NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI: SPECIAL BENCH (COURT-II)

IA-5662/2023
IN
(IB)-605(ND)/2022

IN THE MATTER OF:

Axis Trustee Services Limited
(In the capacity of Debenture Trustee)
Axis House Bombay Dyeing Mills Compound,
Pandurang Budhkar Marg,
Worli, Mumbai-400025 **...Financial Creditor**

VERSUS

Fortis Healthcare Holdings Private Limited
Registered Office at :
G-16 Marina Arcade,
Connaught Circus
New Delhi-110001 **...Corporate Debtor**

And in the matter of :
Daiichi Sankyo Company Limited,
Resident of F/1, Deepali Apartments,
B Block, Ramprastha Colony,
Ghaziabad – 201011 ….**Applicant**

Section: 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules

Order Delivered on: 24.11.2023

CORAM:

SH. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SH. L. N. GUPTA, HON'BLE MEMBER (TECHNICAL)

For the Applicant	:	Sh. Arun Kathpalia Sr. Adv, Ms. Samridhi Hota, Mr. Varad Choudhary, Ms. Astha Ahuja, Ms. Shya Hoon, Mr. Kunal Chatterjee, Advs.
For the RP	:	Adv. Abhishek Anand, Adv. Karan Kohli, Adv. Abhishek Parmar
For Petitioner in IB Axis Trustee Ltd.	:	Advs. Mr. Sumesh Dhawan, Ms. Vatsala Kak, Shaurya Shyam, Advs.

ORDER

Per: Sh. L. N. Gupta, Member (T)

This is an Application filed by M/s Daiichi Sankyo Company Limited (hereinafter referred to as **"Applicant"**), stated to be a Creditor of the Corporate Debtor, under Section 60(5) and Section 65 of IBC 2016 read with Rule 11 of the NCLT Rules 2016, for seeking recall of the order of this Adjudicating Authority dated 16.12.2022, by which M/s Fortis Healthcare Holdings Private Limited (hereinafter referred to as (hereinafter referred to as **"FHHPL"/"Corporate Debtor")** was admitted into CIRP and for initiating proceedings under Section 65 IBC 2016 against the petitioner, Axis Trustee Ltd. at whose behest the CIRP was initiated against the Corporate Debtor.

2. The Applicant has submitted that the CIRP order against FHHPL could be passed by this Tribunal only on account of the failure of the parties viz. the purported Financial Creditor and FHHPL to disclose to this Tribunal, the most important jurisdictional fact pertaining to the corporate status of FHHPL as an NBFC, duly registered with the Reserve Bank of India (hereinafter referred to as **"RBI")**. This holds significance as it positions FHHPL beyond the purview of the definition of 'corporate debtor' under the IBC.

3. During the course of the hearing, Ld. Sr. Counsel for the Applicant informed that it challenged the Admission order dated 16.12.2022 in Comp. App. (AT) (Ins.) No. 279 of 2023, wherein the Hon'ble NCLAT vide order dated 08.11.2023 has clarified that it shall be open for this Adjudicating Authority to proceed and dispose of the present application and the pendency of that

Appeal shall be no impediment in deciding this application. The order of the Hon'ble NCLAT dated 08.11.2023 in **Comp. App. (AT) (Ins.) No. 279 of 2023** reproduced below for the immediate reference:

> *"**08.11.2023:** Learned counsel for the Appellant submits that the Appellant has filed an application I.A. No.5662/2023 and 74/2023 which was listed on 07.11.2023. It is submitted that it may be clarified that there is no impediment in hearing these application by the Adjudicating Authority in view of the pendency of this appeal and interim order dated 05.07.2023.*
>
> *We make it clear that it shall be open for the Adjudicating Authority to proceed and dispose of above mentioned application and the pendency of this Appeal shall be no impediment in deciding those applications.*
>
> *List this Appeal on **13.12.2023.***
>
> *Interim order to continue."*

