

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.234 OF 2021

(Arising out of judgement and order dated 26.02.2021 passed by National Company Law Tribunal, New Delhi Bench II in CA No.266 of 2020 in IB-35(ND)/2017),

In the matter of:

1. Mr T.S. Murali (Ex Director),
R/o G-158, Sector 41,
Noida
Uttar Pradesh 201301

2. Mrs Rema Murali,
W/o Sh T.S. Murali,
R/o G-158, Sector 41,
Noida
Uttar Pradesh 201301

Appellant

Vs

1. Liquidator of Helpline Hospitality Pvt Ltd
Through
Mr. Sarvesh Kashyap,
C/o 7, DDA Market, E Block,
East of Kailash,
New Delhi-110065

Respondent

For Appellant: Mr. Rakesh Tikku, Sr Advocate, Mr Awijit Paliwal, Advocate.
For Respondent: Mr Sameer Rastogi, Mr Dhruvjit Sachar, Advocates.
Mr Sarvesh Kashyap, Liquidator in person.

JUDGEMENT
(18th October, 2022)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'Code'). The appellant in the Memo of Appeal have prayed for grant of following relief:

- i) Set aside the impugned order dated 26.02.2021 passed in CA No.266 of 2020 in CP(IB)-35(ND)/2017 and also set aside the earlier impugned order dated 20.12.2019 in CA No.840 of 2018 in CP (IB)-35(ND)/2017 passed by the Hon'ble National Company Law Tribunal, New Delhi Bench II in CP (IB)-35(ND)/2017 which 'was thereby confirmed by the impugned order dated 26.02.2021.
- ii) Quash the warrants of attachment dated 24.12.2019 affixed on property bearing No.G-158, Sector 41, Noida, Uttar Pradesh 201301 as issued vide impugned orders dated 20.12.2019 passed by the Hon'ble National Company Law Tribunal New Delhi Bench II in CA-840/C-II/ND/2018 in CP(IB) -35(ND)/2017.
- iii) Pass any such order/further orders as this Hon'ble Court may deem fit and proper.

2. By order dated 26.02.2021 the Learned National Company Law Tribunal (hereinafter referred to as 'the Adjudicating Authority'), New Delhi has rejected the application vide CA No.266/C-II/ND/2020 in (IB)-35(ND)/2017. The said application was primarily filed by the appellant to review the order dated 20th December, 2019 passed by the Adjudicating Authority in CA-840/C-II/ND/2018 in (IB)-35(ND) of 2017. By the said order the Learned Adjudicating Authority entertaining application filed by the Liquidator which was filed alongwith report of Forensic Auditor observed that since the property belongs to the corporate debtor i.e. M/s Helpline Hospitality Pvt Ltd and the ex-director who is Appellant No.1 had fraudulently recorded the same in his name, the property bearing G-958, Sector 41, Noida,

UP is hereby attached. Warrants of attachment affixed to the property and the liquidator shall take further steps for public auction of the same. The sale of immovable property shall, however, be confirmed after due orders of the Adjudicating Authority. The Respondents (appellants herein) were directed not to alienate, lease or create any kind of encumbrance or third party interest in property in question till the order is fully complied with.

3. In the present appeal both the appellants are ex-directors of Corporate Debtor namely M/s Helpline Hospitality Pvt Ltd. Before further proceeding it is necessary to delineate certain relevant facts for proper adjudication in the present matter.

4. On 21.03.2017 an application under Section 9 of the Code was filed for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as the 'CIRP') against M/s Helpline Hospitality Pvt Ltd. The said application was admitted on 24.04.2017 and thereafter on 18.07.2017 Insolvency Resolution Professional was appointed. However, finally under Section 33 of the Code, liquidation proceeding was initiated against the corporate debtor and Resolution Professional was appointed as Liquidator. During the liquidation proceeding interim forensic audit report was brought on record on 10.11.2018. It appears from the Forensic Audit Report that during forensic audit it was found that the company/corporate debtor and its directors were liable for prosecution under various provisions of the IPC, Companies Act, 2013 and other relevant laws mainly on the finding that fraudulently diversion of funds from source company Helpline Hospitality Pvt Ltd was done to create personal estate of directors at Noida worth Rs.65,29,836/-. In the forensic

audit it was noticed that company/corporate debtor had taken a loan of Rs.36,59,250/- vide agreement dated 30.04.2004 for a tenure of 104 months period which ended on 22.07.2013 for assets located at Plot No.G-158, Sector 41, Noida UP. However, the said asset was got registered in the name of Appellant No.1 Those facts were not addressed by auditors in their audit reports for financial 2004-05 to 2013-14. The amount withdrawn from the company account for creating their personal wealth was treated as siphoning of money and cheating, fraud, misrepresentation of facts to company financial position. The Agreement Number LBDEL00000921645 from ICICI Bank and the said loan EMI was auto debit from account No.63005006943. The said auditor observed that on the aforesaid facts it was evident that directors made a wilful attempt for diversion of funds from company account to their personal benefits fraudulently. Hence this amount was liable to be recovered alongwith interest @ 18%. The total amount diverted as a consolidated instalment in view of loan statement taken from ICICI Bank dated 30.08.2018 was Rs.6529,836.56. The estimated value of the above said property as per special audit report was Rs.4 crore which was created from the **funds of company** moving fraudulently for repayment of the loan taken for purchase of this house. The special audit report observed that the said house shall be transferred to company immediately to safeguard the interest of stakeholders especially Service Tax Department, Govt of India. Rs,3,91,04,886/- was overdue of Service Tax Department which was to be recovered on sale of said property.

5. On the basis of facts emerged from special audit report and other material available on record the Liquidator filed an application bearing CA No.840/2018 on 21.12.2018 seeking transfer of property bearing No.G-158, Sector 41, Noida in the name of Helpline Hospitality Pvt Ltd (corporate debtor).

6. In the said petition the appellants appeared and filed their response. The application i.e. IA No.840/2018 was heard on different dates and orders were also passed and finally by order dated 20.12.2019 the Adjudicating Authority directed for attachment of the property in question and directed the liquidator to take further steps for public auction. After the order dated 20.12.2019 passed by the Adjudicating Authority, on 7.1.2020, instead of assailing the said order before the Appellate Tribunal, the appellant filed a petition for review of the same order before the Adjudicating Authority. The said review petition was registered as CA No.266/C-II/ND/2020 in (IB)No.35/(ND)/2017. After hearing the parties the Adjudicating Authority on 14.01.2020 reserved the orders. However, to the reasons best known to the appellant, the appellant preferred an appeal before this Appellate Tribunal vide Company Appeal (AT)(Ins) no.262/2020. The said appeal was disposed on 13.03.2020 mainly noticing the facts that the Adjudicating Authority in CA No.266/2020, which was filed for modification on 7.1.2020, the Adjudicating Authority, has reserved its orders. The order dated 13.03.2020 passed by this Tribunal in Company Appeal (AT) (Ins) No.262/2020 is reproduced hereinbelow:

“13.03.2020: We have heard learned counsel for the parties. Learned counsel for the Appellant submits that the Adjudicating Authority vide

impugned order dated 20.12.2019 attached the property bearing Plot No.G-158, Sector 41, Noida, UP 201302 which belongs to the Appellants. The Adjudicating Authority is also directed the Liquidator to take further steps for public auction of the same.

2.In compliance of this direction, the Liquidator has issued a notice on 24.12.2019 restraining the Appellants from transferring, alienating or creating any charge on the aforesaid property and also directed the Appellants to handover the vacant and peaceful possession of the property to the Liquidator within 15 days.

3. It is submitted that after passing the impugned order, the Appellants have filed an application bearing No.CA No.266 of 2020 dated 07.01.2020 for modification of the order, before the Adjudicating Authority. After hearing the argument, the Adjudicating Authority has reserved for orders. No order has been passed till date.

4.Learned counsel for the Appellant submits that till passing of the order by the Adjudicating Authority, the order for handing over the possession of aforesaid property be stayed.

5. We are of the view that the prayer is reasonable and therefore, we pass the order that till passing of the order (in CA No.266 of 2020 dated 07.01.2020) by the Adjudicating Authority taking the possession of the aforesaid property by the Liquidator is hereby stayed.

6. It is made clear that we are not passing any order on merit and the Adjudicating Authority is free to pass the order without influenced by this Order.

7. *The Liquidator who is represented by Mr. Sameer Rastogi is directed not to proceed further in light of this order.*

8. *With this direction the Appeal is disposed of. Not order as to costs.*

9. *The Appellant if aggrieved by the order passed by the Adjudicating Authority in the aforesaid application then they are at liberty to challenge the order.”*

7. However, finally on 26.02.2021 the learned Adjudicating Authority by an elaborate order dismissed the Review Petition on both the counts. It was held that under Regulation 11 of the NCLT rules, while exercising an inherent jurisdiction there was no provision for review of its own order and secondly in the order dated 20.12.2019 there was no apparent error or order was contrary to record. The order dated 26.02.2021 is reproduced hereineblow:-

“The present Application is preferred by Sh. T.S Murali, Ex-Director of M/ s Helpline Hospitality for seeking the following reliefs:

"(A) Permit the Applicants herein to deposit/ pay the sum of Rs. 65,29,836/- over a period of 6 months.

