINDINGS: (Comp. App. (AT) (Ins) No. 295/2020)

85. Considering the arguments advanced on either side and this Tribunal bearing in mind that it has allowed Comp. App. (AT) (Ins) No. 294/2020, the Comp. App(AT)(Ins) No. 295/ 2020 has become an 'Otiose' one, because of the fact as a concomitant effect, the 2nd order dated 10.01.2020 passed by the 'Adjudicating Authority' becomes a nugatory one in the eye of Law and accordingly stands disposed of. No costs. The

connected 'Interlocutory Applications' are closed. However, the Appellant/Bank is directed to file the certified copy of the impugned order in IA No. 21/CTB/2019 in TP No. 40/CTB/2019 (CP (IB) No. 24/KB/2018) before the Office of the Registry of National Company Law Appellate Tribunal, New Delhi, of course within two weeks from today.

[Justice Venugopal M]
Member(Judicial)

[Kanthi Narahari]
Member (Technical)

15th March, 2021
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