NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT)(Insolvency) No. 699 of 2022

IN THE MATTER OF:

Vikas Dahiya
(Ex-Director of Golden Tobacco Limited)
R/o House No. 543, Pole No. 102, Mundka,
West Delhi- 110 041 ..**Appellant**

Versus

1. **Arrow Engineering Limited**
Arrow House No. 1, Arrow City Manhattan
Village- Kandalepada,
Taluka – Pen,
Goa Highway Nh-17 Raigarh,
Maharashtra – 402 107 ..**Respondent No. 1**

2. **Golden Tobacco Limited**
Through its IRP
(Mr. Vichitra Narayan Pathak)
DarjiPura, Post – Amliyara,
Dist. Vadodara- 390 022,
Gujarat ..**Respondent No. 2**

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Rinku Kr. Garg, Mr. Rajan Chaudhary, Mr. Nishant Rao and Ms. Geetika, Advocates**

For Respondents : **Mr. Robin Jaisinghani, Mr. Vikas Mehta, Mr. Jacinta D Silva, Mr. Bhaskar Nayak, Advocates for Respondents No. 1**

Mr. Anurag Bisaria, Advocate for R-2

With
Company Appeal (AT)(Insolvency) No. 812 of 2022

IN THE MATTER OF:

Oval Investment Pvt. Ltd.
Thr. Rajendra Soni
Authorised Representative,
B-97, 2nd Floor, Amrit Puri Garhi,
East of Kailash,
New Delhi- 110 065 ..**Appellant**

Versus

1. **Arrow Engineering Ltd.**
   Arrow House No. 1, Arrow City Manhattan
   Village- Kandalepada,
   Taluka – Pen,
   Goa Highway Nh-17 Raigarh,
   Maharashtra – 402 107 ..**Respondent No. 1**

2. **Golden Tobacco Limited**
   (through Interim Resolution Professional)
   Darjipura, Post Amaliyara,
   Vadodra,
   Gujarat – 390 022. ..**Respondent No. 2**

Present:

For Appellant: **Mr. Dhruba Mukherjee, Sr. Advocate with Mr. Kumar Anuragh Singh, Mr. Zain Khan and Mr. RaktimGogoi, Advocates**

For Respondents : **Mr. Robin Jaisinghani, Mr. Vikas Mehta, Mr. Jacinta D Silva, Mr. Bhaskar Nayak, Advocates for Respondents No. 1**

Mr. Anurag Bisaria, Advocate for R-2

JUDGMENT

[**5th August, 2022**]

(Per Hon'ble Mr. Justice M. Satyanarayana Murthy):

These two appeals are filed against common order passed in IA No. 830/NCLT/AHM/2021 in CP(IB) No. 268/NCLT/AHM/09/2020 dated 7th June, 2022.

2. As both these appeals are filed challenging a common order, raising common grounds, it is expedient to decide both these appeals by a common judgment.

3. The Appellant in Company Appeal (AT)(Insolvency) No. 699 of 2022 is an ex-Director of Golden Tobacco Ltd. whereas the Appellant in Company Appeal (AT)(Insolvency) No. 812 of 2022 is claiming to be shareholder of Oval Investment Pvt. Ltd. To avoid confusion and to maintain consistency, parties arrayed in these appeals hereinafter will be referred as Appellants and Respondents for convenience of reference.

4. The Appellant in appeal No. 699of 2022 was the Respondent in Appeal No. CP(IB) No. 268/NCLT/2009/AHM/2020 – Corporate Debtor. Arrow Engineering Ltd., a Financial Creditor filed an application before the National Company Law Tribunal (in short '**NCLT**') Ahmedabad to initiate Corporate Insolvency Resolution Process (in short '**CIRP**') under Section 7 of Insolvency and Bankruptcy Act, 2016 (in short '**IBC**') against the Corporate Debtor. The said application was dismissed by the Adjudicating Authority on various grounds.

5. Aggrieved by the order of the Adjudicating Authority, the Applicant preferred an appeal before this Tribunal. This Tribunal after hearing the Counsel on record passed a detailed order in Company Appeal(AT)(Ins) No. 183 of 2021. This Appellate Tribunal formulated certain points regarding limitation, relationship between Financial Creditor and Corporate Debtor, acknowledgement of debt etc. The specific points directed by this Tribunal in paragraph-7 of the Judgment are as follows:

i) Whether the Corporate Debtor owed a financial debt to the Appellant in the facts of the present case?

ii) Whether the balance sheet for the years 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19 contain acknowledgment of debt as per the meaning of Section 18 of the Limitation Act, 1963 so as to give benefit fresh limitation period to the Appellant?