(B) Modify the Orders dated 20.12.2019 in CP (IE)-35(ND)/2017 passed by the Hon'ble NCLT New Delhi Bench-II in view of the submissions made hereinabove by staying/removing the warrants of attachment dated 24.12.2019 issued by the Liquidator pertaining to the property bearing no. G-158, Sector 41, Naida, Uttar Pradesh-201301."

2. The brief background of the case is that an Application bearing no. 840 JC-II/ND /2018 filed in (IB)-35(ND)/20 17 under Section 25(2)0 read with Section 66 of the IBC, 2016 preferred by the Liquidator of the Corporate Debtor (CD) namely, Mjs Helpline Hospitality Private Limited was allowed vide order dated 20.12.2019 passed by this Tribunal, wherein the following directions were passed :

“15. In the light of the facts and circumstances, submissions made by the Liquidator, documents including report of the Forensic Auditor and other material on record, the prayer at Serial (C) of the Application is allowed. Since the property belongs to the Corporate Debtor i.e., M/ s Helpline Hospitality and Ex-Director Sh. T.S Murali has fraudulently recorded the same in his name, the property bearing Plot No. G-158, Sector41, Naida, Uttar Pradesh-201302 is hereby attached. Warrants of attachment be affixed to the said property by the Liquidator, who shall take further steps for public auction of the same. The Respondents are directed to not to alienate, lease or create any kind of encumbrance or third party interest in the property in question till the Order is fully complied.

16. Ld. Liquidator is also directed to act upon the other findings of the Forensic Report in an appropriate manner so as to maximise the liquidation value of assets of the Corporate Debtor.”

3. That it was informed by the Ld. Liquidator on 17.08.2020 through the 11th Progress Report filed with this Tribunal vide IA no. 27 44/2020 that the Applicant herein had preferred a Comp. Appeal (AT) (Ins) No. 262 of 2020 T.S. Murali & Anr. Vs Liquidator of Helpline Hospitality Pvt. Ltd, wherein the Hon'ble NCLAT has passed the following order on.13.03.2020:

“3. It is submitted that after passing the impugned order, the Appellants have filed an application bearing no. C.A No. 266 of 2020 dated 07.01.20.20 for modification of the order, before the Adjudicating Authority. After hearing the argument, the Adjudicating Authority has reserved for orders. No order has been passed till date.

4. Learned counsel for the Appellant submits that till passing of the order by the Adjudicating Authority, the order for handing over the possession of the aforesaid property be stayed.

5. We are of the view that the prayer is reasonable and therefore, we pass the order that till passing of the order (in C.A No. 266 of 2020 dated 07.01.2020) by the Adjudicating Authority taking the possession of the aforesaid property by the Liquidator is hereby stayed.

6. It is made clear that we are not passing any order on merit and the Adjudicating Authority is free to pass the order without influenced by this order.

7. The Liquidator who is represented by Mr. Sameer Rastogi is directed not to proceed further in light of this order."

4. It was also informed through the 11th Progress Report that the Hon'ble NCLAT had stayed the Liquidator from taking possession of the aforesaid property.

5. That accordingly, while taking the 11th Progress Report submitted by the Liquidator on record on 17.08.2020, this Tribunal had observed that:

"The Liquidator has mentioned that the IA 266/2020, which was heard by the earlier Bench but one of the Member Ms. Ina Malhotra has superannuated without pronouncement of the order. Hence, the IA 266/2020 needs to be relisted and re-heard. The registry is directed to list the IA 266/2020 on 11th September 2020."

6. That in view of the above, the present Application has been heard and is decided on merits vide this Order.

7. That although the present Application is filed under Rule 11 of the NCLT Rules 2016, during the course of the final hearing, the Ld. Senior Counsel appearing for the Applicant also relied upon Section 420 of the Companies Act, 2013 to seek modification of the order dated 20.12.2019.

8. That while addressing the issue of maintainability of the present Application, Ld. Senior Counsel appearing for the Applicant submitted that it is permissible for this Tribunal to amend and rectify any mistake from a factual or legal view point, as would be apparent from the record and therefore, the present application is maintainable.

9. The Corporate Debtor through Ld. Senior Counsel as well as in his written submissions dated 29.01.2021 has placed reliance on the Judgement of the Hon'ble NCLAT passed in Review Application No.2 of 2018 in Company Appeal (AT) No.12 of 2018 in the matter of Dr. M.A.S. Subramanian & Ors Vs TS Sivakumar & Ors.

10. The Corporate Debtor through Ld. Senior Counsel as well as in his written submissions has further placed reliance on the para 13 of the Judgement of Hon'ble Supreme Court in the matter of Honda Siel Power Products Ltd. Vs Commissioner of Income Tax Appeal (Civil) 5412 of 2007, as quoted below :

"13. "Rule of precedent" is an important aspect of legal certainty in 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 the Tribunal's mistake, error or omission, then it is the duty of the Tribunal 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, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case."

11. During the hearing, it was stated by the Ld. Senior Counsel that this Tribunal has committed the following mistakes that are apparent on the face of the record and which can be rectified by using its jurisdiction conferred under Section 420 of the Companies Act, 2013 :

a) That the Transaction is much older and is outside the purview of Section 66 of IBC 2016. It was added that the limitation period with respect to cumulative effect of Section 67 and 69 of IBC 2016 is 2-5 years, whereas admittedly the transaction in question is of year 2005 and the insolvency proceeding were initiated on 24.04.2017.

b) That the order dated 24.12.2019 will result in cancellation of the sale deed dated 09.02.2005, which is not the jurisdiction of this Tribunal and only Civil Court can do that.

c) That this Tribunal had held that the property in question as Benami. Further the act which deals with the Benami Property is Benami Transactions (Prohibition) Act, 1988. He placed further emphasis on Section 4 and Section 67 of the Benami Transactions (Prohibition) Act, 1988, which are reproduced below:

"4. Prohibition of the right to recover property held benami- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or

against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.»

"67. Act to have overriding effect- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

d) That the Loan from ICICI Bank was taken by the Directors in their individual capacity and the Corporate Debtor company has stood as the guarantor. Since ex-Directors failed to repay the loan, therefore payment was made by the Company in the capacity of a guarantor.

12. That the Liquidator I Respondent in its Written Submissions has opposed the prayer of the Applicant and submitted that this Tribunal j Adjudicating Authority has no power to review its own order.

13. That the Liquidator/Respondent has placed reliance on the decision of the Hon'ble NCLAT in the matter of APC Credit Rating Pvt. Ltd Vs. ROC, NCT of Delhi and Haryana in Company Appeal (AT) No.206 and 221 of 2017, wherein it was held that the Adjudicating Authority has no general power to review its own order or judgement.

14. It is further submitted by the Liquidator/Respondent that the extra-ordinary power of this Tribunal under Rule 11 of NCLT Rules 2016 cannot be used for review of its own order/judgement. It is added by the Respondent that Rule 154 of NCLT Rules 2016 can only be used for the purpose of rectification of any clerical or arithmetical mistake in the order arising from any accidental slip or omission and not for any other purpose. There being no clerical or arithmetical mistake in the Order of this Tribunal dated 20.12.2019, the present Application is not maintainable.

15. It is further stated by the Liquidator/Respondent that the Law of Limitation is not applicable on the proceedings initiated under Section 66 of IBC 2016 as the Forensic Auditor in his findings has found the ex-management fraudulently diverting funds of the corporate debtor for the purpose of acquiring assets in their own name and the assets acquired fraudulently in the name of ex-directors must be restored to the corporate debtor.

16. It is further submitted by the Liquidator/Respondent that as per Section 238 the Insolvency and Bankruptcy Code 2016, the IBC has overriding effect on any other laws for: the time being in force including the Benami Transactions (Prohibition) Act, 1988 as the Insolvency and Bankruptcy Code, 2016 is enacted later in time.

Therefore, in view of the non-obstante clause under Section 238 of the Insolvency and Bankruptcy Code, 2016, provisions of the Benami Transactions (Prohibition) Act, 1988 shall have no effect.

17. It is further stated by the Liquidator/Respondent that the fact that the ex-management were the co-applicant for seeking the loan from the banker of the Corporate Debtor has no persuasive value as in the case of an application for loan to a Company, the Directors of the company are invariably made party. 1

18. After going through the Application, written submissions on record and hearing both the parties, this Bench is of the view that the issues involved in the present Application are the following :

(a) Whether this Adjudicating Authority / Tribunal can review its own Order dated 20.12.2019?

(b) Is there any mistake apparent from the record in the order dated 20.12.2019, which could be rectified by exercising jurisdiction conferred to this Adjudicating Authority under Rule 11 of the NCLT Rules, 2016 or to this Tribunal under Section 420 of the Companies Act, 2013?

19. That at this stage, it is worthwhile to refer to the Judgement of the Hon'ble High Court of Allahabad dated 27.09.2018 in WRIT-C No.-32675 of 2018 in the matter of M/S Khan Enterprises Through Prop. Mohd. Naushad Khan vs The National Company Law Tribunal, which held that:

"It is admitted that there is no provision in IBC for review of the order admitting a petition filed under Section 9 of the IBC. It is also not disputed in law that the power to review cannot be exercised unless there is specific provision for the same."

"As far as power to recall an order is concerned, it is nothing but a procedural review which can be availed only if there is any procedural defect in passing the order or the order has been obtained by playing fraud in any manner. There is hardly any procedural defect pointed out in admitting the petition filed under Section 9 of IBC. The said order of admission is self-explanatory and conforms to all the requirements necessary for admitting a petition filed under Section 9 of the IBC. Merely for the reason that it was not contested by respondent no. 3, it cannot be said that it was a collusive petition or that the order of admission was obtained by collusion between respondents no. 2 and 3."

