

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH  
COURT HALL NO: II**

(Video Conference)

**CORAM: DR.VENKATA RAMAKRISHNA BADARINATH NANDULA – HON'BLE MEMBER (J)  
CORAM: SHRI SATYA RANJAN PRASAD, HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
HYDERABAD BENCH, HELD ON 15.11.2022 AT 02:30 PM THROUGH VIDEO CONFERENCE**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/1248&1249/2022 in Company Petition IB/10/2022
NAME OF THE COMPANY	Feno Plast Limited
NAME OF THE PETITIONER(S)	The Canara Bank
NAME OF THE RESPONDENT(S)	Feno Plast Limited
UNDER SECTION	7 of IBC

**ORDER**

**IA 1248 & 1249/2022**

Ld. Counsels for both sides present.

Order in IA 1248/2022 in CP No.10/2022 pronounced. In the light of our discussion, we hereby recall the order dated 19.10.2022 in CP 10/2022 whereby, the CIRP has been triggered against the Corporate Debtor. Consequently, the moratorium ordered against the Corporate Debtor stands revoked forthwith and the Corporate Debtor is at liberty to function through its Directors as per Law. We, further direct that the matter be listed on 21.11.2022 for considering the correspondence / record now placed relating to the OTS dated 12.07.2022 for the purpose of arriving at whether or not there is a default on the part of the Corporate Debtor.

With these directions, **the Application IA 1248/2022 is allowed and stands disposed of. As IA 1248/2022 is allowed, no orders are required in IA 1249/2022 and therefore, the same is also disposed of as infructuous .**

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**MEMBER (TECHNICAL)**

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**MEMBER (JUDICIAL)**

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH - II**

**IA 1248 of 2022 in  
CP(IB) No. 10/7/HDB/2022**

*U/s. 60(5) of IBC, 2016  
r/w Rule 11 of NCLT Rules, 2016*

In the matter of:

Mr. H. Kishen  
Managing Director of Feno Plast Limited (Suspended)  
P.No.B-3, Vikrampuri Colony  
Secunderabad – 500 009.

... Applicant

1. Feno Plast Limited  
306/308, Chenoy Trade Centre  
Parklane, Secunderabad, Telangana  
... Respondent No.1/Corporate Debtor

2. Canara Bank Limited  
R.P.Road Branch, D.No.5-2-5-2-69/3  
Kandala Plaza, Bible House  
Secunderabad – 500 003  
... Respondent No.2 / Financial Creditor

**Date of Order: 15.11.2022**

**Coram:**

**Hon'ble Dr.Venkata Rama Krishna Badarinath Nandula, Member (Judicial)**  
**Hon'ble Shri Satya Ranjan Prasad, Member (Technical)**

**Parties / Counsels Present:**

For the Applicant : Mrs. Madhavi Latha, Mr. S. Ramakrishna,  
Advocates

For the Respondent : Mr. Manav Gecil Thomas, Advocate

Heard on: 02.11.2022

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[ PER : BENCH ]

**ORDER**

- I. The instant Interlocutory Application is filed on behalf of the Suspended Managing Director of the Corporate Debtor / M/s. Feno Plast Limited under Section 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016 praying the Adjudicating Authority -

*“To recall the Order dated 19.10.2022 passed in CP(IB) No.10/7/HDB/2022 by this Hon’ble Tribunal admitting the same and initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Feno Plast Limited”.*

- II. The gist of the Applicant’s brief is -

- i. The 2<sup>nd</sup> Respondent herein /Canara Bank/Financial Creditor had filed the above Company Petition CP(IB) No.10/7/HDB/2022 on 05.1.2022 under Section 7 of the Insolvency & Bankruptcy Code, 2016 (‘Code’) to initiate the Corporate Insolvency Resolution Process against the 1<sup>st</sup> Respondent /M/s. Feno Plast Limited, for the alleged default in payment of a sum of Rs.55,61,32,955.75 including interest of Rs.25,56,40,214.06, Rs.1,77,94,803.79 in Canara Bank Account and Rs.28,26,97,937.90 in E-Syndicate Bank Account allegedly due as on 30.11.2021, which was admitted by this Adjudicating Authority on 19.10.2022 and appointed the Interim Resolution Professional.