And

iii) Whether the application filed under Section 7 of IBC by the Appellant was barred by time and rightly rejected by the Adjudicating Authority?

6. All these three questions were answered against the Appellants herein and in favour of Respondent Arrow Engineering Ltd., adverting several provisions of IBC, more particularly, Sections 3(11) and 5(8) and other provisions of Limitation Act, 1963, decided all the points against the Appellant – Ex- Director.

7. This Tribunal finally concluded that the Adjudicating Authority committed a grave error in dismissing the CP(IB) No. 268/NCLT/2009/AHM/2020 filed by Financial Creditor under Section 7 of IBC, set aside the order while allowing the appeal and issued direction to the Adjudicating Authority to pass consequential order including order of moratorium within one month from the date of receipt of copy of the order.

8. Aggrieved by the order passed by this Appellate Tribunal, the Appellant in Company Appeal (AT) (Insolvency) No. 699 of 2022 herein preferred an appeal before the Hon'ble Apex Court in Civil Appeal No. 7715 of 2021. The Hon'ble Apex Court was pleased to dismiss the appeal by an order dated 05.05.2022, confirmed the order passed by this Appellant Tribunal in Company Appeal(AT)(Insolvency) No. 183 of 2021.

9. After confirmation of the order passed by this Tribunal by the Hon'ble Apex Court, the Adjudicating Authority passed the impugned order as directed by this Tribunal.

10. Arrow Engineering Pvt. Ltd., a Financial Creditor filed an I.A No. 830/NCLT/AHM/2021 in CP(IB) No. 268/NCLT/09/AHM/2020, claiming the following reliefs:

i) Allow the present application;

ii) Commence CIRP of the Corporate Debtor in terms of the order dated 02.12.2021 of Hon'ble NCLAT in Company Appeal(IB)(Insolvency) No. 183 of 2021 and pass consequential order;

iii) Pass any further order or direction as it may deem fit by this Hon'ble Tribunal.

11. The Application filed by the Financial Creditor was allowed and passed following order:

"12. We direct the Financial Creditor to deposit a sum of Rs.2.00 lacs (Rupees Two Lacs only) with the Interim Resolution Professional, namely Mr. Mr. Vichitra Narayan Pathak to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Financial Creditor.

13. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the Corporate Debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

14. A copy of the order shall be communicated to the Applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the RoC for updating the Master Data. RoC shall send compliance report to the Registrar, NCLT.

15. We further clarify that since the Hon'ble NCLAT had directed to pass order within one month from the date when order is produced before NCLT, which was to be utilized by the parties to endeavour to settle the matter, the said one month shall be considered from the date of the receipt by NCLT of the order of the Hon'ble Supreme Court dated 05.05.2022. The said order of Hon'ble Supreme Court was first submitted by the applicant alongwith IA 426 of 2022

filed on 09.05.2022. It is directed that if parties settle the matter, they are at liberty to file appropriate proceedings.

16. Application is admitted in terms of above order and disposed of."

12. As seen from the operative portion of the order extracted above, passed by the Adjudicating Authority, it is evident that CIRP is commenced by the Adjudicating Authority, appointed Mr. Vichitra Narayan Pathak as Interim Resolution Professional (in short '**IRP**') to complete CIRP.

13. Aggrieved by the aforesaid order, Mr. Vikas Dahia, the Ex-Director of Golden Tobacco Ltd. Corporate Debtor and Oval Investment Pvt. Ltd. claiming to be shareholder, filed these appeals, respectively.

14. The Appellants in both the appeals contended that the order of the Adjudicating Authority is silent as to the pleas raised by these Appellants regarding relationship of the Financial Creditor and Corporate Debtor, limitation and acknowledgement of any debt etc. In absence any specific findings on the issues raised by the Appellant in Company Appeal (AT)(Insolvency) No 699 of 2022, the order passed by the Adjudicating Authority is *ex facie* erroneous. It is also further contended that a Civil Appeal was preferred before the Hon'ble Apex Court, only, challenging the order of remand and not against the findings recorded by this Tribunal in Company Appeal

(AT)(Insolvency) No. 183 of 2021. Therefore, the question of application of principle of resjudicata does not arise.

