

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO. II) KOLKATA**

IA (IBC) No. 286/KB/2024

In

C.P. (IB) No. 146/KB/2023

*An Application under Section 60(5) of the Insolvency and Bankruptcy Code,
2016, read with Rule 11 of the National Company Law Tribunal Rules,
2016.*

IN THE MATTER OF:

Subham Capital Private Limited

... Financial Creditor

Verses

Vedic Realty Private Limited

... Corporate Debtor

And

IN THE MATTER OF:

Raj Kishore Mode.

... Applicant

Vs.

1. Subham Capital Private Limited

2. Mr. Kannan Triuvengadam, IRP of Vedic Realty Private Limited

...Respondents

Date of Pronouncement: 09th February, 2024

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

Appearance (via video conferencing/physically):

1. Mr. Joy Saha, Sr. Adv.] For the Financial Creditor
2. Mr. Shaunak Mitra, Adv.
3. Mr. Shounak Mitra, Adv.
4. Ms. Vaibhavi Pandey, Adv.

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1. Ms. Urmila Chakraborty, Adv.] Applicant in IA(I.B.C)/ 286(KB)/2024
 2. Ms. Madhuja Barman, Adv.
 3. Ms. Archana Sonthalia, Adv.
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1. Mr. Avik Chaudhuri, Adv.] For IRP in IA(I.B.C)/286(KB)/2024

ORDER

Per Bidisha Banerjee, Member (Judicial):

1. This Court is assembled through hybrid mode.
2. Heard the Ld. Sr. Counsel Mr. Joy Saha appearing for the Respondent / Financial Creditor and also Ld. Counsel Ms. Urmila Chakraborty appearing for the Applicant at length.
3. The present application has been filed seeking recalling of the order of admission dated January 25, 2024 and an order dated January 8, 2024 in C.P.(IB)No. 146/KB/2023 filed by the Respondent No. 1 against Vedic Realty Private Limited.
4. **Facts in a nut shell:**
 - a. By an order dated October 18, 2023 this Tribunal granted one last opportunity to the Corporate Debtor to file its Reply Affidavit within a period of two weeks failing which cost would be imposed. Further, on December 01, 2023, the Corporate Debtor sought further time to file reply and permission was granted to file the same within a period of one week subject to payment of cost of Rs. 25,000/- payable to the Prime Minister's National Relief Fund and the matter was posted to January 08, 2024.

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- b.** That pursuant to the said order the Corporate Debtor paid the cost of Rs. 25,000/- on January 5, 2024 to the Prime Minister's National Relief Fund as the same will be evident from the payment receipt and bank statement of the Corporate Debtor for the said relevant period.
- c.** That on January 8, 2024, when the matter was taken up, the Learned Counsel appearing for the Corporate Debtor was on his legs before the Hon'ble High Court at Calcutta and, as such, he was unable to attend the proceeding when it was taken up for consideration nor he could apprise this Tribunal about the fact that the cost has already been paid in terms of the Order dated December 1, 2023, to file a Reply Affidavit.
- 5.** It is urged that the Corporate Debtor has paid the cost amount as it has all the intention to contest the proceeding instituted by the respondent No.1 as according to it is not maintainable in law as well as on facts. But due to the illness and indisposition of the authorized representative of the Corporate Debtor, the Ld. Advocate could not sit with him to prepare the reply affidavit.
- 6.** The Corporate Debtor received an intimation at 10.51 a.m. on January 25, 2024, that the said petition is listed in the additional cause list of January 25, 2024, at 10.30 AM for pronouncement of the said order. But even before the list was uploaded an Order of Admission was

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passed on January, 25, 2024, thereby appointing the Respondent No. 2 as IRP, over the affairs of the Corporate Debtor.

7. The applicant urges that the Corporate Debtor ought to have been heard at least on the question of law and ought to have been given another opportunity to be represented and to file an application for recalling the ex-parte order and / or to explain or show cause as to why it could not be represented on January 8, 2024.
8. That the order of admission dated January 25, 2024 records the following:

“We would note that on December 01, 2023, the Ld. Counsel for the respondent sought for further time to file reply affidavit, which was allowed for one week subject to payment of cost of Rs.25,000/-, payable to Prime Minister’s National Relief Fund.”