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- ii. Aggrieved by the said Order dated 19.10.2022, the Applicant had filed the present application as certain essential and material facts pertaining to the One Time Settlement, for short 'OTS' dated 12.07.2022 sanctioned by the 2<sup>nd</sup> Respondent and its implementation have not been placed before this Hon'ble Tribunal, which would demonstrate that as on 19.10.2022, the Corporate Debtor was not in default of the OTS terms accepted by the 2<sup>nd</sup> Respondent/Financial Creditor and the OTS was being implemented pursuant to its acceptance on 12.07.2022 by the 2<sup>nd</sup> Respondent / Financial Creditor.
- iii. The Corporate Debtor was negotiating with the 2<sup>nd</sup> Respondent for a One Time Settlement, vide its letter dated 05.01.2022, which was rejected only on 25.04.2022.
- iv. Meanwhile, the Hon'ble Tribunal vide Order dated 16.03.2022 forfeited the right to file counter. On 04.04.2022, the Corporate Debtor had filed an IA 424/2022 along with the Counter Statement to recall the Order dated 16.03.2022, which was dismissed by this Tribunal on the ground that the OTS proposal had been rejected by the 2<sup>nd</sup> Respondent and Orders had been reserved in the main Petition.
- v. However, in the meantime, the 2<sup>nd</sup> Respondent/Financial Creditor sanctioned an OTS vide Lr.No.SMCB/4929/FENOPLAST/078/ 2022-23/PSK, dated 12.07.2022, for Rs.68.40 crores towards full and final settlement of consortium dues, of which Rs.50.60 crores was towards the 2<sup>nd</sup> Respondent Bank's dues.

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The salient features of the OTS are as follows:

- a. Rs.34.84 crores would be payable by the Corporate Debtor by 31.07.2022.
- b. Rs.20.27 crores would be payable by the Corporate Debtor to the Respondent Bank by 31.10.2022.
- c. Balance Rs.13.29 crores to be paid by the Corporate Debtor by 31.12.2022.
- d. On receipt of the said Rs.34.84 crores, the Respondent/Financial Creditor was to release Unit I (Patancheru, Medak Dist.) with NOC to sell the same; and handover the physical possession of Units II & III (Nandigaon, Medak dist.) to the Corporate Debtor.

A copy of the OTS Letter dated 12.07.2022 is filed at page nos. 23 to 25 of the application.

- vi. As per Clause 8, further proceedings under SARFAESI/CMM/Civil Court/DRT/NCLT against the Corporate Debtor/Corporate Guarantor/Guarantors shall be deferred and to be withdrawn after full and final payment of the OTS amount. Initially, the Corporate Guarantor was unable to adhere to the timeline for the 1<sup>st</sup> and 2<sup>nd</sup> tranches and vide email dated 03.08.2022 the OTS was cancelled. However, by email dated 23.08.2022, the 2<sup>nd</sup> Respondent / Financial Creditor informed the Corporate Debtor to pay Delay Period Interest as per OTS sanction amount for activating OTS as per earlier terms amounting to approximately Rs.25,38,100/- upto 30.08.2022 and also on 24.08.2022 communicated the No Lien Bank Account details for remittance of the amount. The Corporate Debtor deposited an amount of Rs.32.91 crores in the non-lien account and on 29.08.2022, the 2<sup>nd</sup>

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Respondent by email also confirmed receipt of the same and stated that the charge to the extent of its mortgage in respect of Unit I will be released after adjusting the amount. Further, on 01.09.2022, the Respondent requested State Bank of India, Consortium Member to issue No Objection Certificate as per OTS for release of Unit I property and handing over of physical possession of Units 2 & 3.

- vii. The Corporate Debtor in compliance with the terms of the OTS had made the payments to the Respondent Bank. As on 19.10.2022, there is no default as per the accepted OTS. The Corporate Debtor is genuine and eager to settle and repay its dues. However, for reasons best known to the 2<sup>nd</sup> Respondent / Financial Creditor, it was reluctant to disclose the OTS dated 12.07.2022 even after OTS was accepted by the Respondent Bank alongwith delayed payment interest. The next/3<sup>rd</sup> tranche of payment was due on 31.10.2022 and the last date to make the total payment against the outstanding balance is 31.12.2022.
- viii. As per the accepted schedule of payment in OTS, as on 19.10.2022, there was no default by the Corporate Debtor. The balance amounts under OTS are payable on 31.10.2022 and 31.12.2022 and the Corporate Debtor were keen to settle the entire outstanding of the Respondent Bank and already about 66% of the Respondent Bank's dues under the OTS.
- ix. The aforesaid facts materially altered the status of the dues and has established *bona fide*, efforts of the Corporate Debtor to discharge the dues, after the orders were referred by the Hon'ble Tribunal. On 19.10.2022, this Hon'ble Tribunal was pleased to admit the above