15. Specific contention of the Appellants in both the appeals are that there was no operational or financial debt and the claim of the Financial Creditor does not attract either Section 5(7) or 5(8) of IBC and has drawn attention of this Court to the judgment of this Tribunal passed in Company Appeal (AT)(Ins) No. 550 of 2020 in the matter of ***Vipul Ltd. Vs. Solitaire Buildmart Pvt. Ltd***. to contend that to maintain an application under Section 7 of IBC, there must be a financial debt as defined under Section 5(8) and also relied on another judgment passed in Company Appeal (AT)(Ins) No. 780 of 2020 in the matter of ***Mukesh N. Desai Vs. Piyush Patel***. The Appellants also contended that there was no acknowledgment of debt and statement of accounts, particularly balance sheet of the Corporate Debtor mentioning debt of the Financial Creditor does not amount to acknowledgment of debt. But these aspects were not considered in detail by Adjudicating Authority and simply passed an order admitting Section 7 of IBC application, appointing Mr. Vichitra Narayan Pathak as IRP to complete CIRP. Therefore, the admission of Application and Interlocutory Application of Financial Creditor is illegal and requested to set aside the same.

16. During hearing, learned Counsel for the Appellant in appeal No. 699, Mr. Abhijeet Sinha vehemently contended that in the

absence of any finding recorded by the Adjudicating Authority as to the subsisting legally enforceable financial debt and its acknowledgment by the Appellants herein, the order is illegal. Apart from that, the Adjudicating Authority did not consider the question of limitation. Therefore, the order of the Adjudicating Authority is *ex facie* erroneous and requested to set aside the common order passed by the Adjudicating Authority.

17. The Appellant Oval Investment Pvt. Ltd. in appeal no. 812 contended that the Appellant is a shareholder of the Corporate Debtor Company and merely because there is no appeal against the findings of the Appellate Tribunal, the Appellant is not debarred from challenging the legality of the order as it would seriously affect the rights of the shareholder in the Corporate Debtor, Company. As the Appellant was not a party to the earlier proceedings i.e. 1st round of litigation before this Tribunal and before the Hon'ble Apex Court, the Appellant is entitled to assail the findings recorded by the Adjudicating Authority by filing an appeal under Section 61 of IBC in collateral or incidental proceedings. The Judgment in Application for initiation of insolvency resolution process is a Judgment-in-rem and the 3rd Party whose interest is affected may file appeal at any time.

18. During the hearing, Mr. Dhruba Mukherjee, learned Sr. Counsel for the Appellant in Company Appeal (AT)(Insolvency) No. 812 of 2022 vehemently contended that the Appellant a shareholder

in Oval Investment Pvt. Ltd. was not a party to the earlier proceedings and the Corporate Debtor is acting adverse to the interest of the Appellant. The Appellant can assail the order, mere failure to challenge the earlier orders is not a ground to dismiss the appeal and requested to allow the appeal. Placed reliance on the judgment of the Hon'ble Apex Court in ***Booz-Allen & Hamilton Inc Vs. SBI Home Finance Ltd. &Ors***.[1] and ***Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd***.[2],***Vidarbha Industries Power Limited Vs. Axis Bank Limited***[3] In view of the Principle laid down in the Judgments of Apex Court, the Appellant cannot be non-suited on the ground that no appeal was preferred against the order passed by this Appellate Tribunal in Appeal(AT)(Insolvency) No. 183/2021, which was affirmed by Hon'ble Apex Court in Civil Appeal No. 7715 of 2021.

19. Mr. Vikas Mehta, learned Counsel for Arrow Engineering Ltd. Financial Creditor in Company Appeal (AT)(Insolvency) Nos. 699 and 812 of 2022 contended that when the Appellate Tribunal recorded its findings, considering all contentions raised in the appeal were answered and the order attained finality in view of the judgment of the Hon'ble Apex Court in Civil Appeal No. 7715 of 2021, thereby the Appellants are debarred from raising similar contention which attained finality, in support of his contentions, he placed reliance in

[1]2011 (5) SCC 532
[2]2018 (2) SCC 678
[3]Civil Appeal No. 004633 of 2021

EdukantiKistamma (Dead) Through L.Rs Vs. Venkatareddy(Dead) Through L.R.s[4] on the strength of principle laid down in the above judgment, requested this Tribunal to dismiss the appeals in limine.