4. In view of the aforesaid order of the Hon'ble NCLAT, the IA-5662/2023 was heard on merits.

5. During the hearing, the Ld. Sr. Counsel Mr. Arun Kathpalia appearing for the Applicant contended that the FHHPL/Corporate Debtor is an NBFC as per the "List of NBFCs registered with the RBI (as on May 31, 2023)", where the name of the Fortis Healthcare Holdings Pvt. Ltd. (FHHPL) appears at Serial No. 435. He further submitted that in the Balance Sheet of the Corporate Debtor for the period ending 31.03.2016 filed with the present IA, CD/FHHPL itself has acknowledged that it was an NBFC since 08.04.2009. To buttress his plea, he referred to Sections 3(17), 3(7), and 227 of IBC 2016 and Financial Service Provider Rules dated 15.11.2019. It was argued on behalf of the

Applicant that: (a) the CD/FHHPL, being an NBFC, falls within the definition of "Financial Services Provider" (FSP) as defined under Section 3(17) of IBC 2016; (b) Financial Service Providers are kept outside of the definition of a "Corporate Person" under Section 3(7) of IBC 2016; (c) since NBFC, being a FSP, is not a Corporate Person, it cannot be the Corporate Debtor; and (d) therefore, no CIRP can be initiated against an NBFC unless an Application is filed by RBI under Section 227 of IBC, 2016 read with Financial Service Provider Rules dated 15.11.2019.

6. The Ld. Sr. Counsel for the Applicant further submitted during the hearing that this fact of CD/FHHPL, being an NBFC was not disclosed by the parties including M/s Axis Trustee Limited in IB-605/2022 before this Adjudicating Authority, which led to the admission of the Corporate Debtor into the CIRP vide order dated 16.12.2022 of this Adjudicating Authority.

7. Based on such facts and submissions, the Ld. Sr. Counsel for the Applicant prayed for recall of the CIRP order dated 16.12.2022. However, after some arguments, he voluntarily withdrew the prayer (c) as regards to initiation of proceedings under Section 65 of IBC, 2016 against the petitioner.

8. Mr. Abhishek Anand, Ld. Counsel appearing for the RP also confirmed that from the communication received by him from the RBI, the CD/FHHPL is an NBFC. He, however, prayed that while deciding the matter, orders may be passed regarding reimbursement of CIRP costs and expenses.

9. Ld. Counsel Mr. Sumesh Dhawan representing the Petitioner in IB-605/2022 namely, Axis Trustee Services Limited submitted that at the time of filing as well as during the course of hearing on admission of the said IB

petition, they were not aware of the CD/FHHPL being a Financial Service Provider or NBFC. He added that even from the name of the CD/FHHPL, it does not appear to be an NBFC. He further stated that CD/FHHPL never appeared during the hearing, for which the matter was proceeded and heard ex-parte. It was only when a reference was made by the RP to the RBI, they came to know from the RP that CD/FHHPL is an NBFC. He, however, sought an opportunity to file an affidavit in response to the IA and to that effect.

10. In compliance, the petitioner in IB- 605/ND/2022 i.e., M/s Axis Trustee Ltd. vide an Affidavit dated 09.11.2023, averred the following:

> *"3. That the Financial Creditor categorically denies the allegation of collusion of the Financial Creditor i.e., Axis Trustee Services Limited with the Promoters of Fortis Healthcare Holdings Private Limited as the said allegation is completely incorrect and false, however, since during the course of arguments, the Applicant has sought to withdraw its prayer under Section 65 of the Code, the Financial Creditor reserves its right to the contest the same, if need arises.*
>
> *4. That for full disclosure, the Financial Creditor was not aware about the Non-Banking Finance Company (NBFC) status of Fortis Healthcare Holdings Private Limited, neither at the time of filing of the Section 7 Petition nor at the stage of arguments on the Section 7 Petition before this Hon'ble Adjudicating Authority."*

11. We heard the parties and perused the record of IB-605/2022 filed by M/s Axis Trustee Ltd under Section 7 of IBC, 2016 against M/s Fortis Healthcare Holdings Pvt. Ltd. On perusal of the documents available on record, it is observed that the petitioner M/s M/s Axis Trustee Ltd nowhere

averred that the respondent Fortis Healthcare Holdings Pvt. Ltd was a Financial Service Provider or an NBFC. It is further seen from the record that since no one appeared on behalf of the Respondent despite service of notice, the Respondent was proceeded ex-parte vide order dated 03.10.2022 of this Adjudicating Authority. It is concluded from the record that during the course of the hearing, there was no disclosure by anyone at any point in time including the petitioner in IB-605/2022 that the Respondent was an NBFC.