petition and did not have the occasion to consider the vital question of whether the Petition could be admitted in view of the changed circumstances, substantial payments and novation of contract between the parties under the OTS dated 12.07.2022 and the terms were compiled by the Corporate debtor and further payment was not yet due to the Applicant. The Order dated 19.10.2022 is detrimental to the Corporate Debtor, its creditors and other stakeholders at large and rendered the Corporate Debtor's future uncertain. In the interest of justice, the said Order dated 19.10.2022 admitting the above petition and initiating CIRP against the Corporate Debtor be recalled and the above petition be deferred till 31.12.2022.

- x. Since the OTS terms are being complied with by the Corporate Debtor and substantial payments about 66% of the Respondent's dues under the OTS have been made during the pendency of the Petition to the Respondent / Financial Creditor. There has been an omission by the parties to place the aforesaid facts before this Hon'ble Tribunal is neither willful nor wanton but out of anxiety to avoid any default and restructure the outstanding amicably. The balance of convenience and interests of justice are wholly in favour of recall of the said order dated 19.10.2022. The Corporate debtor will be put into grave prejudice, irreparable loss and hardship if the order is not recalled. On the other hand, the Respondent will not be put to any prejudice, loss or hardship if the order is recalled.



III. The 2<sup>nd</sup> Respondent filed its *Counter*, denying the averments made by the Applicant, while stating as under:

- i. The instant Application is liable to be dismissed at the threshold as the case has been decided on merits after hearing both sides and the remedy is to challenge the impugned order before the Hon'ble NCLAT.
- ii. The Corporate Debtor committed default which is a matter of record, even as on date. Furthermore, the Corporate Debtor, during the pendency of the case before this Tribunal, sent a number of OTS proposals. This was used by the Corporate Debtor for seeking time before this Tribunal.
- iii. After notice was ordered, the Corporate Debtor appeared and sought time to file counter on numerous occasions. The right to file a counter was forfeited on 16.03.2022. Thereafter, the matter came up for hearing and was reserved for Orders on 25.04.2022. The Corporate Debtor, only after watching the proceedings carefully, chose to file an application, vide I.A. No. 424 of 2022, seeking recall of the order forfeiting the right to file counter. The said application was dismissed, vide order dated 29.04.2022. Once the right to file counter was forfeited, the Corporate Debtor did not take any steps to challenge the said order and thus, the said order attained finality.



- iv. Numerous opportunities were given by this Tribunal to the Corporate Debtor. In the application under Section 7, this Tribunal, vide order dated 16.02.2022, adjourned the matter for a period of four weeks, on the submission of the Corporate Debtor that it would sell its non-core assets and repay the loans. On the failure of the Corporate Debtor to do so, the right to file counter was forfeited, vide order dated 16.03.2022, as no counter was filed.
- v. The case was again listed on 06.04.2022, when the Corporate Debtor appeared in person and sought for time, which was granted. Thereafter, the matter came up for hearing on 12.04.2022 and was adjourned.
- vi. Thereafter the matter was *suo moto* reopened due to a change in the composition of the Bench. Thereafter, when the matter came up for hearing on 14.09.2022, both the parties were heard and the matter was Reserved for Orders.
- vii. The OTS dated 12.07.2022, stood cancelled by virtue of the e-mail dated 03.08.2022. Thereafter, the Corporate Debtor filed a Writ Petition, i.e., W.P. No. 33132 of 2022, before the Hon'ble High Court, challenging the rejection of the OTS. The said Writ Petition was withdrawn by the Corporate Debtor. Thereafter, the Corporate Debtor filed W.P. No. 35656 of 2022, with regard to the OTS conditions.