20. During hearing, this Tribunal also raised a query as to the maintainability of the appeal on the same grounds which were raised in the earlier round of litigation, in Company Appeal (AT) (Ins.) No. 183 of 2022 dated 02.12.2021, decided in favour of the Respondent and affirmed by the Hon'ble Apex Court in Civil Appeal No. 7715 of 2021. But the learned Sr. Counsel Mr. Dhruba Mukherjee contended that when the Appellant, Oval Investment Pvt. Ltd. was not a party, the Appellant is entitled to file an appeal challenging the findings, though no appeal was preferred.

21. Mr. Abhijeet Sinha, learned Counsel in Appeal No. 699/2022 and Shri Vikas Mehta learned Counsel in both the appeals filed their respective brief Written Submissions whereas instructing counsel of Mr. Dhruba Mukherjee, learned Sr. Counsel did not submit any Written Submission on behalf of the Appellant in Appeal No. 812/2022. The Appellants and Respondents reiterated their contentions raised during the argument, the respondent annexed a copy of the judgment in ***Edukanti Kistamma (Dead)Through L.Rs Vs. Venkatareddy (Dead) Through L.R.s***

[4]2010(1) SCC 756

22. Considering the rival contentions, perusing the materials available, points need to be answered by this Appellate Tribunal are as follows:

i) ***Whether the Appellants in both the appeals are competent to challenge the order passed by the Adjudicating Authority in IA No. 830/NCLT/AHM/2021 in CP(IB) No. 268/NCLT/AHM/09/2020 and Company Appeal (AT)(Insolvency) No. 699 of 2022 and Company Appeal (AT)(Insolvency) No. 812 of 2022 when the findings recorded by this Appellate Tribunal in Company Appeal(AT)(Insolvency) No. 183 of 2021 attained finality in view of the judgment passed in Civil Appeal No. 7715 of 2021 by the Hon'ble Apex Court?***

ii) ***Whether the order passed by the Adjudicating Authority suffers from any illegality or irregularity warranting interference of this Appellate Tribunal while exercising power under Section 61 of IBC. If so, whether the common order passed by the Adjudicating Authority in IA No. 830/NCLT/AHM/2021 in CP(IB) No. 268/NCLT/AHM/ 09/2020 is liable to be set aside?***

Point 1 and 2: As both the points are interconnected, we find it expedient to decide both points by common discussion.

It is an undisputed fact that the Financial Creditor filed CP(IB) No. 268/NCLT/AHM/09/AHM/2020 which was dismissed by the Adjudicating Authority by an order dated 07.06.2022.

23. Aggrieved by the order passed by the Adjudicating Authority, the Financial Creditor preferred an appeal before this Appellate Tribunal bearing Company Appeal (AT)(Ins) No. 183 of 2021 which was allowed by this Tribunal by judgment dated 02.12.2021. At this stage it is relevant to advert to certain findings recorded in Company Appeal (AT)(Insolvency) No. 183/2021. In the Written Submission filed in appeal No. 699/2022 and during oral argument, Shri Abhijeet

Sinha, learned Counsel contended that application under Section 7 of IBC is not maintainable as the debt cannot be construed as Financial Debt as defined under Section 5(8) of IBC. The basis for this contention is that the MOU was signed by the Corporate Debtor and the 1st Respondent which clearly states that there was an arrangement between the Corporate Debtor and 1st Respondent to carry on joint venture and development of project, while the Corporate Debtor agreed to provide land to Respondent No. 1 who was to provide financial assistance for the development of project. There was no relationship between the Corporate Debtor and Financial Creditor and in the absence of proof that the debt due was a financial debt, as defined in Section 5(8) of IBC, the application is not maintainable.

24. In fact, the Appellant in the earlier round, contested the Company Petition before the Adjudicating Authority and the Adjudicating Authority, after considering entire material, dismissed the Company Petition filed by the Financial Creditor. The same was assailed in Company Appeal (AT)(Ins) No. 183 of 202, where this Tribunal reversed the order passed by the Adjudicating Authority and allowed the appeal, while directing the Adjudicating Authority to initiate CIRP appointing IRP and impose moratorium.

