NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Reference made by Three Member Bench in
I.A. No. 3961 of 2022 in
Company Appeal (AT) (Ins.) No. 729 of 2020

IN THE MATTER OF:

Union Bank of India (Erstwhile Corporation Bank) ...Appellant

Versus

Dinkar T. Venkatasubramanian & Ors. ...Respondents

Present:

For Applicant: **Mr. N. Venkataraman, ASG with Mr. Sanjay Kapoor, Ms. Megha Karnwal, Mr. Surya Prakash, Mr. Arjun Bhatia, Mr. Devesh Dubey, Mr. V. Chandrashekhar Bharathi, Ms. Amrita Chandramouli, Ms. Shruthi Shivkumar, Mr. Rahul Vijay Kumar, Advocates for Applicant in I.A. No. 3961 of 2022.**

For Respondents: **Mr. R. Venkata Ramani, AG, Mr. Alok Kumar, Mr. Abhinav Shukla, Mr. Kunal Arora, Mr. Raman Yadav, Mr. Abhishek Pandey, Advocates for R-1/UBI.**

Mr. Sumant Batra, Mr. Sanjay Bhatt, Ms. Ruchi Goyal, Advocates for R-2 (RP).

O R D E R

ASHOK BHUSHAN, J.

This Bench has been constituted to consider three questions referred by the three-member bench vide its order dated 09.02.2023, which are to the following effect:

Cont'd.../

"I. Whether this Tribunal not being vested with any power to review the judgment can entertain an application for recall of judgment on sufficient grounds?

II. Whether judgment of this Tribunal in "I.A. No. 265 of 2020 in Company Appeal (AT) (Ins.) No. 412 of 2019, Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr." and "I.A. No. 3303/2022 in Company Appeal (AT) (Ins.) No. 359 of 2020, Rajendra Mulchand Varma & Ors Vs K.L.J Resources Ltd & Anr." can be read to mean that there is no power vested in this Tribunal to recall a judgment?

III. (In the above two judgments this Tribunal has held that this Tribunal cannot recall its judgment in exercise of its inherent jurisdiction) Whether 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." lays down the correct law?"

2. Background facts leading to filing of I.A. No. 3961 of 2022 need to be noticed for answering the questions referred to this Bench.

i. In Corporate Insolvency Resolution Process initiated by an application filed by Union Bank of India under Section 7 against the Corporate Debtor – Amtek Auto Ltd., Resolution Plan submitted by Respondent No.2 and 3 was approved by the

Committee of Creditors by majority voting share of 70.07% on 11.01.2020.

ii. The Resolution Professional filed an application I.A. No. 255/2020 for approval of the Resolution Plan. I.A. No. 222/2020 was also filed by the Union Bank of India praying for certain reliefs.

iii. The Adjudicating Authority by order dated 09.07.2020 allowed the I.A. filed by the Resolution Professional and approved the Resolution Plan and by the same order rejected I.A. No. 222/2020 filed by the Union Bank of India.

iv. Union Bank of India filed Company Appeal (AT) (Ins.) No. 729 of 2020 assailing the order dated 09.07.2020. In the Company Appeal (AT) (Ins.) No. 729 of 2020, Union Bank of India did not implead the Committee of Creditors as one of the parties. Company Appeal (AT) (Ins.) No. 729 of 2020 was partly allowed by judgment dated 27.01.2022 of this Tribunal.

v. The Financial Creditors of the Corporate Debtor filed Civil Appeal by Diary No. 5609 of 2022 in the Hon'ble Supreme Court challenging the judgment dated 27.01.2022, which Appeal was dismissed as withdrawn with liberty to file a Review Application, as was prayed by order dated 01.04.2022.

vi. After the order of the Hon'ble Supreme Court dated 01.04.2022, Review Application being Review Application No. 01 of 2022 was filed which was dismissed by this Tribunal on 02.09.2022. While dismissing the Review Application following order was made in Para 10:

> *"10. We are one with the argument raised by Counsel for the Respondent in this regard and thus, it is hereby held that no review application is maintainable before this Tribunal as there is no provision for review in the Code. However, the Appellant, if so advised, may take recourse to its other remedy in accordance with law in case it is still aggrieved against the order dated 27.01.2022 or a part of it."*

vii. The Applicant on the strength of liberty granted in the order dated 02.09.2022 to take recourse in accordance with law has filed I.A. No. 3961/2022, in which I.A. following prayers have been made:

> ***"PRAYER***
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> *In the light of aforesaid facts and circumstances it is humbly prayed that this Hon'ble Appellate Tribunal may graciously be pleased to:*
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> *(a) Allow the present application and recall the order dated 27.01.2022 passed by this Appellate in Company Appeal (AT) (Ins) No. 729/2020)*
>
> *(b) Direct ad interim stay of the operation of the order dated 27.01.2022 passed by this Hon'ble*

Appellate Tribunal in Appeal (AT) (Ins) No. 729/2020 till disposal of the present Recall Application.

(c) Pass any other order which this Hon'ble Appellate Tribunal may deem fit in eyes of equity, justice and good conscience taking into account the specific facts and circumstances of the case."

viii. When I.A. No. 3961/2022 came before three-member bench, submission was raised on behalf of the Respondents to the application objecting to the maintainability of the application. Two three-member bench judgments were relied before the three-member bench for the preposition that neither a review nor recall application is maintainable to review or recall judgment of this Tribunal. The judgments relied by the Respondent were judgments of this Tribunal in *"I.A. No. 265 of 2020 in Company Appeal (AT) (Ins.) No. 412 of 2019, Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr."* and *"I.A. No. 3303/2022 in Company Appeal (AT) (Ins.) No. 359 of 2020, Rajendra Mulchand Varma & Ors Vs K.L.J Resources Ltd & Anr."*.

ix. Before three-member bench, learned counsel for the Applicant relied on judgments of Hon'ble Supreme Court and contended that the Tribunal has ample jurisdiction to recall a judgment under its inherent jurisdiction. It was contended that in a case when judgment is delivered without necessary party being before

the Court, the judgment deserves to be recalled. The three-member bench, in view of the above submission of the parties, referred the three questions, as noted above, for consideration of this Larger Bench.

3. We have heard Shri N. Venkataraman, learned ASG for the Applicant and Shri R. Venkata Ramani, learned Attorney General for the Respondent – Union Bank of India.

4. Shri N. Venkataraman, learned senior counsel submits that inherent power of this Tribunal is preserved by virtue of Rule 11 of the NCLAT Rules, 2016 and in exercise of inherent power, Tribunal can recall the judgment, in facts of the present case where the Committee of Creditors of the Financial Creditor which have approved the Resolution Plan was not impleaded as Respondent in the Appeal, which Appeal was allowed by this Tribunal. It is submitted that there is no quarrel that this Tribunal has not been vested with power to review its judgment but power to recall a judgment is very much there with this Tribunal which can be exercised in appropriate case. Learned counsel for the Applicant relying on various judgments of the Hon'ble Supreme Court, which we shall notice hereinafter, submits that distinction has been drawn between jurisdiction to review and jurisdiction to recall a judgment. It is submitted that jurisdiction to recall is jurisdiction which is inherent in Court as well as in Tribunal which exercises judicial power of State. It is submitted that a judgment delivered by this Tribunal without necessary party being before the Tribunal, can be recalled in exercise

of jurisdiction of this Tribunal which is preserved by virtue of Rule 11 of the National Company Law Appellate Tribunal Rules, 2016. It is submitted that an order passed without giving an opportunity of hearing to an affected party is an order which violates the principles of natural justice and deserves to be recalled. It is submitted that the judgment of three-member bench of this Tribunal in *"Agarwal Coal Corporation Private Limited"* and *"K.L.J Resources Ltd." (Supra)* holding that Tribunal can neither exercise jurisdiction to review nor jurisdiction to recall does not lay down correct law. There is no jurisdiction in the Tribunal to review a judgment but Tribunal has ample jurisdiction to recall a judgment on the Tribunal being satisfied that there being procedural error in delivering a judgment by the Tribunal which needs correction. Learned counsel for the Applicant, however, submits that Applicant is not contending that those applications which are disguised as recall petition but in actual are review petition should be entertained by this Court. This Tribunal need not entertain any recall petition which is in essence a review petition.