- viii. The Bank continuously tried its best to recover the dues from the Corporate Debtor who has been only trying to delay the recovery proceedings by filing one case after another. It is not in dispute that the erstwhile directors have differences among themselves due to which Company Petition was filed before this Tribunal.
- ix. Thus, as the case is filed challenging part of the OTS, benefit of the same cannot be sought by the Corporate Debtor before this Tribunal. Furthermore, the Corporate Debtor is vehemently contesting the Securitization Application before the Debts Recovery Tribunal, numbered as SAIR No. 595 of 2022, against which an application for stay was filed and the same was dismissed.
- x. The OTS that the Corporate Debtor is seeking benefit, of as on today, stands cancelled. These pertinent aspects were not placed by the Corporate Debtor in the instant Application.
- xi. The eagerness of the Corporate Debtor to repay the outstanding dues, as averred, is against the record as the Writ Petition challenging the terms of the OTS is pending before the Hon'ble High Court of Telangana. In the event the Corporate Debtor was interested to clear the outstanding dues of the Financial Creditor, the terms and conditions with regard to the OTS, the benefit of which is being sought, would not have been challenged.
- xii. Contending thus, it was prayed that the instant Application be dismissed.

- IV. Learned Counsels for both sides filed the Written Submissions.
- V. In the light of the contest as above, the point that emerges for consideration by this Adjudicating Authority is –

**Whether the Adjudicating Authority has jurisdiction to recall its order directing initiation of CIRP against the Corporate Debtor? If so whether the Order dated 19.10.2022 in CP No.10/7/HDB/2022 warrant recall?**

- VI. We have heard the Learned Counsels for both sides, perused the record and the Case Law.
- VII. The facts of this case require us to quote the following finding of *Hon'ble Supreme Court of India, in re, Ramjas Foundation & Ors. Vs. Union of India & Ors,*

*'The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums" (Emphasis is ours)*

- VIII. Alleging that the *deliberate suppression* of the material communication dated 24.08.2022 by the Financial Creditor despite being full aware of the same, lead to the passing of the impugned order whereby Corporate Insolvency Resolution Process, for short, 'CIRP', has been ordered against the Corporate Debtor, the Applicant who is the ex-director of the Corporate Debtor has filed the present application seeking to recall the said Order.

IX. Admittedly, the Corporate Debtor has been sanctioned OTS, vide letter dated 12.07.2022 whereby the Financial Creditor agreed to receive a sum of Rs.6.84 crores from the Corporate Debtor towards the dues payable to the 2<sup>nd</sup> Respondent / Financial Creditor. It is stated after adjusting the upfront payment of Rs.0.40 crores and the balance of Rs.4.66 crores to be paid as follows:

- Rs.6.84 crores (our share is Rs.5.06 crores) – As an amount of Rs.0.40 crores is adjusted towards OTS upfront amount, the balance payable by the Company is Rs.4.66 crores to be paid on or before 31.07.2022.
- Rs.28.00 crores (our share is Rs.20.71 crores) to be paid on or before 31.07.2022.
- Rs.20.27 crores (our share is Rs.15.00 crores) to be paid on or before 31.10.2022.
- Balance OTS amount of Rs.13.29 crores (our share is Rs.9.83 crores) to be paid on or before 31.12.2022.

On receipt of offer amount of Rs.34.84 crores (Rs.6.84 crores and Rs.28.00 crores) to the Consortium, permitted to release the Unit I (as mentioned in Sl.No.1) and handover the physical possession of remaining Unit II and Unit III (as mentioned under Sl.No.2 and Sl.No.3) to the Company.

X. As the Corporate Debtor failed to comply the terms relating to the payment to be made by 31.07.2022, the 2<sup>nd</sup> Respondent/Financial Creditor had in terms of the Sanction Letter dated 12.07.2022 cancelled the said OTS, vide communication dated 03.08.2022.

XI. However, the Corporate Debtor approached the Authorities of the Financial Creditor seeking for revival of the said OTS by accepting to pay interest for the delayed period amounting to approximately Rs.25,38,100/- up to 30.08.2022. The said request of the Corporate Debtor dated 23.08.2022 has been accepted by the Authorities of the Financial Creditor, vide communication dated 24.08.2022, which inter alia, states as follows:

1. Upon receipt of Rs.32.91 crores into our no lien account (209272434), IFSCO Code: CNRB0004929 the auction will be stalled.
2. OTS sanction communication dated 12.07.2022 will be activated as per the earlier terms and the bids EMI paid will be refunded to the bidders.
3. Bank will release the charge on Unit-I land to the extent of 10,046 sq. yds. and give no objection to 8,898 sq. yds. also (18,944 sq. yds.)
4. Bank shall release the charge on the entire extent of 18,944 sq. yds and the extent of land at Unit-I, 21 & 21/A, IDA, Phase-1, Patan Cheruvu would be registered in the name of buyer by the bank.