20. That Ld. Senior Counsel for the Applicant has placed reliance on para 30 of the Judgement passed by Hon'ble Supreme Court in

Civil Appeal No. 1171 of 2004 in the matter of Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited, which is reproduced overleaf :

"30. In our judgement, therefore, 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 travel beyond the record to see whether the judgement 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. If the view accepted by the court in the original judgement is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record."

21. Further, in Review Application No. 2 of 2018 in Company Appeal (AT) No.12 of 2018- DR MAS Subramanian & Ors Vs TS Sivakumar & Ors., also relied by the Applicant, it is held by the Hon'ble NCLAT that:

"9. Power of Review is not an inherent power. Reference can be made to the Judgement of Hon 'ble Supreme Court in the matter of Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited reported in (2008) 14 SCC 171. In that matter Hon'ble Supreme Court was considering a provision similarly worded as sub-section 2 of Section 420. Hon'ble Supreme Court in Para 30 of the Judgement observed as under:-

"30. In our judgment, therefore, 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 the record to see whether the judgement 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. If the view accepted by the court in the original judgement is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record."

22. Since there is no express provision for "Review" of an order by the Adjudicating Authority in the IBC, 2016 and the "Power of review is not an inherent power" as held by the Hon'ble NCLAT in the aforesaid Judgement and again, reiterated in its latest Judgement dated 03.02.2021 in the matter of Adish Jain Vs Sumit Bansal and Ors in Company Appeal (AT) (Insolvency) No.379 of 2020, this Bench is of the considered opinion that this Adjudicating Authority does not have and therefore, cannot exercise any "Power to Review" its own Order under Rule 11 of the NCLT rules, 2016 or otherwise.

23. Further to see whether the alleged mistakes as stated by the Ld. Sr. Counsel for the Applicant and mentioned in Para 11 of this order are the ones, which can be rectified by exercising jurisdiction under Section 420(2) of the Companies Act, 2013. For adjudicating this, it is necessary to examine the nature of the alleged mistakes, in the light of Section 420(2) of the Companies Act 2013, within the boundaries of the documents available on record:

a) In reference to the mistake alleged with respect to the transaction referred to this Adjudicating Authority under Section 66 being barred by Limitation it is seen that it has been rebutted by the Liquidator in his written submissions stating that Law of Limitation is not applicable to the proceedings under Section 66 of IBC 2016. Further, the aforesaid plea (of transaction referred to this Adjudicating Authority under Section 66 being barred by Limitation) was not raised by the Applicant at the time of the hearing of CA840/C-II/ND/2018. Therefore, in our view, the Applicant cannot seek re-hearing of the matter under the garb of rectification under Section 420 of the Companies Act 2013. Here, it is worthwhile to refer to the Judgement passed by Hon'ble High Court of Calcutta in the matter of Prashant Properties Limited Vs SPS Steels Rolling Mills Ltd. C.O. No. 2205 of 2019 With C.A.N. No. 6305 of 2019 dated 25.09.2019, wherein it was observed that:

"29. Even if Section 66 of the IBC applied to past transactions, unlike Sections 44, 48 and 51, IBC (under which the NCLT, as Adjudicating Authority, can avoid past transactions), under Section 66, the NCLT cannot avoid past transactions, even if fraudulent, but under Section 66(2) can only direct the Director/partner of the Corporate Debtor, and not other parties to the transaction, to make contribution

to assets of the Corporate Debtor. As such, even if Section 66, IBC could arguably apply at all to past transactions, it would not then be subject to the restriction as to look-back period. Palpably with such reason in mind, the said section might have been sought to be applied to the PUA-in-question, despite not being otherwise applicable at all to the same."

That further, the coordinate Bench of NCLT Ahmedabad in LA No. 212 of 2019 in LA. No. 458 of 2018 in C.P. (I.B) No. 19/7/NCLT/AHM/2017 dated 29.05.2020, in the case of VITOL S.A. in the matter of Mr. Abhishek Nagori Vs Asian Natural Resources (India) Limited held that:

"1 0.3 Moreover, while a look-back period has been provided for undervalued transactions under section 46, there is no limitation period for fraudulent transactions covered under sections 49 and 66 of the Code. The intent is that "once a fraud always a fraud".

The maxim (fraud vitiates every transaction into which it enters as well as to contracts and other transactions. " The basic essence is that any person who has carried out any wilful act should not be allowed to get away by citing reasons such as lapse of time or look back period is 2 years only."

*b) That with regard to direction of cancellation of the sale deed dated 09.02.2005, from perusal of the order dated 24.12.2019, it is observed that there is no order of cancellation of the sale deed in the order dated 20.12.2019. Only a direction for attachment of the said property and its public auction was given by this Adjudicating Authority with a view to recover and maximise the value of the assets of the Corporate Debtor-in-Liquidation. That this Adjudicating Authority is empowered under Section 66(2) of the IBC 2016 to direct the Ex-Directors to make such contribution to the assets of the corporate debtor as it may deem fit. The provision of Section 66(2) of IBC 2016 is reproduced below:
(Fraudulent trading or wrongful trading.*

66. (1)

(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, if-

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was

no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor."

In the case herein, the Ex-Directors instead of minimising losses of the Corporate Debtor, their action of fraudulently recording of the property belonging to the Corporate Debtor M/s Helpline Hospitality in their own name has resulted in complete loss of the asset, which was duly procured in the name of and from the funds of the Corporate Debtor.

c)As regards to calling the property in question as Benami, this Adjudicating Authority has referred to the Judgement of the Hon'ble High Court of Delhi in the matter of Reserve Bank of India Vs JVG Finance Ltd. in Co. Appeal 1818/2011 in Co. Pet. 265/1998 only to infer that the property purchased from the funds of a company belongs to the company and therefore, should vest in the Corporate Debtor /Company. This Adjudicating Authority has never termed the property in question as Benami. Further, the Liquidator in his written submissions had rebutted the allegations of the Applicant by stating that the Section 238 of IBC 2016 will override the provisions of Benami Transactions (Prohibition) Act, 1988. That which Act will override which one is a question of law where there could be views. Therefore, the moment the issue is debatable and there is a possibility of having more than one view, this Tribunal ceases to have jurisdiction under Section 420 of the Companies Act 2013. In this context, it is worthwhile to refer to the Judgement of Hon'ble NCLAT in the Review Application No. 09 of 2020 Company Appeal (AT) (Insolvency) No. 848 of 2019 in the matter of Deepakk Kumar Vs M/s Phoenix ARC Pvt. Ltd., wherein it was held that :

"26 The term 'record' in Section 420 of the Companies Act, 2013 means record to the proceedings of the case. An error must be a 'patent error' and not a mere 'wrong decision'. Where two views are possible and the matter is debatable, the order cannot be rectified by mistake apparent from record as per decision 'Commissioner of Income Tax' V. 'East India Cotton Association Ltd.' (1984) 14 9 ITR pg. 274. When there is no mistake apparent from the record in the judgement delivered by a Tribunal, then an application for review filed by the concerned Applicant cannot be construed to be one under Section 420(2) of the Companies Act or under Rule 11 of 'NCLA T' Rules, 2016.

Therefore, we are of the opinion that the rectification sought is outside the purview of Section 420 of Companies Act, 2013.

d) Further, with regard to the argument advanced by the Sr Counsel on behalf of the Corporate Debtor "that the Loan from ICICI Bank was taken by the Directors in their individual capacity and the Corporate Debtor company has stood as the guarantor and as the ex-Directors failed to repay the loan, the payment was made by the Company in the capacity of a guarantor" the same has been rebutted by the Liquidator in its submissions stating that the Ex- management was the co-applicant for seeking loan from the banker of the Corporate Debtor has no persuasive value as in the case for application for loan to a company, the Directors of the Company are made party to it. In this regard, it is worth perusing the relevant finding of Forensic Auditor, which was placed by the Liquidator and quoted in the Order of this Tribunal dated 20.12.20219 in the CA-840/C-II/ND/2018, recording that:

"The Company has taken a loan of Rs. 36,59,250/-vide agreement dated 30.10.2004 for a tenure of 104 Months (8Years 8 Months) period ended on 22.07.2013 for asset located at Plot No. G-158, Sector-41, Naida, Uttar Pradesh 201302 for personal assets in the name of Mr. Thondiyil Sivarama Pillai Murali (T.S. Murali) Director, being a Coapplicant of said assets. The facts are not addressed by auditors in their audit report for the financial year 2004-05 to 2013-14. The Amount withdraw from company account for creating their personal wealth is treated as siphoning of money and cheating, fraud, misrepresentation of facts to company financial position.

The Agreement No. is LEDEL00000921645 from ICICI bank and the said Loan EMI is auto debit from account No. 630xxxxxx943. Hence on the basis of facts it is evident that directors made a wilful attempt for diversion of funds from company account to their personal benefits fraudulently hence the same amount is liable to be recovered along with interest @18%. The Total Amount diverted as an consolidated instalment in view of loan statement taken from ICICI bank dated 30.08.2018 is Rs.65,28,836.56/-

The Present estimated market Value of above said property around 4 Crores which is created from the funds of company moving fraudulently for repayment of the loan taken for purchase of this house. This House shall be transfer to Company immediately to safeguard the interest of stakeholders specially Service Tax department, Government of India. RS.3,91,04,886/- were overdue of Service Tax

Department which can be recovered to sale this property. It is recommended that an - early action will support the claim overdue of different stakeholders, the amount can be recovered by the court of law from their personal estate of directors or sale their property for which loan has taken by transfer into company account."