9. It is urged that not only right to file reply was closed as it was not pointed out that cost have been paid, but the matter was heard at one go and an admission order was passed.
10. It is alleged that this Tribunal has failed to take into consideration that the Petitioner / the Respondent No. 1 herein is a Non-Banking Financial Company (for short ‘NBFC’) having an NBFC Certificate issued by the Reserve Bank of India. Despite being an NBFC, the Respondent N. 1 has not disclosed any loan document and / or loan

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agreement to show that there has been any loan transaction between the parties which is mandatory.

11. Being an NBFC, the alleged financial creditor is bound by the RBI Master Circular-Fair Practices Code dated July 2, 2012, being RBI/2012-13/27 DNBS (PD) CC No. 286/03.10.042/2012-13 paragraph 2A (ii) whereof the said RBI Circular stipulates as under:

“Loan appraisal and terms/conditions

The NBFCs should convey in writing to the borrower in the vernacular language as understood by the borrower by means of sanction letter or otherwise, the amount of loan sanctioned along with the terms and conditions including annualised rate of interest and method of application thereof and keep the acceptance of these terms and conditions by the borrower on its record. As complaints received against NORES generally pertain to charging of high interest penal interest, NBFCs shall mention the penal interest charged for late repayment in bold in the agreement.

It is understood that in a few cases, borrowers at the time of sanction of loans are not fully aware of the terms and conditions of the loans including rate of interest, either because the NBFC does not provide details of the same or the borrower has no time to look into detailed agreement.

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Not furnishing a copy of the loan agreement or enclosures quoted in the loan agreement is an unfair practice and this could lead to disputes between the NBFC and the borrower with regard to the terms and conditions on which the loan is granted.

NBFCs are, therefore, advised to furnish a copy of the loan agreement preferably in the vernacular language as understood by the borrower along with a copy each of all enclosures quoted in the loan agreement to all the borrowers at the time of sanction/disbursement of loans."

- 12.** Further that breach of a Deed of Settlement cannot be construed to be a financial debt under Section 5(8) of the Code. Such defenses should be allowed to be raised by the Corporate Debtor.
- 13.** Ld. Sr. Counsel Mr. Joy Saha while vehemently opposing the prayer for recall would submit that once an order is passed on merits, it cannot be recalled. The only recourse is to file an appeal before the Hon'ble NCLAT.
- 14.** We have heard the rival contentions.
- 15.** We are not inclined to enter into the merits of defence raised by the Corporate Debtor. We are aware of the decision of Hon'ble NCLAT in

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the case of **Union Bank of India (Erstwhile Corporation Bank Vs. Dinkar T. Venkatasubramanian & Ors. at I.A. No. 3961 of 2022 in Company Appeal (AT) (Ins.) No. 729 of 2020** reassuring the right of this Tribunal to recall its order which reads as under:

*“Para 20: The above judgments of the Hon'ble Supreme Court clearly lays down that there is a distinction between review and recall. 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*

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questions referred to us, need not further elaborate the circumstances where power of recall can be exercised.”

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“Para 26:We, however, hold that the judgment laying down that this Tribunal has no power to recall the judgment does not lay down correct law.”

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

I: This Tribunal is not vested with any power to review the judgment, however, in exercise of its inherent jurisdiction this Tribunal can entertain an application for recall of judgment on sufficient grounds.

II & III: The judgment of this Tribunal in "Agarwal Coal Corporation Private Limited vs Sun Paper Mill Limited & Anr." and "Rajendra Mulchand Varma & Ors vs K.L.J Resources Ltd & Anr." observing that this Tribunal cannot recall its judgment does not lay down the correct law.”

- 16.** It is evident that the Corporate Debtor had paid the costs to file its reply, whereas this Tribunal under an erroneous assumption that no costs have been paid to file a Reply, proceeded to hear out the matter on merits and without a reply from the Corporate Debtor, rendered its order of admission.

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- 17.** Therefore, to cause fairness qua parties, we consider it this to be fit case to recall our order of admission only for a limited purpose to allow the Corporate Debtor to file its reply within 7 days.
- 18.** List this matter on **04.03.2024**.
- 19.** With the above directions, **IA (IBC) No. 286/KB/2024 in C.P. (IB) No. 146/KB/2023 is disposed of.**
- 20.** The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 21.** Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee,
Member (Judicial)**

Signed on this the 09th day of February, 2024

M. Jana (P.S.)