XII. Pursuant thereto, the Corporate Debtor sought for the details of the 'No Lien Account' enabling him to transfer the amount and accordingly transferred the sum of Rs.32.91 crores representing the interest for the

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delayed payment as well as the first tranche payment. The receipt of the same has been duly acknowledged by the Financial Creditor, vide email letters dated 29.08.2022 and 01.09.2022 which are as follows:

***Email Letter dated 29.08.2022 –***

*“We are in receipt payment of Rs.32.91 crores in no lien account on 26.08.2022, we will release our charge to the extent of our mortgage i.e. 10046 sq. yds. in Unit No.1 (total comprising of total 18944 sq. yds) after adjusting the amount”.*

***Email Letter dated 01.09.2022 –***

*“In terms of our OTS sanction, on receipt of part amount of Rs.34.84 crores (Rs.6.84 crores + Rs.28.00 crores) to the Consortium. We have permitted to release Unit 1 property and to handover the physical possession of Unit 2 and Unit 3 properties to the borrower subject to obtention of NOC from your Bank (SBI) for release of the Unit-1 property and NOC for handing over of possession of the properties of Unit 2 & 3.*

*We have received the part amount of Rs.34.84 crores as per terms of our sanction and we are in receipt of your NOC dated 30.08.2022 for release of unit 1 property. You are requested to provide NOC for handing over of physical possession of Unit 2 & Unit 3 subject to not to release of the charge on the said properties (Unit 2 & 3)”.*

- XIII. Thus, by 24.08.2022 the OTS dated 12.07.2022 which was cancelled on 03/08/2022 has been revived, part amount of Rs.34.84 crores as per terms of sanction *has been received by 01/09/2022 and the financial creditor in terms of the OTS has initiated steps for release of Unit 1 property, while the second tranche payment was due by 30.10.2022 and the last payment by 31.12.2022.*



XIV. While things stood thus, the above matter came up for hearing on 14/09/2022, after it was reopened due to change in the constitution of Bench. Surprisingly, neither parties have disclosed the above material facts before this Tribunal. On the other hand, the Financial Creditor maintained (even in the counter filed in the present application) that due to the default committed in complying the terms of the OTS by the Corporate Debtor, the OTS dated 12/07/2022 stood cancelled by 03/08/2022. Therefore, in the wake of the said submission of the Ld. Counsel for the Financial Creditor that the OTS dated 12/07/2022 has failed, this Adjudicating Authority on 19.10.2022 after having held that ‘the Adjudicating Authority is *satisfied* that the Financial Creditor has established the debt and also the *default* in repayment of the said debt’ and admitted the Company Petition, thus, triggered initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

XV. The prayer of the Applicant/Suspended Managing Director of Corporate Debtor, in this application is resisted by the 2<sup>nd</sup> respondent/Financial Creditor contending that, the Adjudicating Authority has *no jurisdiction* to recall the order dated 19/10/2022 and *nextly*, that as the OTS dated 12/07/2022 since cancelled by 03/08/2022, the default in repayment of the admitted debt as on 19/10/2022 was apparent, the order admitting the company petition is in accordance with law. Both these pleas were resisted by the Applicant contending that the Adjudicating Authority has the Jurisdiction to recall its order by relying on the rulings of the Hon’ble NCLAT, in re, Apex Court in United India Insurance Co. Ltd. vs. Rajendra Singh where the Apex Court held that:

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*“Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless, to recall its own order. If it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim”. (Emphasis is ours)*

- XVI. The plea of jurisdiction in so far as the case on hand is concerned needs to be considered not only on the basis of ruling in re, United India Insurance Co. Ltd. *supra*, but also from *the facts that lead to the passing of the impugned order* of admission of the company petition by this Adjudicating Authority.
- XVII. Ld. Counsel for the Applicant strenuously contended that, since the indisputable communication dated 24/08/2022 allows time to the Applicant to pay the 2<sup>nd</sup> tranche amount till 30/10/2022, taking a firm stand before this Adjudicating Authority that the OTS dated 12/07/2022 has been cancelled and that the Corporate Debtor *defaulted* in discharging the debt and pressing for triggering CIRP against the Corporate Debtor well before 30/11/2022 is nothing but a deliberate misrepresentation of facts and playing ‘fraud’ as such, on the grounds of misrepresentation and fraud on the part of the Financial Creditor the impugned order is liable to be set aside. Nextly, Ld. Counsel contended that, had the Financial Creditor/2<sup>nd</sup> Respondent placed the above material before this Adjudicating Authority by 19.10.2022, this Tribunal would not have admitted the Company Petition, as existence of default at the time of admission of a petition filed under Section 7 of IB Code being the *sine qua non*, for triggering CIRP against the Corporate Debtor is totally absent in the case on hand.