That it is a matter of fact that the aforesaid findings were neither challenged nor anything contrary was produced by the Applicant herein. Therefore, there was no reason for this Adjudicating Authority to believe that the findings of the Forensic Auditor are untrue.

To further check whether any mistake apparent on the face of record has been committed by this Tribunal in this regard, we revisit the relevant Loan Account Statement of ICICI Bank itself, that was placed as part of the record of CA-840 J CII/ND/2018 and which is reproduced overleaf:

Evidently, the aforesaid Loan Account of ICICI Bank was in the name of the "Helpline Hospitality (P) Ltd" and the Ex-Directors Sh T.S. Murli and Ms Rema Murli were the "Co-Applicants" only. The column of the Guarantor, as a matter of fact, is appearing blank in the said statement.

It is, therefore, patently wrong to say that the Loan from the ICICI Bank was taken by the Ex-Directors in their individual capacity and the Corporate Debtor company stood as the guarantor.

24. When we again refer to the Judgement passed in the Review Application No. 09 of 2020 Company Appeal (AT)(Insolvency) No. 848 of 2019 in the matter of Deepakk Kumar Vs M/ s Phoenix ARC Pvt. Ltd., we find that the Hon'ble NCLAT has held that:

"27. It is worth for this Tribunal to recollect and recall the decision of Hon'ble Supreme Court in 'Lily Thomas' V. 'Union of India' reported in AIR 2000 Supreme Court pg. 1650 at spl. Pg. 1665 wherein it is held that the power to rectify or amend the order is exercised to remove the mistake without disturbing its finality."

25. Through the prayers in the present Application, namely: "(A) Pennit the Applicants herein to deposit /pay the sum of Rs. 65,29,836/- over a period of 6 months (B) Modify the Orders dated 20.12.2019 in CP (IB)- 35(ND)/2017 passed by the Hon'ble NCLT New Delhi Bench- II in view of the submissions made hereinabove

by staying/ removing the warrants of attachment dated 24.12.2019 issued by the Liquidator pertaining to the property bearing no. G-158, Sector 41, Noida, Uttar Pradesh- 201301. " in our considered view, what the Applicant is asking (by seeking to amend the order) is to disturb the finality of the order dated 20.12.20219 passed by this Tribunal in the CA-840/C-II(ND)/2018, which is not permissible under Law.

26. In the light of the discussion above, we find that the 'power of review' is not an inherent power and also, there is no express provision for 'review' of an Order in the IBC 2016, which is a self-contained Code dealing with both the provisions and procedure. Hence, we cannot assume the jurisdiction to review the Order as prayed for. Further, as discussed above, the rectifications as sought by the Applicant are neither apparent from the face of record nor involve any arithmetical, clerical or procedural mistake and therefore, are beyond the purview of Section 420(2) of the Companies Act, 2013.

27. In sequel to the above, the present Application is dismissed. The Liquidator is directed to proceed accordingly and keep this Authority posted of the progress of Liquidation proceedings at fortnightly interval."

8. Since order noted above was passed on application of review of earlier order dated 20.12.2019 passed by the Adjudicating Authority it is apt to reproduce the same order as follows:-

“Order dated 20.12.2019

The present Application is preferred under Section 25(2)(j) read with Section 66 of the IBC 2016. The Prayer of the Ld. Liquidator, which remains for consideration is reproduced below:

c) Direct the Respondent no. 1 to transfer the property bearing Plot No. G-158, Sector 41, Noida Uttar Pradesh-201302 in the name of Helpline Hospitality Pvt. Limited, which has been fraudulently transferred in his own name and for which they are liable to be punished under section 68 & 69 of the Insolvency and Bankruptcy Code, 2016;"

2. It is averred by the Ld. Liquidator:

“5. That Corporate Debtor had taken a housing loan of Rs.36,59,250/-vide Loan Agreement No. LBDEL00000921645 dated 30.10.2004 from ICICI Bank for a tenure of 104 Months (8 Years and 8 Months) period ended on 22.07.2013, for purchasing

an immovable property located at Plot No. G-158, Sector-41. Noida, Uttar Pradesh-201302. Total purchase consideration of the above said property was paid as follows:

<i>Mode of Payment</i>	<i>Date</i>	<i>Amount</i>
<i>By cheque No.422310 drawn on Punjab National Bank Jor Bagh issued by Helpline Hospitality Pvt Ltd</i>	<i>11.01.2005</i>	<i>4,00,000</i>
<i>By Cheque No.149194 drawn on ICICI Bank Ltd, Mumbai against Loan account taken by Helpline Hospitality Pvt Ltd</i>	<i>31.12.2004</i>	<i>25,00,000</i>
<i>By cheque No.149195 drawn on IcICI Bank Ltd, Mumbai against which Loan account taken by Helpline Hospitality Pvt Ltd</i>	<i>31.12.2004</i>	<i>7,00,000</i>
	<i>Total</i>	<i>36,00,000</i>

Copy of Loan Account Statement for Loan Account Number LBDEL00000921645, Repayment Schedule Report and Bank Statement of Punjab National Bank are attached herewith..."

3. That the Ld. Liquidator has placed a copy of the Sale Deed of property bearing. Plot No. 158, Block-G, Sector 41, Noida, Dist. G.B. Nagar, executed in the name of Respondent No. 1 on record.

4. It is further submitted by the Ld. Liquidator:

"8. That in addition to EMI paid from Bank Account Number 630005006943 against Loan Agreement No LBDEL00000921645 dated 30.10.2004 an amount of Rs. 20,00,000/- (Rupees Twenty Lacs only) was also paid as pre payment of loan vide Chq No. 399980 dtd. 31st March, 2012 from Company's Bank Account Number 172502000000730 maintained with the Indian Overseas Bank, Kribhco, Sector-1, Noida. Copy of Bank Statement of Indian Overseas Bank is attached herewith...."

"9. That total loan amount of Rs.65,29,836.56/- (Rupees Sixty Five Lacs Twenty Nine Thousand Eight Hundred Thirty Six and paise Fifty Six only) was paid from Company's Bank accounts against said Loan Agreement No. LBDEL00000921645. The facts are not addressed by auditors in their audit report for the financial year 2004-05 to 2013-14."

"10. The amount withdrawn from the company's bank account for creating their personal wealth is carried on with an intent to defraud creditors of the Corporate Debtor which are mainly government authorities....."

5. Further, the Ld. Liquidator has placed on record the report of the Forensic Auditor where the following has been observed:

FINDINGS IN BRIEF:

Upon a detailed investigation, it has been found that the Company and its directors are liable for prosecution under various provisions of the Indian Penal Code, 1860, Companies Act, 2013 and any other laws on the following accounts:

FINDING NO.1 FRAUDLENTLY DIVERSION OF FUND FROM SOURCE COMPANY HELPLINE HOSPITALITY PRIVATE LIMITED TO PERSONAL

ESTATE OF DIRECTORS AT NOIDA WORTH RS 65,29,836/

The Company has taken a loan of Rs. 36,59,250/-vide agreement dated 30.10.2004 for a tenure of 104 Months (8Years 8 Months) period ended on 22.07.2013 for asset located at Plot No.G-158, Sector-41, Noida, Uttar Pradesh-201302 for personal assets in the name of Mr.Thondiyil Sivarama Pillai Murali (T.S. Murali) Director, being a Co-applicant of said assets. The facts are not addressed by auditors in their audit report for the financial year 2004-05 to 2013-14. The Amount withdraw from company account for creating their personal wealth is treated as siphoning of money and cheating. fraud, misrepresentation of facts to company financial position.

The Agreement No. is LBDEL00000921645 from ICICI bank and the said Loan EMI is auto debit from account No.630005006943. Hence on the basis of facts it is evident that directors made a willful attempt for diversion of funds from company account to their personal benefits fraudulently hence the same amount is liable to be recovered along with interest @18%. The Total Amount diverted as an consolidated installment in view of loan statement taken from ICICI bank dated 30.08.2018 is Rs. 65,29,836.56/

The Present estimated market Value of above said property around 4 Crores which is created from the funds of company moving fraudulently for repayment of the loan taken for purchase of this house. This House shall be transfer to Company immediately to safeguard the interest of stakeholders specially Service Tax department, Government of India. RS.3,91,04,886/ were overdue of Service Tax Department which can be recovered to sale this property. It is recommended that an early action will support the claim overdue of different stakeholders, the amount can be recovered by the court of law from their personal estate of directors or sale their property for which loan has taken by transfer into company account.

FINDING NO.2 EVASION OF SERVICE TAX AND NON PAYMENT THERE

OF RS.3,91,04,886/- PLUS PENALTY RS 4,13,29,014/- SUM TOTAL (8.04 CRORES)

As Per Order passed by Ms. Aruna N. Gupta, Commissioner of Service Tax, DLISVTAX002COM0511617 of Helpline Hospitality Private Limited vide letter No.IV(16) Hqrs/ST/Adj/HHPL/21/2015/3452 has levied a Penalty of 41329014/- and service Tax Amount due Rs 39104886/- .It is appears from the records that HHPL is irregular in paying government dues and evaded government revenue which is cheating and fabrication of records under law. Same is treated as fraud and misappropriation of funds towards their personal benefit by directors hence liable to pay personally. Government can recover the sum selling their estate too.