25. The order of this Tribunal attained finality in view of the judgment delivered in Civil Appeal No. 7715 of 2021 dated 05.05.2022 by the Hon'ble Apex Court.

26. This Tribunal framed three points which we referred in earlier paragraph 4 (i)(ii)(iii), for consideration and this Tribunal adverted to the contentions, noted in paragraphs 4, 5 of the order, so also in paragraph-7.This Appellate Tribunal recorded its findings as to the acknowledgment of debt in paragraphs 19,20, 21 etc. and concluded that the debt due to the Financial Creditor – Respondent herein is the financial debt within the meaning of Section 5(8) of IBC and the claim of the Financial Creditor is within limitation and that the default is within the period of limitation. These findings were assailed by an appeal before the Hon'ble Apex Court and the Hon'ble Apex Court affirmed the judgment of this Tribunal.

27. The Appellants during hearing contended that though the findings recorded by this Appellate Tribunal attained finality, as the Appellants only questioned the remand order passed by this Tribunal in the appeal in the first round of litigation. Therefore, the principle of resjudicata has no application to the present case and placed reliance on the judgment of the Hon'ble Court in **Canara Bank v. N.G. Subbaraya Setty**[5] consequently the claim of the Appellants is not hit by the principle of resjudicata and entitled to raise objection on different aspects regarding maintainability of Company Application.

[5](2018) 16 SCC 228

28. Undoubtedly, the principle of resjudicata is a principle enunciated under Section 11 of CPC and therefore, the Rules of CPC has no application to this Tribunal in view of Section 238 of IBC but still the Appellants are not entitled to raise such pleas which were already decided by this Tribunal, as it amounts to abuse of process of law.

29. The Hon'ble Apex Court in the matter of **Canara Bank v. N.G. Subbaraya Setty,** referred above supra adverted to the doctrine of resjudicata as in Halsbury law which is as follows:

> *"the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation [Halsbury's Laws of England, 3rd Ed., Vol. 15, para. 357, p. 185]". Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (p. 187, paragraph 362). "Res judicata", it is observed in Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — interest republicaeut sit finis litium; the other, the hardship*

> *on the individual that he should be vexed twice for the same cause — nemo debetbisvexari pro eadem causa" [Corpus Juris, Vol. 34, p. 743]. In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel. "Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law" [Ibid p. 745]. Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted."*

After adverting the laid down in various decisions the Apex Court concluded that the erroneous judgment will not operate as Resjudicata. The judgment of this Tribunal cannot be held to be erroneous as the judgment was affirmed by Apex Court. If for any reason the judgment of this Tribunal is held to be erroneous it would amount to reviewing not only the judgment of this Tribunal but also the judgment of the Apex Court in Civil Appeal No. 7715 of 2021. This Tribunal is incompetent to exercise a jurisdiction to review its own judgment or judgement of Apex Court. Hence we are unable to accede to the request of the counsel for the Appellant Sh. Abhijeet Sinha.

The Hon'ble Apex Court also note the principle laid down in ***Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.*** [2013] 4 All ER 715 (at 730-731) where the Court has observed as follows:

"The principle in Henderson v Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the Yat Tung case [1975] AC 581. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, Johnson v Gore-Wood & Co [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiffs claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in Vervaeke (formerly Messina) v Smith [1983] 1 AC 145, 157 that the principle in Henderson v Henderson was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p. 31 as follows: "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public

interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole"

and finally the Hon'ble Apex Court concluded as follows:

"Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the Court takes place. However, there are certain notable exceptions to the application of the doctrine. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. This case is concerned with the application of the last mentioned exception to the rule of res judicata. The brief facts necessary to appreciate the applicability of the said exception to the doctrine of res judicata are as follows. In the present case, respondent No.1 availed a credit facility from the petitioner bank sometime in 2001. Respondent

> *No.2, his son, stood as a guarantor for repayment of the said facility. As respondent No.1 defaulted in repayment of a sum of Rs.53,49,970.22, the petitioner bank filed O.A. No. 440 of 2002 before the DRT Bangalore, against respondent Nos.1 and 2. Respondent No.1, in order to repay the dues of the bank, signed an assignment deed dated 8.10.2003 with the Chief Manager, Basavanagudi Branch, Bangalore for assignment of the trademark "EENADU" in respect of agarbathies (incense sticks) on certain terms and conditions. Clauses 1 to 7 of the aforesaid assignment are set out hereunder:*