XVIII. Per contra, the Learned Counsel for the 2<sup>nd</sup> Respondent/Financial Creditor argued that as the OTS has been cancelled by 12/07/2022 due to default on the part of the Corporate Debtor in complying the terms of OTS, default by 19/10/2020 in repayment of the admitted debt is apparent, hence the order dated 19/10/2022 admitting the company petition is perfectly valid both under law and on facts.

XIX. A bare perusal of the communication dated 24.08.2022 filed by the applicant along with this application in unambiguous terms reveals that, the OTS dated 12.07.2022 which was cancelled on 03/08/2022, has been revived subject to the following terms:

1. Upon receipt of Rs.32.91 crores into our no lien account (209272434), IFSC Code: CNRB0004929 the auction will be stalled.
2. OTS sanction communication dated 12.07.2022 will be activated as per the earlier terms and the bids EMI paid will be refunded to the bidders.
3. Bank will release the charge on Unit-I land to the extent of 10,046 sq. yds. and give no objection to 8898 sq. yds also (18,944 sq. yds.)
4. Bank shall release the charge on the entire extent of 18,944 sq. yds and the extent of land at Unit-I, 21 & 21/A, IDA, Phase-1, Patan Cheruvu would be registered in the name of buyer by the bank.

XX. The Email Letter dated 29.08.2022 from the Financial Creditor which is as follows confirms compliance of the part of the terms of the letter dated 24/08/2022, supra,

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“We are in receipt payment of Rs.32.91 crores in no lien account on 26.08.2022, we will release our charge to the extent of our mortgage i.e. 10046 sq. yds. in Unit No.1 (total comprising of total 18944 sq. yds) after adjusting the amount”.

XXI. The next Email Letter dated 01.09.2022 from the Financial Creditor which is as below, confirms that the OTS has been revied;

“In terms of our OTS sanction, on receipt of part amount of Rs.34.84 crores (Rs.6.84 crores + Rs.28.00 crores) to the Consortium. We have permitted to release Unit 1 property and to handover the physical possession of Unit 2 and Unit 3 properties to the borrower subject to obtention of NOC from your Bank (SBI) for release of the Unit-1 property and NOC for handing over of possession of the properties of Unit 2 & 3.

We have received the part amount of Rs.34.84 crores as per terms of our sanction and we are in receipt of your NOC dated 30.08.2022 for release of unit 1 property. You are requested to provide NOC for handing over of physical possession of Unit 2 & Unit 3 subject to not to release of the charge on the said

XXII. Undoubtedly, the Financial Creditor failed in bringing the above facts to the notice of this Tribunal, when the impugned order was passed. No doubt even the Corporate Debtor also withheld the above material information from being placed before us, but unlike the Financial Creditor the Corporate Debtor did not gain by concealing the said material information, in fact the said suppression has resulted in passing an adverse order of initiation of CIRP against the Corporate Debtor. Therefore, in so far as the Corporate Debtor is concerned, it is a case of “*fault*” on the part of the Ld. Counsel for the Corporate Debtor in not placing the said material before this Adjudicating Authority by 19.10.2022.

XXIII. It is trite to say that for the *fault* of an Advocate party should not suffer. Reliance in this regard can be placed on the ruling of Hon’ble Supreme Court of India, in re, Rafiq & Anr. vs Munshilal & Anr 1981.

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“It is not proper that an innocent litigant, after doing everything in his power to effectively participate in his proceedings by entrusting his case to the Advocate, should be made to suffer for the inaction, deliberate omission or misdemeanour of his agent. For whatever reason the Advocate might have absented himself from the Court, the innocent litigant could not be allowed to suffer injustice for the fault of his Advocate. (Emphasis is ours).

XXIV. In our considered opinion the Financial Creditor’s approach is unclear. **Hon’ble Supreme Court of India, *in re, Ramjas Foundation & Ors.***, supra, wherein it was held that;

“The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution **but also to the cases instituted in other courts and judicial forums**” (Emphasis is ours).