FINDING NO.3 NON-MAINTENANCE OF BOOKS OF ACCOUNTS AND STATUTORY RECORDS OF THE COMPANY AS WELL AS ITS GROUP AND SUBSIDIARY COMPANIES

The Company have registration under different applicable laws which is not complied by the directors of company not only Helpline Hospitality but group companies too. Some Registration are shown as under:

6.That the Respondents No. 1 & 2 have filed their written submissions and have submitted that the Respondent No. 1 and Respondent No.2 were the Directors of the Company till 2006 and they had resigned from the Company since 01.11.2006.

7. In this regard, the Ld. Liquidator vide para 14 of his application has submitted the following:

"14. That Mr. Murali Sivaramapillai Thondiyil and Ms. Reema Murali are the promoters of the company and holding 100% shareholding in the Company. That Mr. Murali Sivaramapillai Thondiyil and Ms. Reema Murali were also designated as a Managing Director respectively of M/S Helpline Hospitality Private Limited, however they have resigned from the post of Directorship of the Company w.e.f. 01/11/2006. On the contrary, they have signed the Financial Statements for the Financial year ended on 31/08/2008, 31/03/2009, 31/03/2010, 31/03/2011 and 31/03/2012. It is noteworthy that Mr. T.S. Murali, Resident of G-158, Sector-41, Noida, India 201301, PAN-ABOPT2055R, DIN-00399183 former director of the company has been running the affairs of the Company and he has been solely incharge of all the activities affirmed of the Company. This fact has also been observed in the "Order-in Original no. DLISVTSX002COM0511617" passed by Ms. Aruna N. Gupta, Commissioner of Service Tax Delhi."

8. That the Ld. Liquidator on a clarification sought by this Bench has filed a supplementary Affidavit submitting additional documents on record in support of his averments. That the Ld. Liquidator has placed the Audited Balance Sheets for the Financial Years 2007-08 to 2011-12 reflecting the signatures of Mr. T.S. Murali and Ms. Reema Murali on the said Balance Sheets in the capacity of Directors.

9. Further, Ld. Liquidator has placed on record the Order dated 25.01.2017 passed by Ms. Aruna N. Gupta, Commissioner of Service Tax in Original Application No. DLISVTAX002COM0511617, whereby, the Ld. Commissioner had made the following observations:

“21. Shri. TS. Murali again appeared under summons to tender his statement on 09.09.2014 (RUD-33) and stated that in HHPL, he was only an authorized signatory. On being shown the balance sheets for the year 2009-10 to 2011-12 of HHPL received from Registrar of Companies (RUD-21) where his name was written alongwith his position in the company as 'Director', he admitted that he was working as Director in HHPL. He was also shown copy of Balance Sheet of HHPL for 2011-12 along with ITR (Income Tax Returns) (RUD-34) resumed from his Noida office on 20.03.2014 vide S. No.19 of Annexure to Panchnama and asked to identify the signature of Directors. He identified the signatures as of himself and that of his wife Mrs. Rema.”

10. Basing on the certificate issued by the Company Secretary Sh. Alok Chandra Singh, the Ld. Liquidator has confirmed that Forms DIR-12 towards resignation of Directors Sh. T.S. Murali (Murali Sivaramapillai Thondiyil DIN:00399183) and Ms. Reema Murali (Rema Murali DIN:00399270) were digitally signed by Sh. Vikraman Pillai Sivarama Pillai, Director (DIN06928280) on 08.08.2014. Date of filing of the said form as on the website www.mca.gov.in is 18.08.2014.

11. From the additional documents and clarifications submitted by the Ld. Liquidator, it is unequivocally clear to this Bench that Sh. T.S. Murli and Ms. Reema Murali, who claimed to have resigned w.e.f. 01.11.2006, were signing the Financial Statements and were in effect managing the affairs of the company.

12, In the written submissions, the Respondent No. 1 has admitted that they have taken the home loan from the ICICI Bank as a co-applicant for an amount of Rs.36,59,250. It is further submitted by the Respondents that.....out the total Rs.65,29,836/- in question, the Respondent No. 1 has repaid Rs.51,60,000/- as per the record which was once accepted by the Liquidator as per the audit report, the rest of the amount has been waived off by the Company Directors considering the aspect that the applicant was the Ex-director and was running the company in their absence”.

13. After hearing submissions of both the parties, this Bench is of the view that the plea advanced by the Respondent No. 1 and 2, that they had resigned from the Company in the year 2006 does not merit any consideration. Further, in response to the clarifications sought by this Bench, the Ld. Liquidator has reconfirmed that as per the books of accounts of the Corporate Debtor, duly certified by the Forensic Auditor, an amount of Rs. 51,60,000 alleged to have been repaid by the Respondents, has not been received by the Corporate Debtor. There is no document/receipt placed by the Respondent Director, which could suggest that they have reimbursed the loan amount to the Company Le, M/s. Helpline Hospitality Pvt. Ltd. Thus, Respondents have failed to bring anything on record which is contrary to the observations made by the Forensic Auditor in its report. Mere resignation of Director from the Company does not absolve the Director/Respondent concerned from any financial impropriety/irregularity committed during his tenure as Director.

14 Further, perusal of the Loan Account Statement' of ICICI Bank on record makes it amply clear that the loan to purchase the property bearing No. G-158, Sector 41, Noida, U.P. was availed by the Corporate Debtor i.e., M/s. Helpline Hospitality Pvt. Ltd. The said Loan's EMIS were being deducted as auto-debit from the accounts of the Corporate Debtor, as confirmed by the report of Forensic Auditor. Moreover, the Cheques reflected towards payment of EMIS of Rs. 36,00,000 in the Transfer Deed cum Sale Deed dated 09.02.2005 matches and are from the Bank Accounts of the Corporate Debtor. Hence, it is clear that the property in question has been procured by utilizing the funds of the Corporate Debtor and, hence, the same deems to be the asset of the company. Here it is worthwhile to refer to the Judgement of the Hon'ble High Court of Delhi in the matter of Reserve Bank of India Vs. M/s. JVG Finance Ltd. in CO. APPL. 1818/2011 IN CO. PET. 265/1998 wherein, it has been upheld that the property purchased in Benami name from the funds of a company belongs to the company. In the instant case, the property having been purchased out of the funds of the Corporate Debtor, should naturally vest in the Corporate Debtor Company.

15. In the light of the facts and circumstances of the case, submissions made by the Liquidator, documents including report of the Forensic Auditor and other material on record, the prayer at serial (C) of the Application is allowed. Since the property belongs to the Corporate Debtor i.e., M/s. Helpline Hospitality Pvt. Ltd. and the Ex-Director Sh. T.S. Murali have fraudulently recorded the same in his name, the property bearing Plot No. G-158, Sector-41, Noida, Uttar Pradesh-201302 is hereby attached. Warrants of attachment be affixed to the said property by the Liquidator, who shall take further steps for public auction of the same. The Sale of the immovable property shall however, be confirmed after due Orders of this Bench. The Respondents are directed to not to alienate,

lease or create any kind of encumbrance or third party interest in the property in question till the Order is fully complied.

16. Ld. Liquidator is also directed to act upon the other findings of the Forensic Report in an appropriate manner so as to maximise the liquidation value of assets of the Corporate Debtor.

17. The application is disposed off accordingly.”

9. Mr. Rakesh Tikku, learned senior counsel at the very outset has drawn our attention to Page 82 of the Paper Book i.e. 1st Page of copy of application No.840/2018 filed before the NCLT. He submits that the index reflects that the said petition was filed by the Liquidator under Section 25(2)(J) read with Section 66 of the Code. By way of placing Section 25(2)(J) of the Code, he submits that under such provision there was no reason for entertaining petition by the NCLT. He further submits that the application filed before the NCLT by the Liquidator was contrary to provisions of the IBC and as such earlier order i.e. order dated 20.12.2019 passed in Company Application No.840/2018 by the NCLT was not sustainable in the eye of law. He has further referred to Section 43(4), 44, 45 and 46 of the Code to satisfy this Tribunal that NCLT has incorrectly entertained the petition filed by the liquidator and passed order dated 20.12.2019. He has further argued that the order dated 20.12.2019 was passed contrary to the record and this was the reason that immediately after passing of the order dated 20.12.2019 the appellant herein filed an application for modification of the order only on 07.01.2020 which was numbered as CA-266/C-II/ND/2020 in (IB)-35(ND)/2017.

10. Shri Tiku, learned senior counsel submits that in CA No.266/2020 after hearing on 04.01.2020 the order was reserved. However, since immediately no order was passed the appellant was left with no option but to file an appeal before this Appellate Tribunal which was registered as Company Appeal (AT)(Ins) No.262/2020. The said appeal was filed on 1.2.2020 assailing the order dated 20.12.2019 passed by the NCLT. He has drawn our attention to para XII of Memo of Appeal filed before this Tribunal which is at Volume II Page 370. He submits that in earlier appeal filed before this Tribunal in para 12 at running page 370 the Appellant made a statement that as a way of abundant precaution keeping in view the limitation period for preferring the appeal, the appellant herein are filing the appeal against the impugned order dated 20.12.2019 passed by the Adjudicating Authority without prejudice to the right of the appellants with regard to the orders passed by the NCLT in CA No.266/2020 in CP (IB)35(ND)/2017.

