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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 305/2020

**ALWAYS REMEMBER PROPERTIES PRIVATE LIMITED**

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv.  
with Mr. Darpan Wadhwa, Mr.  
Gaurav Mishra, Mr. Daman  
Popli, Ms. Ria Chanda and Ms.  
Neetu Devrani, Advs.

versus

**RELIANCE HOME FINANCE LIMITED & ANR.**

..... Respondents

Through: Mr. Pranjit Bhattacharya and  
Mr. Rishi Agrawala, Advs. for  
R-1.

**CORAM:**

**HON'BLE MR. JUSTICE YASHWANT VARMA**

**ORDER**

**07.12.2022**

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**I.A. 12978/2022(Recall Of O.D. 25-07-2022)**

1. This application seeks recall of the order of 25 July 2022.
2. The record would reflect that although the matter was placed before a learned Judge who had passed the order, orders were, thereafter, passed for the matter being placed before the competent Roster Bench.
3. Mr. Sethi, learned Senior Counsel appearing in support of the present application, draws the attention of the Court of the reasoning assigned in that order with the learned Judge proceeding on the premise that since Corporate Insolvency Resolution Process ["CIRP"] proceedings had commenced in light of the judgment of the Supreme Court in **Alchemist Asset Reconstruction Company Ltd. vs. Hotel Gaudavan (P) Ltd.**, [(2018) 16 SCC 94], the moratorium

would take into effect and consequently all proceedings against the corporate debtor would stand interdicted. Upon coming to the aforesaid conclusion, the learned Judge proceeded to record thus:-

“4. The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against corporate debtors.”

4. Before this Court, it is not disputed that reference of disputes to arbitration were sought with respect to respondent No.1. Undisputedly and it is admitted before the Court today that no proceedings under the Insolvency and Bankruptcy Code, 2016 had been instituted against that respondent.

5. In that view of the matter, it is manifest that the order suffers from a patent and manifest error apparent on the face of the record.

6. Learned counsel appearing for the respondents, however, would contend that, notwithstanding the above, bearing in mind the fact that the Court was exercising powers under Section 11 of the Arbitration and Conciliation Act, 1996 [**“the Act”**], it would not be entitled to undertake what is and would be entitled to construe as a substantive review. He seeks to draw sustenance from a decision rendered by three learned Judges of the Bombay High Court in **Antikeros Shipping vs. Adani Enterprises Ltd.**, [2020 SCC OnLine Bom 277] where while dealing with a review petition which had come to be allowed by a learned Single Judge, the Full Bench of the Bombay High Court entered the following observations:-

“31. The impugned judgment has a reasoning which is rolled over with respect to the issue of 2680 days delay to be condoned. The learned Single Judge has held that by acquiescence and/or by consent jurisdiction cannot be conferred on a Court or an authority having no jurisdiction to take cognizance of a matter and because the learned Single Judge was exercising procedural review jurisdiction to correct a wrong by a Court of record, the issue of delay was irrelevant. Therefore, the learned Single Judge has not dealt with the sufficiency of the cause shown in the pleadings in the Notice of Motion (L) No. 2015 of 2018.

32. For the reasons above, holding that it was not a case of procedural review and much less by a Court of record inasmuch as the order review whereof was prayed for was passed by the delegate of the Chief Justice of this Court, we hold that in formally condoning the delay on the reasoning given, the impugned order is vitiated when it proceeds to condone the delay by not considering whether sufficient cause was shown to condone the delay of 2680 days in seeking review of the order dated 21st April, 2011.

33. Whilst it may be true that an order passed in a lis or an issue which cannot be taken cognizance of by a Court or an authority is void and non-est, but that does not mean that a party can sleep over its rights and participate in further proceedings and one fine day approach the Court or the authority to rectify the error. In cases where a party was unaware of an order passed against it or was not aware of a fact which if brought to the notice of the Court or the authority would have resulted in the Court or the authority having no jurisdiction, in said situations alone the issue of delay and laches would become immaterial for the reason the party concerned would have approached the Court or the authorities at the first available opportunity to it to question the order which lacked jurisdiction.

34. In the instant case the respondent knew about the order dated 21st April, 2011 when the Arbitral Tribunal gave notice to it and the appellant filed its Statement of Claim on 5th July, 2012. On 15th October, 2012 the respondent filed an application before the Arbitral Tribunal seeking disclosure of documents by the appellant followed by filing its Statement of Defence and raising a Counter-Claim on 23rd October, 2012. On 1st February, 2013 the respondent challenged the jurisdiction of the Tribunal on the plea that the appellant being a company incorporated outside India the order under section 11 of the Act was a nullity because it was a case of an International Commercial Arbitration. On 3rd July, 2013 the Arbitral Tribunal rejected the challenge to its jurisdiction and the respondent kept quiet. It participated in the arbitration proceedings till when after evidence was led by both parties and counsel for the appellant concluded submissions and the counsel for the respondent opened arguments in reply and after seeking adjournments from the Tribunal filed the review petition on 30th August, 2018. It needs no rocket science for anyone to infer that probably the respondent got a premonition that it might lose. The members of the Arbitral Tribunal charged and were paid daily hearing fee. The counsel engaged by the appellant were also paid their fee. The respondent knew of the expenditure being incurred by the appellant. We therefore hold that the respondent failed to show sufficient cause entitling it to 2680 days delay in seeking review of the order dated 21st April, 2011 to be condoned.”

7. Mr. Sethi, on the other hand, would contend that undisputedly the power which the High Court exercises as a nominee of the Chief

Justice under Section 11 of the Act is no longer liable to be construed or viewed as merely an administrative power.

8. According to Mr. Sethi, the power that is so exercised by the Court is and continues to be judicial in character. He draws the attention of the Court to the following pertinent observations as were made by the Supreme Court in **M. M. Thomas vs. State of Kerala and Another**, [(2000) 1 SCC 666] relating to the powers which may otherwise be exercised by the Court of Record:-

“14. The High Court as a court of record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In *Naresh Shridhar Mirajkar v. State of Maharashtra* [AIR 1967 SC 1 : (1966) 3 SCR 744] a nine-Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a court of plenary jurisdiction being a court of record.

15. In *Halsbury's Laws of England* (4th Edn., Vol. 10, para 713) it is stated thus:

“The chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of actions, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular action.”

(Though the above reference is to English courts the principle would squarely apply to the superior courts in India also.)”

9. Having considered the rival submissions, the Court notes that

presently as the law stands duly enunciated by the Supreme Court in **United India Insurance Company Limited vs. Antique Art Exports private Ltd.**, [(2019) 5 SCC 362], it would be incorrect for the Court to hold that the power exercised under Section 11 of the Act is a mere administrative function. As has been categorically held the power is judicial. It would also be incorrect to hold or to sustain the submission that while exercising the power conferred by Section 11 of the Act, the Court ceases to be a Court of Record as is understood. The Court also notes that the review or reopening of proceedings which is sought is not with respect to any power exercised by the Court under Section 11 on merits. The review is sought on account of the evident factual mistake in that order.

10. Bearing in mind the undisputed fact that the order suffers from an evident factual error based on the incorrect statement made by counsel, the order of 25 July 2022 shall stand recalled.

11. Let the petition be now placed for consideration on 06.02.2023.

**YASHWANT VARMA, J.**

**DECEMBER 7, 2022**

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