XXV. Therefore, in the light of our discussion as above, *it is as clear as crystal that the finding in the Order dated 19/10/2022 as to the existence of default on the part of the Corporate Debtor, was arrived at without regard to the material factors that existed as on 19/10/2022, namely, the revival of the OTS dated 12.07.2022 which was cancelled on 03/08/2022, receipt of part amount of Rs.34.84 crores as per terms of sanction of OTS by 01/09/2022, 30.10.2022 being the due date for second tranche payment, initiation of steps in terms of the OTS by the Financial Creditor for release of Unit 1 property. Needless to say, that the above factors which were suppressed have a tremendous influence on the finding regarding the plea of default.*

XXVI. Here, it is pertinent to refer to the ruling in re, *Vidarbha, supra, Hon’ble Supreme Court* categorically held that,

"Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits". (Emphasis is ours).

- XXVII. There can be no doubt that the plea of the Corporate Debtor that the debt was not due and payable by the date of admission of the Petition under Section 7 of IB Code, is a good ground against admission and therefore, if the same is established the petition under section 7 of IB Code has to be rejected. In so far as the case on hand, had the Financial Creditor placed the above material information relating to OTS post 12/07/2022 before this Adjudicating Authority, we were duty bound to consider the same. While arriving at a finding on the plea of default. However, as the same has been withheld by the Financial Creditor this Adjudicating Authority had no opportunity to consider the same. As such, the finding in so far as the 'default' on the part of the Corporate Debtor arrived at vide order dated 19/11/2022, is in violation of the ruling in *Vidharbha*, supra, that 'The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits'.
- XXVIII. Therefore, it is overwhelmingly clear that the submission of the Financial Creditor all through that the OTS dated 12/07/2022 has failed as such the default was apparent, was nothing but misrepresentation of fact before this Adjudicating Authority. When once it is found that the impugned order dated 19/10/2022 was the outcome of misrepresentation of facts, as held *in re, United India Insurance Co. Ltd., supra*, where it was held that, "No Court or Tribunal can be regarded as powerless, to recall its own order, if

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it is convinced that the order was wangled through fraud or **misrepresentation** of such a dimension as would affect the very basis of the claim”, this Adjudicating Authority, therefore has the jurisdiction to recall its order dated 19/10/2022.

- XXIX. Needless to say, that the *object* of the proceeding under Section 7 of Insolvency & Bankruptcy Code, for short ‘IBC’ is not ‘recovery’ but ‘*resolution*’ of the Corporate Debtor. Therefore, to drag a Corporate Debtor into CIRP without there being an honest finding of *default* on the part of the Corporate Debtor by the date of admission of the petition under section 7 of IB Code, is nothing but an arm twisting. Therefore, on facts and under law it is imperative to recall the order dated 19.10.2022 and reopen the matter for the purpose of considering the post 24/08/2022 correspondence between the Financial Creditor and the Corporate Debtor relating to OTS dated 12.07.2022 and then arrive at a fresh finding on whether or not the corporate debtor has committed default in payment of the debt which is admittedly not in dispute. We therefore accordingly recall the order dated 19/10/2022 and direct that the matter be listed on 21/11/2022.

Point is answered accordingly.

- XXX. It may be stated that the Financial Creditor has not placed any information as regards to constitution of Committee of Creditors as on date, by the IRP. It is not even stated whether or not the IRP has taken the charge and acted upon.

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XXXI. Therefore, in the light of our discussions as above, we hereby recall the Order dated 19.10.2022 in CP (IB) 10/7/HDB/2022 whereby CIRP has been triggered against the Corporate Debtor, consequently, the moratorium ordered against the Corporate Debtor stands revoked forthwith and the Corporate Debtor is at liberty to function through its directors as per law. Let the matter be listed on 21.11.2022 for considering the correspondence/record now placed relating to OTS dated 12.07.2022. Accordingly, IA 1248 of 2022 in CP(IB) No.10/7/HDB/2022 is allowed. However, without costs.

XXXII. In the result, IA 1248 of 2022 in CP(IB) No.10/7/HDB/2022 is allowed and stands disposed of.

  
SATYA RANJAN PRASAD  
MEMBER (TECHNICAL)

  
Dr.N.V.RAMA KRISHNA BADARINATH  
MEMBER (JUDICIAL)

Syamala