11. The learned senior counsel has further drawn our attention to the order dated 13.03.2020 passed by this Appellate Tribunal in Company Appeal (AT)(Ins) No.262/2020. He submits that this Appellate Tribunal on earlier occasions by its order dated 13.03.2020 disposed off the appeal recording in para 5 as “we are of the view that the prayer is reasonable and, therefore, we pass the order that till passing of the order (in CA No.266/2020) by the Adjudicating Authority taking the possession of the aforesaid property by the liquidator is hereby stayed”. The order passed by this Tribunal in earlier appeal has already been incorporated in this order.

12. Learned senior counsel for the appellant has further argued that on different dates i.e. 8.8.2019, 1.10.2019 and 9.10.2019 repeatedly it was held by the NCLT that the Liquidator was entitled to recover the loan amount. However, contrary to earlier orders passed by the Adjudicating Authority by the impugned order dated 20.12.2019 the Adjudicating Authority directed for attachment of the property bearing No.G-158, Sector 41, Noida which was registered in the name of the appellant No.1. According to the learned senior counsel for the appellant the learned Adjudicating Authority has further committed serious jurisdictional error in interfering with the property which was registered in the name of the appellant and the Adjudicating authority has stated treating the said property as Benami Property. It has been argued that the Adjudicating Authority was not having any jurisdiction to interfere with the Benami property. Since the jurisdiction for such dispute was lying in the competent court under the Benami Transaction (Prohibition) Act, 1988. He has drawn our attention to running Page 59 (internal page 18) of the impugned order to say that the Learned Adjudicating Authority has even without any jurisdiction has examined the question of Benami Property. He by making such submission has also referred to para 23 of the impugned order which is at running page 55 to 59. He tried to persuade the Court that the Learned Adjudicating Authority without any jurisdiction has tried to cancel the sale deed and considered the property in question as Benami Property.

13. Shri Tiku, learned senior counsel submits that since in the earlier order i.e. order dated 20.12.2019 there was apparent error which was contrary to

record the learned Adjudicating Authority exercising its jurisdiction under Section 420(2) of the Companies Act, 2013 was well within its jurisdiction to rectify the same. However, the Learned Adjudicating Authority only on the ground that under Rule 11 of the NCLAT Rules exercising inherent jurisdiction was not competent to review earlier order rejected the review petition. He contends that the Adjudicating Authority has further committed error in not exercising its review jurisdiction and correcting the earlier order by its subsequent order i.e. order dated 26.02.2021 has also been assailed in the present appeal. In sum and substance it has been argued that both the orders i.e. order dated 20.12.2019 and order dated 26.02.2021 are liable to set aside. Besides making oral submission on behalf of the appellant Notes of Written submission has also been filed which is reproduced herein below. Alongwith the written submissions the appellant has also brought on record two judgements one passed by Hon'ble Supreme Court in Civil Appeal No.5412/2007 Honda Siel Power Products Ltd Vs Commissioner of Income Tax and another judgement of this Tribunal i.e. M.A.S. Subramanian and Ors Vs TS Sivakumar and Ors ,AMI/NL/0243/2018, Shri Tiku learned senior counsel referring to aforesaid judgement submits that since there was apparent mistake in order dated 20.12.2019 on application for review filed by the appellant the Learned Adjudicating Authority was required to review the order and remove error which was committed in earlier order. However, the Learned Adjudicating Authority has failed to discharge its duty. The appellant has filed the written submissions which are as follows:

“1.That the present matter has been filed as appeal under Section 61 of the 1BC, 2016 read with Rule 11 of the NCLAT Rules, 2016 against the

Impugned Order dated 26.02.2021 passed by the Hon'ble Adjudicating Authority, which confirmed the Orders dated 20.12.2019 in CA No.840 of 2018 in CP (IB)-35(ND)/2017 passed by the Hon'ble Adjudicating Authority.

That the impugned Orders dated 26.02.2021 confirming the Order dated 20.12.2019 suffers from various infirmities and irregularities and is bad in the eyes of law and hence the same has been challenged before this Hon'ble Tribunal on various grounds which are incorporated in the appeal filed herein, along with all the relevant documents. The short notes of submissions are also being filed herewith for the kind perusal of this Hon'ble Court.

The appellants are thus praying for the setting aside of the impugned order date 26.02.2021 passed in CA No.266 of 2020 in CP (IB)-35(ND)/2017 and also setting aside the earlier impugned order dated 20.12.2019 in CA no.840 of 2018 in CP (18)-35(ND)/2017 passed by the Hon'ble Adjudicating Authority. The appellants are also seeking the quashing of the warrants of attachment dated 24.12.2019 affixed on property bearing no. G-158, sector 41, Noida, Uttar Pradesh, 201301 as issued vide impugned orders dated 20.12.2019 passed by Hon'ble Adjudicating Authority in CA-840/C II/ND/2018 in CP (IB)- 35 (ND)/2017.

That the appellants irrespective of the challenge to the Impugned Order are still ready and willing to contribute to the assets of the Corporate Debtor to the tune of Rs 65,29,836/- as per the own averments of the Respondent herein in terms of the Orders dated 01.10.2019 passed by the Hon'ble Adjudicating Authority which is as follows:

ORDER DATED 01.10.2019:

"Ld.Counsel for the liquidator submits that the expenses of Rs 1.12 crores by respondent no.3 & 4 have been accepted by him. The only issue which remains is in respect of the home loan taken by the non-applicant for Rs 65,29,836/-. To come up on 9th October 2019 to evidence return of this loan account as alleged."

That in view of the aforesaid order and submissions made by the Respondent herein, Order dated 09.10.2019 was passed by the Hon'ble Adjudicating Authority which is as follows:

Relevant portion of Order dated 09.10.2019 :

"The short point which remained for consideration was regarding recovery of the housing loan availed from icici home loans in the name of the corporate debtor and repaid by the corporate debtor"

That in view of the above the Respondent is bound to confine itself to the said Orders which were passed on the statements and instructions of the Respondent herein and the said orders remain unchallenged. The appellants however have challenged the Order dated 26.02.2021 on various grounds which may be read as part and parcel of the present notes of submissions.

A) That the appellants, being husband and wife, are the ex-directors of the corporate debtor i.e. M/s helpline hospitality pvt ltd and are acquainted with all the facts & details of the matter

B) That the present appeal is being preferred in the name of the Appellant No.1 and No.2 and not in the name of the Corporate Debtor since the property so attached by the Hon'ble Adjudicating Authority is in the registered name of the Appellant No.1 who is also the Ex Director of the Corporate Debtor I.e. M/s Helpline Hospitality Pvt Ltd.

C) That the Hon'ble Adjudicating Authority went beyond the scope and jurisdiction of their own orders by failing to appreciate its own orders dated 01.10.2019 and 09.10.2019 as mentioned hereinabove.

D) That the Hon'ble Adjudicating Authority while deciding the CA no.266 of 2020 for modification of order dated 20.12.2019 has gone into the merits of the matter despite adjudging in its own orders dated 26.02.2021 that the Hon'ble Adjudicating Authority has no inherent power of review and has thus overstepped its jurisdiction and passed the impugned order on the merits of the case as well.

E) That the impugned order dated 26.02.2021 read with the order dated 20.12.2019 passed by the Hon'ble Adjudicating Authority is beyond the scope of the section 66 of the IBC act under which the respondent had preferred the application bearing no.840/C-li/ND/2018 in (IB) 35(ND)/2017. That since the property bearing no.G-158, Sector 41, Noida-201301 was purchased by the appellants in the year 2005 vide a registered sale deed dated 09.02.2005 and since then the appellants are in uninterrupted possession of the said property and the home loan linked with the purchase of the said property was closed in the year 2013 whereas the liability of the alleged creditor(s) arose firstly in the year 2017 thus terming the said transaction to be fraudulent or wrongful especially in light of the "twilight zone" as referred to in section 66 of the IBC Act is beyond the scope of the section 66 of the IBC Act.

F) That the Hon'ble Adjudicating Authority has wrongly held that the said transaction was carried on with the intention of defrauding the creditors since at the time of registration of sale deed in year 2005 there was no liability pending upon the corporate debtor thus the question of defrauding the creditors does not even arise and even at the time of repayment of the home loan there was no liability on the Corporate Debtor

till the year 2013 when the home loan was fully repaid and closed in its entirety. It is submitted that the insolvency proceedings against the Corporate Debtor were initiated in the year 2017 I.e. after 12 years of purchase of the property.

G) That the Hon'ble Adjudicating Authority has erred in holding the transaction to be fraudulent wherein the property was purchased by the Appellant No.1 in his name through a registered sale deed in the year 2005 and the home loan was taken in the joint names of the Corporate Debtor and the Appellants and was repaid from the accounts of the Corporate Debtor. At best it is a case wherein the contribution has been taken from the Corporate Debtor and the Appellants can be directed repay the said amount to the Corporate Debtor.

H) That the Hon'ble Adjudicating Authority has, without the force of law, assumed the powers of a civil court by directing the respondent to publicly auction the immovable property which is duly registered in the name of the Appellant no.1 thus in turn negating the registered sale deed of the immovable property in the name of the appellant no.1 which is wholly impermissible in law and amounts to overstepping the jurisdiction bestowed upon the Hon'ble Adjudicating Authority.