5. Shri R. Venkata Ramani, learned Attorney General submits that in I.A. No. 222/2020 which was filed by the Union Bank of India before the Adjudicating Authority, only party impleaded was the Resolution Professional, hence, by challenging the order of Adjudicating Authority rejecting the said application on 09.07.2020, Union Bank of India was not required to implead any other party to the Appeal. He submits that there is no error in the judgment of this Tribunal dated 27.01.2022 which need to be recalled. The judgment was delivered by hearing all the parties to the Appeal. The review

application filed by the Applicant having been rejected by this Tribunal, no recall application can be entertained.

6. We have considered the submissions of learned counsel for the parties and perused the record.

7. All the three questions, as noted above, being inter-connected are taken together for consideration. For answering the questions, as referred above, we need to examine the nature and extent of inherent powers of this Tribunal.

8. The Appellate Tribunal has been constituted under Section 410 of the Companies Act, 2013. Section 424 deals with the procedure before Tribunal and Appellate Tribunal. Section 424 is as follows:

> *"**424. Procedure before Tribunal and Appellate Tribunal.** – (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [1][or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.*
>
> *(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [2][or under the Insolvency and*

Bankruptcy Code, 2016], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely —

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the

Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).”

9. Under Sub-section (2) of Section 424, Tribunal has also been vested with various power as are vested with the Civil Court under Code of Civil Procedure. We may also notice Rule 11 of the National Company Law Appellate Tribunal Rule, 2016 which deals with inherent power. Rule 11 is as follows:

*“**11. Inherent Powers. –** Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the tribunal to make such orders as may be*

necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

10. It is to be noticed that Rule 11 is akin to Section 151 of the Code of Civil Procedure. The Court as well as Tribunals exercise juridical power of the State while performing adjudicatory functions. The Hon'ble Supreme court has held in *"AIR 1961 SC 1669, Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala & Ors."* that procedures of Court and Tribunal may differ but the functions are not essentially different. Justice Hidayatullah while considering the Courts and Tribunals made following observation in Para 31:

"31. …….. By "Courts" is meant Courts of Civil Judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established."

11. The inherent power of the Courts and that of the Tribunals are the powers which are not conferred to it but those powers are inherent in the Courts and Tribunals by strength of duty to do justice to parties before it.

While considering nature of inherent powers under Section 151, Hon'ble Supreme Court in *"AIR 1962 SC 527, Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal"* laid down following in Para 23*:*

> *"23. ……. The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."*

12. Inherent power by a Court or Tribunal can be exercised to do justice between the parties, which exercise, however, in no manner should contravene any express provision of the statute.

13. Now we proceed to notice the judgments which have been relied by learned counsel for the Applicant and three-member bench judgments of this Tribunal which has been referred to in the referring order. The first judgment which has been relied by learned counsel for the Applicant is judgment of Hon'ble Supreme Court in *""(1988) 2 SCC 602, A. R. Antulay vs. R.S. Nayak & Another"*. In the above case, before the Hon'ble Supreme Court question arose as to whether the Hon'ble Supreme Court in exercise of its powers can set aside a direction given by earlier judgment of Hon'ble Supreme Court dated