12. Against this backdrop, we refer to the Judgement of the Hon'ble NCLAT in the matter of **"Union Bank of India (Erstwhile Corporation Bank) Vs Dinkar T. Venkatasubramanian & Ors."** in Company Appeal (AT) (Ins.) No. 729 of 2020, dated 25.05.2023, which reads thus:

> *20. ….. The power to review is not conferred upon this Tribunal but **power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal** as has been declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example; necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. **There may be other grounds for recall of a judgment. Well known ground on which a judgment can always be recalled by a Court is ground of fraud played on the Court in obtaining judgment from the Court.** We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised."*

(Emphasis added)

13. In terms of the aforesaid Judgment, this Adjudicating Authority is empowered to recall its order, whenever the same is obtained by playing fraud on the Court or by concealing material facts. In the case of IB-605/2022, already we have found that no one including the petitioner M/s Axis Trustee Ltd disclosed the material fact that the Respondent/FHHPL was an NBFC at the time of hearing. Further, since no one appeared on behalf of the Respondent despite service of notice, the Respondent was proceeded ex-parte and the matter was heard. Thus, the CIRP order got to be passed based on the documents on record and submissions made by the M/s Axis Trustee Ltd. Thus, in our considered view, the order dated 16.12.2022 obtained by parties by concealment of material fact or playing fraud on the Court is a nullity.

14. Hence, considering the averments and submissions made by the parties, and the peculiar facts and circumstances of the case, by invoking our inherent powers under Rule 11 of NCLT Rules 2016, **we hereby (a) recall the order dated 16.12.2022, (b) terminate the CIR process initiated in respect of M/s Fortis Healthcare Holdings Pvt. Ltd. with immediate effect, and (c) declare the CIRP initiated in respect of M/s Fortis Healthcare Holdings Pvt. Ltd. vide order dated 16.12.2022 as *void ab initio*. M/s Fortis Healthcare Holdings Pvt. Ltd. is released from the rigors of CIRP and the RP is released from its duties.**

15. The petitioner M/s Axis Trustee Limited contended that it was not aware of the fact that the Corporate Debtor was NBFC and even the name of the Corporate Debtor does not suggest that it is an NBFC, and the applicant in the present IA has not pressed for initiation of proceedings under Section

65 of IBC 2016. However, on perusal of the petition IB-605/2022, we find that the Financial Creditor M/s Axis Trustee Limited had executed Debenture Trustee Agreement and Debenture Trust Deed with the FHHPL and subscribed NCDs of the FHPPL, we are unable to accept the plea that the Financial Creditor was not aware of the status of the FHHPL, in which they made the huge investment and on default of which they approached this Adjudicating Authority. However, taking a lenient view, we warn the petitioner M/s Axis Trustee Ltd. not to repeat such acts and undertake full due diligence before filing such an application.

16. Nevertheless, since the CIRP in IB-605/2022 got initiated due to sheer negligence of the Financial Creditor M/S Axis Trustee Ltd., **we order (a) imposition of cost of Rs. 50,000/- (Fifty Thousand) only to be paid by the Petitioner M/s Axis Trustee Ltd. to the Prime Minister's Relief Fund within 15 days of this order; and (b) direct that the entire CIRP cost and legitimate expenses of IRP/RP (who, in IB-605/2022, being the Section 7 petition, was appointed on the recommendation of the Financial Creditor) shall be borne by the Petitioner M/s Axis Trustee Ltd.**

17. **The IA-5662/2023 is accordingly allowed.**

18. A copy of this order shall be provided by the Court Officer/Registry to the parties of IB-605/2022, present IA-5662/2023, and RP. A copy shall also be sent by the Registrar/Court Officer to RBI and IBBI for their record.

Sd/-	Sd/-
(L. N. GUPTA)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (T)	**MEMBER (J)**