I) That in any event since the property bearing no. G-158 Sector 41 Noida-201301 is duly registered vide a registered sale deed in the name of the Appellant no. 1, the power to cancel the sale deed is with the concerned civil court and hence the question of public auction of the same does not arise since it is not in the name of the Corporate Debtor and neither it was ever in the name of the Corporate Debtor.

J) That the Respondent has acted beyond the jurisdiction and without any power of various sections of the IBC,2016 and as such the impugned Order dated 26.02.2021 is beyond the scope and jurisdiction of the Hon'ble Adjudicating Authority as well which cannot assume the powers of the Civil Court. A detailed explanation has been provided by the Appellants herein the grounds of Appeal showcasing how the respondent has acted beyond the powers and jurisdiction provided under various sections and how the terming the transaction of purchase of the property has been termed "benaami" is also beyond the scope of the Hon'ble Adjudicating Authority which does not have the powers of the Civil Court nor has the power to cancel the sale deed dated favouring the appellant no.1 herein. Inasmuch as the possession of the property was never with the Corporate Debtor but with the appellants since the date of purchase and it has been used as their sole residential premises since the year 2005, the mere payment from the account of the Corporate Debtor would not entitle the Respondent to term the property as being purchased by the Corporate Debtor in view of the registered sale deed favouring the appellant no.1 herein. The Hon'ble Adjudicating Authority in fact cannot set aside the sale transaction dated 09.02.2005 which only a civil court has the power to do so.

K) That as per the IBC 2016 since the jurisdiction under Section 25 (2) (j) of the Code contemplates to "preserve and protect the assets of the Corporate Debtor" as provided u/s 25 (1) of the Code for which purposes the actions as contemplated under Section 25 (2) of the Code can be initiated by the Resolution Professional and the exercise of such power by the Resolution Professional as encapsulated in Para 12(A) is independent of and distinct from the powers of the Liquidator as provided by Section 35 of the Code.

L) That the scope of power under Section 25 (2) (1) of the Code is for avoidance of transaction in accordance with the Chapter III of the IBC, 2016. And the avoidance of transactions as contemplated by the IBC, 2016 is provided under Section 45 of IBC, 2016 with the caveat of Section 46 of the said Code with an order to be passed under Section 48 of the Code.

M) That as such the impugned order negating the sale deed dated 09.02.2005 is beyond the scope and jurisdiction of the Hon'ble Adjudicating Authority as well as Section 66 and 67 of the Insolvency & Bankruptcy Code, 2016 since at the time of taking of loan, the Company was not a corporate debtor as insolvency proceedings were initiated in year 2017.

N) That assuming though not admitting, that the averment made by the liquidator, this was a transaction to defraud the creditors as contemplated under Section 49 of the Code even then a pre-requisite of setting aside a transaction u/s 49 of the Code has to be an undervaluation of transaction u/s 45 of the Code which will also have to satisfy the twin test of Section 49 (1) (a) or (b) of the Code and Section 45 (2) (a) or (b) of the Code, besides to overcome the limitation mandate of Section 46 of the Code.

Citations referred to by the Appellants

*"HONDA SIEL POWER PRODUCTS VS COMMISSIONER OF INCOME TAX"
by Hon'ble Supreme Court of India on 26.11.2007
MANU/SC/4565/2007, [2007] 12 SCR 552*

"M.A.S SUBRAMANIAN & ORS vs T.S SIVAKUMAR - by Hon'ble

NCLAT, New Delhi on 24.09.2018 - MANU/NL/0243/2018"

14. The learned senior counsel for the appellant has further taken a stand that whatever mistake was committed, those mistakes were committed

sometime in the year 2005 and as such under Section 66 of the companies Act, 2013 it was beyond period of limitation to be examined by the Adjudicating Authority.

15. Mr Sameer Rastogi, learned counsel appearing on behalf of Liquidator opposing the appeal submits that the appellant maliciously and only with a view to continue with the property in question, which was admittedly purchased on the fund of Corporate Debtor, has generated the litigations by filing the review petition as well as approaching this Appellate Tribunal simultaneously.

16. He submits that there is no error in either of the order and as such the appeal is liable to be rejected. Besides orally opposing the appeal on behalf of the Respondent No.1 Notes of Written submission has been filed which is quoted hereinbelow:

“1.That the present Notes of Submission is being filed in compliance of the direction issued by the Hon’ble National Company Law Appellate Tribunal, New Delhi Bench at New Delhi vide Order dated 25.04.2022.

2. That Helpline Hospitality Pvt. Limited is a private company limited by shares incorporated under the Companies Act, 1956 and administered under the Companies Act, 2013 having separate legal entity distinct and independent from its stakeholders including the shareholders and directors

3. That the present appeal has been filed to achieve ulterior motive of misappropriation of the immovable asset which ought to have been registered in the name of the corporate debtor and which the ex directors, illegally by misusing their position, have got registered in their name. Accordingly, the present appeal preferred by the appellants has been filed with malafide and the Adjudicating Authority vide its order dated 20.12.2019 and subsequently vide order dated 26.02.2021 has rightly directed the appellants to make the loss good by transferring the said immoveable property in the name of the corporate debtor.

4. That the Company Application No. 840/ 2018 had been basically filed under Section 66 of the Insolvency and Bankruptcy Code, 2016 though in the heading of the application Section 25 (2) (j) has been mentioned. It is settled law that once a fraud is always a fraud and there is no look back period under Section 66 of the Insolvency and Bankruptcy Code, 2018 like other provisions of the law. Therefore, the appellants are with mala fide giving emphasis on Section 25 (2) (j) which has a mere reference in the said application and emphasis has been solely given to Section 88 of the Insolvency and Bankruptcy Code, 2018. Moreover, the Resolution Professional was further appointed as Liquidator. Section 25 (2) (j) talks about Initiation of avoidance transaction in accordance with Chapter III and as per Section 35 (1) (b) which is in Chapter II, the Liquidator shall have power to take into his custody or control all the assets, properties etc. of the corporate debtor.

5. That the appellants have alleged that the Hon'ble Adjudicating Authority, without the force of law, has assumed the powers of a civil court by directing the respondent to publicly auction the immovable property which is duly registered in the name of the appellant no. 1 which is wholly impermissible in the law, contrary to the facts that the Hon'ble Adjudicating Authority issued direction to the appellants to transfer the said immovable property in the name of the corporate debtor which has been purchased out of the fund of the corporate debtor and accordingly, which ought to have been registered in the name of the corporate debtor and due to fraud perpetrated by the appellants being the ex-directors, the same has been registered in the name of the appellant no. 1. Further, the Liquidator has power to sale the property of the corporate debtor through public auction. However, the appellant to achieve their ulterior motive and camouflage the illegality and impropriety pretreated in the management and affairs of the corporate debtor giving it a different color contrary to the facts.

6. That the Insolvency and Bankruptcy Code, 2016 being the complete code and the National Company Law Tribunal being the Hon'ble Adjudicating Authority has jurisdictions over an issue arising out of or in

connection with the corporate Insolvency resolution process or the liquidation process in terms of Section 60 of the Insolvency and Bankruptcy Code, 2015 as held by Hon'ble Supreme Court in Civil Appeal No.9241 of 2019 In the matter of Gujarat Urja Vikas Nigam Limited versus Mr. Amit Gupta and Others. The Apex Court has held as under:

"It suffices to note that clause (c) of Section 60(5) confers jurisdiction on the NCLT to entertain or dispose of -any question of priorities or any question of law or facts arising out of or in relation to the Insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code"

7. That further to achieve ulterior motive, the appellants are making submissions which are contrary to the facts as the appellants have wrongly alleged that the Hon'ble Adjudicating Authority has inferred the said transaction as Benaami transaction contrary to the facts that the Hon'ble Adjudicating Authority in the aforesaid orders has never inferred the said transaction as Benaami transaction. In fact, the Hon'ble Adjudicating Authority has only referred the submissions made by the parties which has been wrongly alleged by the appellants that the same has been held to be Benaami transaction by the Hon'ble Adjudicating Authority. Moreover, Section 238 of the Insolvency and Bankruptcy Code have overriding effect over the Benaami Transactions and Prohibition Act, 1988

8. That the present appeal has been preferred by the appellants to camouflage the misdeeds perpetrated in the financial affair of the corporate debtor as they illegally purchased an immovable property in their name out of the loan taken and repaid by the corporate debtor and now they are hopelessly taking excuse of limitation knowing full well that under Section 66 of the Insolvency and Bankruptcy Code, 2016, there is no prescribed look back period and once a fraud is always a fraud and the offence committed by the appellants in defrauding the corporate debtor and ultimately the creditors is continuing in nature.

9. That the corporate debtor also failed to deposit the statutory liability of Rs.8,59,13,147/- due to which the corporate debtor was pushed on the verge of death bed and therefore, the Adjudicating Authority while rejecting the application filed by the appellant has rightly held that the property purchased from the coffer of the corporate company i.e.. corporate debtor belongs to the corporate debtor and therefore, should vest in the corporate debtor.

10. That the liquidation value of the said immovable property is Rs.1,49,21,332/- which got appreciated from the purchase price of Rs.36,00,000/- for which Rs.65,29,836/- was paid towards loan liability up to July 2013 from the Corporate Debtor Bank Accounts and now the appellants are alleging that they can be directed to pay the said amount ignoring the time value of money Lo., interest on the said amount till date. Moreover, the proceeding under Insolvency and Bankruptcy Code is not a recovery proceeding.