30. The Hon'ble Apex Court, recently held that doctrine of resjudicata is applicable to proceedings under IBC also in ***Ebix Singapore Pte Ltd. vs Committee Of Creditors Of Educomp***[6]held that the doctrine of resjudicata is applicable to the proceeding of IBC. In paragrapgh-63, the Apex Court dealt with the doctrine of resjudicata adverting to the judgment in the ***in Satyadhyan Ghosal v. Deorajin Debi*** (1960) 3 SCR 590, the Apex Court held:

> *"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a resjudicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because*

[6]Civil Appeal No. 3224 of 2020

no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

From the above extract, it is clear that while res judicata may have been codified in Section 11, that does not bar its application to other judicial proceedings, such as the one in the present case.

31. In view of the principle laid down in the above judgment strictly doctrine of resjudicata is applicable even to the proceedings under IBC and challenge to the findings in incidental or collateral proceedings amounts to an abuse of process of Court. In any view of the matter, when the Appellant raised a specific ground before the Adjudicating Authority and before this Tribunal in the first round of litigation as narrated above, against the order passed by this Tribunal in judgment passed in Company Appeal (AT)(Ins) No. 183 of 2021,affirmed by the Hon'ble Apex Court in Civil Appeal No. 7715 of 2021 dated 05.05.2022, again raising such grounds in the second

round of litigation in incidental proceedings is nothing but an abuse of process of Court.

32. Though the learned Counsel for the Appellant Sh. Abhijeet Sinha contended that the Appellant only challenged the order of remand to the Adjudicating Authority passed by this Tribunal in Company Appeal (AT)(Ins) No. 183 of 2021, only the findings with regard to the remand to Adjudicating Authority attained finality in Civil Appeal No. 7715 of 2021 passed on 05.05.2022 and not on other grounds. Assuming for a moment that Civil Appeal No. 7715 of 2021 was preferred challenging the finding of this Tribunal with regard to remand of the matter to the Adjudicating Authority, still the findings recorded by this Tribunal on various other contentions raised by the Appellants became final. In fact, the Appellants did not place on record the grounds of appeal in Civil Appeal No. 7715 of 2021, which was decided on 05.05.2022 and in absence of the appeal grounds, this Tribunal has no other alternative except to reject the contention that the Appellant only challenged the remand order. Viewed from any angle, the order became final in the Appeal i.e., Company Appeal (AT)(Ins) No. 183 of 2021 by this Tribunal and affirmation of the same by judgment dated 05.05.2022 passed in Civil Appeal No. 7715 of 2021, the Appellants are precluded from raising the same contention in the present Appeal.

33. Mr. Dhruba Mukherjee, learned Sr. Counsel though contended that the Appellant being shareholder of Corporate Debtor and not a party to the earlier proceedings, is entitled to assail the findings recorded by the Adjudicating Authority. He relied upon the Judgment in the matter of ***Booz-Allen & Hamilton Inc., Vs. SBI Home Finance Ltd. &Ors***., referred supra. The Hon'ble Supreme Court while deciding arbitrability of dispute, distinguished the right in rem and in personam, when the finding recorded by this Tribunal is right in rem, the same can be questioned by the Appellant being shareholder. The Hon'ble Apex Court in the above judgment held as under:

.....

> *"It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself."*

34. Since the adjudication by this Tribunal is in effect right in rem, the Appellant, being shareholder, filed this appeal. The law declared

by Hon'ble Apex Court is not in dispute, but the Appellant herein is claiming interest through Corporate Debtor. When the Corporate Debtor challenged the same applying doctrine of resjudicata, in view of law declared by Apex Court in ***Ebix Singapore Pvt. Ltd.*** and the judgment has attained finality, the Appellant who is claiming interest through Corporate Debtor is debarred from re-agitating the same applying doctrine of resjudicata, in view of law decided by Apex Court in ***Ebix Singapore Pvt. Ltd***. Learned Sr. Counsel Mr. Dhruba Mukherjee contended that though the Appeal was allowed, still the Appellant who was not a party to earlier proceeding, he can challenge the same relying on ***Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd***. wherein the Hon'ble Supreme Court held as follows:

> *"Because in* ***Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd****. [(2018) 2 SCC 674], the Hon'ble Supreme Court in an Insolvency and Bankruptcy matter, while dealing with the issue of merger of judicial pronouncements, held that such order was not 'law declared' in terms of Article 141, and hence, was of no precedential value, as extracted hereunder:*
>
> *"28. The decision in Smart Timing (supra) by the NCLAT, which was relied upon by the impugned judgment, was then pressed into service by Dr Singhvi stating that an appeal from this judgment has been dismissed by this Court and that, therefore, following the principle in Kunhayammed v. State of Kerala (2000) 6 SCC 359, the NCLAT's judgment has merged with the Supreme*

Court's order dated August 18, 2017, which reads as follows:

"Heard the learned counsel appearing for the appellant. We do not find any reason to interfere with the order dated 19.05.2017 passed by the National Company Law Appellate Tribunal, New Delhi. In view of this, we find no merit in the appeal.

Accordingly, the appeal is dismissed."

Whether or not there is a merger, it is clear that the order dated August 18, 2017 is not "law declared" within the meaning of Article 141 of the Constitution and is of no precedential value. Suffice it to state that the said order was also a threshold dismissal by the Supreme Court, having heard only the learned counsel appearing for the appellant"

Shareholder claiming right through Corporate Debtor, the Judgment against Corporate Debtor is binding on its shareholders. As law laid down by Hon'ble Apex Court in the above Judgment is not in quarrel, but the facts of this case are distinguishable from the facts of the above judgment. In instant case, the judgment of this Tribunal is merged with the order of Adjudicating Authority in CP (IB) No. 268/NCLT/AHM/2020, though Civil Appeal No. 7715 of 2021 was dismissed at the stage of admission. Thus, the findings recorded by this Tribunal attained finality. Those findings cannot be challenged in incidental or collateral proceedings. The claim of appellants is hit by doctrine of resjudicata and abuse of process of law, as this Tribunal

exercising powers conferred by Section 61 of IBC, while, deciding Company Appeal (AT)(Ins) No. 183 of 2021 adverted to all the contentions of both the parties and recorded specific findings. Even assuming for a moment that those findings were not challenged by the Appellants, still the judgment became final. Therefore, the Appellants either in Appeal No. 699 or in Appeal No. 812 of 2022 are disentitled to re-agitate the findings recorded by this Tribunal and affirmed by the Hon'ble Supreme Court, in the incidental proceedings. This Tribunal cannot sit in appeal over its own order, cannot review its own order.

35. Mr. Vikas Mehta, learned Counsel for Respondents in Appeal Nos. 699 and 812 of 2022 submits that when the judgment of this Tribunal has become final, the Appellants are dis-entitled to agitate the same, placed reliance on the Apex Court Judgment in ***Edukanti Kistamma (Dead) Through LRs Vs. Venkatareddy (Dead) Through LRs*** referred supra

…

> *"34. This judgment and order of the High Court also attained finality as it was not challenged by the respondents any further. Thus, in our view, the question of reconsideration of the validity of the tenancy certificate under Section 38-E(2) so far as Appellants 1 and 3 are concerned, could not arise in any subsequent proceedings whatsoever. More so, the entitlement of the said Appellants 1 and 3 to claim restoration of possession also cannot be reopened/questioned., as their entitlement to that effect had attained finality as the judgment and order of the High Court dated 28-4-2000, wherein their right to claim restoration of*

possession had been upheld, was not challenged by the respondents any further.

..

38. In view of the above factual matrix, we are of the considered opinion that it was not permissible for the High Court to reopen the issue either of grant or issuance of tenancy certificate under Section 38-E(2) or deal with the issue of restoration of possession so far as Appellants 1 and 3 are concerned. At the most, the High Court could proceed in the case of Appellant 2.

39. Admittedly, Smt. Ayesha Begum, the original landholder, had 127 acres of land. The claim of the appellants was valid and maintainable in view of the provisions of Section 37-A of the 1950 Act. The High Court was not justified in observing that as the issue of restoration of possession remained pending before the authority for about nineteen years, the respondents were justified in getting adjudication of their rights regarding issuance of certificate as it had not reached the finality. Mere pendency of proceedings before the court/tribunal cannot defeat the rights of a party, which had already been determined. The High Court ought to have appreciated that proceedings were only in respect of execution of the orders which had already been passed. Thus, proceedings were for the consequential relief. The issue of restoration of possession is to be decided under Section 32 of the 1950 Act. Question of application of the provision of Section 35ought to have been raised in the first round of litigation. Such an issue is required to be agitated at the very initial stage of the proceedings and not in execution proceedings. The said issue in respect of Appellants 1 and 3 had already attained finality. More so, if in the tenancy registers of the relevant years, the High Court could not have opened the issues of factual controversies at all.