11. That order dated 01/10/2019 and 09/10/2019 was passed by the Hon'ble Adjudicating Authority on an application which was partly heard and not finally decided. The Hon'ble Adjudicating Authority had taken into consideration the only issue left for adjudication. The Respondent has never approached the Hon'ble Adjudicating Authority to recovery of the home loan amount which is Rs 65,20,836/

12. That the claim of Service Tax Department is Rs. 8.26.68,028/- which covers the period from Financial Year 2009 to 2014. However, to achieve ulterior motive, the appellants are making submissions that there was no liability on the Corporate Debtor till the year 2013 which are contrary to the facts

13. That right to apply under the Code accrues only on the date the Code came into effect. Therefore Limitation start from the date of Insolvency and Bankruptcy Code came into force i.e. on or after 1" December, 2016 Black Pearls Hotels Pvt. Limited Vis Planet M. Retails Ltd. [CA (AT) (Ins) No. 91 of 2017] dated 17.10.2017

14. That the Adjudicating Authority while rejecting the application filed by the appellant as not maintainable has rightly held that the property purchased from the coffer of the corporate company i.e., corporate debtor belongs to the corporate debtor and therefore, should vest in the corporate debtor which has been rightly directed by the Hon'ble Adjudicating Authority vide its Order dated 20.12.2019 and 26.02.2021."

17. Besides hearing learned counsel for the parties and examining Notes of written submission we have perused the materials available on record and prima facie we are of the opinion that the appeal is fit to be rejected outrightly. From the facts enumerated hereinabove it is evident that for purchase of the property in question, loan was obtained in joint name of company/corporate debtor and both the appellants. It is also not in dispute that the loan amount was repaid from the account of the corporate debtor/company. However, at the time of registration to the reasons best known to the appellants the said property was got registered in the name of Appellant No.1. It has also been noticed that after getting the said property registered which was purchased from the fund of corporate debtor, sometime in the year 2006 both the appellants tendered resignation as directors of the company. However, subsequently it has been noticed by the competent authority that the said company was being run by both the appellants. It is reflected from the

impugned order itself that the company had taken loan of Rs.36,59,250/- vide Agreement dated 30.10.2004 and the said loan through EMI was auto debited from the account of the corporate debtor. On the Corporate Debtor service tax due of Govt of India was outstanding to the tune of Rs.3,91,04,886/-. The estimated value of the property in question was about Rs.4 crores. It is not in dispute that during liquidation proceedings in respect of the corporate debtor an interim forensic audit report dated 10.11.2018 was received. In forensic audit report it appears that it was noticed that fraud was committed by the appellant in getting the property registered in his name. It has further been noticed that after getting the property registered in his name both the directors tendered resignation from the Board of the company. However, the record suggests that both the directors were continuing to run the corporate debtor even thereafter.

18. So far as argument of learned senior counsel for the appellant that the application filed by the liquidator before the Adjudicating Authority was under Section 25(i)(j) which was not applicable is concerned, we are of the opinion that levelling of section does not matter if a petition is filed before the Court having jurisdiction to deal with the same. Besides referring sub-section 25(i)(j) the petition itself reflects that it was also filed under Section 66 of the Code. It would be better to reproduce Section 66 of the Code which is as follows:

*“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, if-

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a

person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per Section 10-A.”

19. On perusal of the aforesaid section it is evident that if during liquidation process it is found that any fraud was committed then the Adjudicating Authority has jurisdiction to examine the same and pass appropriate order. In the present case on the basis of forensic audit report it was noticed that in relation to registration of property in the name of appellant fraud was committed. Loan for the purchase of the said property was taken on the joint agreement of appellants as well as corporate debtor and thereafter entire loan amount was repaid from the corpus of the corporate debtor itself and as such it can be inferred that by committing fraud the property was got registered in the name of Appellant No.1. Accordingly considering the fraud which was noticed in the Forensic audit report the appellant is not entitled to raise question of limitation. So far as argument advanced by the learned senior counsel on behalf of appellant that the learned Adjudicating authority has interfered with the property which was covered under the Benami Transaction Act is concerned, on perusal of the impugned order it is difficult to infer that Learned Adjudicating Authority has recorded as if the property was benami. Moreover, the Liquidator in its application had made a prayer for directing the appellant to transfer the property in the name of Corporate Debtor. The

Adjudicating Authority on an application filed by the Liquidator considered the fact that the property in question was property of corporate debtor and passed order for attachment of the same for its auction sale so that liability of the corporate debtor may be settled.

20. On application filed by the Liquidator the Learned Adjudicating Authority passed a detailed order. There was no error nor it was a case of beyond its jurisdiction. However, the appellant on the one hand filed a Review Petition which was numbered as Application No.266/2020 and on other hand within few days he preferred an appeal before this Tribunal vide Company Appeal (AT)(Insolvency) No.262/2020. In the review petition after hearing the Adjudicating Authority had reserved order on 14.01.2020 whereas the appellant filed appeal against the main order dated 20.12.2019 on 1.2.2020. This Tribunal noticing the fact that against the order dated 20.12.2019 in review petition order was reserved by the Adjudicating Authority disposed off the appeal. Thereafter the Adjudicating Authority has passed the order on review petition i.e. CA No.266/2020 dealing with each and every aspects which were raised by the appellant.

21. Before the Adjudicating Authority in its review petition the Appellants had raised two points. Firstly permit the appellant to deposit sum of Rs.6529836/- that too over a period of 6 months and secondly to modify order dated 20.12.2019. The amount which was offered by the appellant to be paid in instalment was a debt which had occurred long back, whereas offer was made in the year 2019. The loan amount was Home Loan amount in a property of which value has enhanced to the extent of Rs.4 crore as per Company Appeal (AT)(Ins) No.234/2021

prevailing market price. Moreover, during the liquidation proceeding it was difficult for Adjudicating Authority to accept such a proposal.

22. So far as argument advanced by the learned counsel for the appellant on modification of the order is concerned, it is required to be examined as to whether the Adjudicating Authority can review its own order and is there any apparent mistake contrary to the record in the order dated 20.12.2019. It was argued that said order can be modified exercising jurisdiction under Rule 11 of the NCLT Rules or under Section 420 of the Companies Act. However, on examination of order passed in review it is evident that on both the issues the Adjudicating Authority by assigning detail reasons answered in negative. Neither under Rule 11 of NCLT Rules, the NCLT was competent to review/recall its earlier order nor Section 420 of the Companies Act was applicable in view of the fact and circumstances of the case particularly the fact that the liquidation proceeding was continuing under the provisions of the IBC Code. The Learned Adjudicating Authority also did not find any apparent error in the order which could have been considered as an order contrary to the record and as such both the questions were negated by the Adjudicating Authority assigning detailed reasons.

23. So far as two judgements on which reliance was placed by the Learned senior counsel for the appellant is concerned we are of the opinion that on the facts and circumstances of the present case those judgements are not applicable. In Honda Siel case (Supra), the Hon'ble Supreme Court was consideration the applicability of Section 254(2) of the Income Tax Act. Under the Income Tax Act, the Income Tax Authority was having jurisdiction to

rectify any mistake in an order within a period of four years from the date of order. It is appropriate to reproduce Section 254(2) of the Income Tax Act which is as follows:-

“The Appellate Tribunal may at any time of within four years from the date of the order, with a view to rectify any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment if the mistake is brought to its notice by the assessee or assessing official...”

24. However, under Rule 11 of the NCLT Rules no such power has been vested with the Adjudicating Authority.

25. Similarly in M.A. Subramaniam case the dispute was in relation of operation and mismanagement of the company under the Companies Act. Whereas in the present case liquidation proceeding was going on under the provisions of IBC Code. Accordingly appellant may not get any benefit from the aforesaid two judgements.

26. Of course, the learned senior counsel for the appellant tried to persuade the Court that the Adjudicating Authority has no jurisdiction under the Benami Transaction Act but on going through the impugned order we do not find any finding recorded by the Adjudicating Authority as if the property in question was Benami. It is admitted case that the property was registered in the name of Appellant No.1. There are sufficient material on record to suggest that loan for purchasing the said property was obtained in the joint name of corporate debtor and appellants, the entire loan amount was paid from the account of the corporate debtor but the property was got registered in the name of Appellant No.1. In such a situation we are of the opinion that on the

strength of special forensic audit report and application filed by the Liquidator, the Learned Adjudicating Authority has committed any error in directing and observing while allowing application that “*Since the property belongs to the Corporate Debtor i.e., M/ s Helpline Hospitality and Ex-Director Sh. T.S Murali has fraudulently recorded the same in his name, the property bearing Plot No. G-158, Sector41, Noida, Uttar Pradesh-201302 is hereby attached. Warrants of attachment be affixed to the said property by the Liquidator, who shall take further steps for public auction of the same. The Respondents are directed to not to alienate, lease or create any kind of encumbrance or third party interest in the property in question till the Order is fully complied.*”

27. So far as the stand taken by the learned senior counsel for the appellant that the order were passed on 8.8.2019, 1.10.2019 and 9.10.2019 are concerned, on perusing the same we are of the opinion that these orders were not final order on the petition filed by the Liquidator rather final order was passed on 20.12.2019 considering each and every aspect.

28. In the facts and circumstances as discussed hereinabove we find no merit in the appeal. Accordingly the appeal stands dismissed.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

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