36. In addition to the above judgment of Hon'ble Supreme Court, in the recent judgment in Civil Appeal No. 4840 of 2021 dated

17.08.2021 in the matter of ***Neelama Srivastava Vs. State of UP and Ors.***[7] held that when the judgment attained finality, it cannot be re-agitated in any collateral or incidental proceeding. In ***Rudra Kumar Sain and Ors. Vs. Union of India and Ors.***[8]while dealing with identical issue, the Hon'ble Supreme Court held that reconsideration of the judgment of the Court which has attained finality is not normally permissible. The decision upon the question of law rendered by this Court was conclusive and would bind the Court in subsequent cases. The Court cannot sit in appeal against its own judgment.

37. In the matter of ***Union of India Vs. Maj. S.P. Sharma***[9], the Hon'ble Apex Court held a decision rendered by the Competent Court cannot be challenged in a collateral proceeding for the reason that it is not permissible to do so as and when chooses and the finality of the proceeding would seize to have any meaning.

38. Applying the principle laid in the above judgment to the present facts, to give quietus to the dispute and to avoid abuse of the process of Court to challenge the judgment which attained finality in a collateral or incidental proceeding, the appellants must be non-suited.

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[7]Civil Appeal No. 4840 of 2021
[8](2000) 8 SCC 25
[9]Civil Appeal No. 2951-2957 of 2001

39. In view of the principle laid down in the above judgements, the principle of resjudicata, though a part of CPC, it would be applicable to the proceeding of this Tribunal and IBC. Only to prevent the abuse of process of law and give a finality to any proceeding, or orders, and to avoid an endless litigation to frustrate the very object of enacting IBC, the claim of appellants is liable to be rejected.

40. Indeed, a judgment obtained by playing fraud on the Tribunal or judgment or order passed without inherent jurisdiction is nonest in the eye of law and the same can be challenged in a collateral or incidental proceeding, but it was not the case of the Appellants in these appeals. Hence in any collateral or incidental proceeding, the judgment cannot be agitated which attained finality. If such course is permitted it would amount to exercise of power of review of its own judgment or sitting over the judgment in appeal against its own order or judgment which is impermissible under law.

41. Learned Counsel for the Appellant Sh. Abhijeet Sinha contended that the Respondent is entitled to raise objections referred supra, such contention is liable to be rejected as it lacks no merit in view of the principle laid down by the Hon'ble Apex Court. Similarly, the contentions of learned Counsel Sh. Dhruba Mukherjee are also liable to be rejected applying the same principle. Accordingly, the contentions of the Counsel are hereby rejected while holding that the Appellants are disentitled to re-agitate the findings recorded by this Tribunal, both on facts and in law, attained finality in view of the

judgment of the Hon'ble Apex Court in Civil Appeal No. 7715 of 2021 dated 05.05.2022.

42. In view of our aforesaid discussion, we find no illegality in the order passed by the Adjudicating Authority in IA No. 830/NCLT/AHM/2021 in CP(IB)No.68/NCLT/AHM/09/AHM/2020, dated 7th June, 2022, since, the Adjudicating Authority complied with the direction issued by this Tribunal in Company Appeal (AT)(Ins) No. 183 of 2021 dated 02.12.2021, passed consequential order. Accordingly, we find no merit in the contention of the Appellants and we find no ground to warrant interference by this Tribunal, while exercising power under Section 61 of IBC. Accordingly, the points are held in favour of the Respondents-Financial Creditors and against the Appellants in both the appeals.

43. In view of finding recorded on both the points, we find the appeals are devoid of merits and deserves to be dismissed.

44. In the result, Company Appeal (AT)(Insolvency) No. 699 of 2022 and Company Appeal (AT)(Insolvency) No. 812 of 2022 are dismissed. No costs.

(Justice Ashok Bhushan)
Chairperson

(Justice M. Satyanarayana Murthy)
Member(Judicial)

(Barun Mitra)
Member(Technical)

Akc