16.02.1984. Justice Venkatachaliah in Paras 159, 160 and 161 laid down following:

> *"**159.** But in certain cases, motions to set aside Judgments are permitted where, for instance a judgment was rendered in ignorance of the fact that a necessary party had not been served at all, and was wrongly shown as served or in ignorance of the fact that a necessary party had died, and the estate was not represented. Again, a judgment obtained by fraud could be subject to an action for setting it aside. Where such a judgment obtained by fraud tended to prejudice a non party, as in the case of judgments in-rem such as for divorce, or jactitation or probate etc. even a person, not eo-nomine a party to the proceedings, could seek a setting-aside of the judgment.*
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> ***160.** Where a party has had no notice and decree is made against him, he can approach the court for setting-aside the decision. In such a case the party is said to become entitled to relief ex-debito justitiae, on proof of the fact that there was no service. This is a class of cases where there is no trial at all and the judgment is for default. D.N. Gordan, in his "Actions to set aside judgments[92]." says:*
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> > *The more familiar applications to set aside judgments are those made on motion and otherwise summarily. But there are judgments obtained by default, which do not represent a judicial determination. In general, Judgments rendered after a trial are conclusive between the parties unless and until reversed on appeal. Certainly in general judgments of superior courts cannot be overturned or questioned bet ween the parties in collateral actions. Yet there*

> *is a type of collateral action known as an action of review, by which even a superior court's judgment can be questioned, even between the parties, and set aside.*
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> ***161.*** *Cases of such frank failure of natural justice are obvious cases where relief is granted as of right. Where a person is not actually served but is held erroneously, to have been served, he can agitate that grievance only in that forum or in any further proceeding therefrom. In Issac's case[88] Privy Council referred to:*
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> > *a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in exercise of the inherent jurisdiction of the court without needing to have recourse to the Rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make."*

14. The Hon'ble Supreme Court in the above judgment has clearly held that where a party has had no notice and decree is made against him, he can approach the court for setting-aside the decision.

15. The next judgment relied by learned counsel for the Appellant is the judgment of Hon'ble Supreme Court in *"(2009) 2 SCC 703, Asit Kumar Kar Vs. State of West Bengal & Ors."*. The Hon'ble Supreme Court in the said judgment has noted distinction between review and recall petition in para 6, which is to the following effect:

> *"6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers*

on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party."

16. In another judgment of *"(1999) 4 SCC 396, Budhia Swain & Ors. Vs. Gopinath Deb & Ors."*, the Hon'ble Supreme Court has dealt with power to recall. In Paras 5, 6, 7 and 8 following has been laid down:

*"**5.** The only provision for review in the Act is to be found in Section 38-A whereunder a review may be sought for within one year from the date of the decision or order but only on the ground that there has been a clerical or arithmetical mistake in the course of any proceedings in the Act. It was also conceded by the learned counsel for the appellants that the proceedings initiated by the appellants were certainly not under Section 38A. It was also conceded at the bar that the subsequent action of the O.E.A. Collector could be sustained only if supportable by the power to recall.*

***6.** What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in Indian Bank Vs. M/s Satyam Fibres India Pvt. Ltd.[1] Vide para 23, this Court has held that the courts have inherent power to recall and set aside an order*

(i) obtained by fraud practised upon the Court,

(ii) when the Court is misled by a party, or

(iii) when the Court itself commits a mistake which prejudices a party.

In A.R. Antulay Vs. R.S. Nayak[2] (vide para 130), this Court has noticed motions to set aside judgments being permitted where

(i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented,
(ii) a judgment was obtained by fraud,
(iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no service.

7. *In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment – Opening and Vacating" (paras.265 to 284 at pages 487-510) the law on the subject has been stated. The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter judgment may be vacated on that ground. However, in*

general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will not be entered when the proper remedy is by some other proceedings, such as by appeal. The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or submits to it, waiver or estoppel results.

8. *In our opinion a tribunal or a court may recall an order earlier made by it if*

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed.

The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

17. Learned counsel for the Applicant has also relied on judgment of the Hon'ble Supreme Court in *"1980 (Supp) SCC 420, Grindlays Bank Ltd. vs. Central Government Industrial Tribunal & Ors.".* In the above case, Industrial Tribunal has given an award; an application was filed for setting aside the award; there was no express provision in the Industrial Disputes Act, 1947 and Rules framed thereunder providing for setting aside ex-parte order. The Hon'ble Supreme Court held that even though there was no express provision to set aside the award, the Tribunal has jurisdiction to pass the order, which is ancillary and incidental power to discharge its functions effectively. In Para 6 of the judgment following was laid down:

"6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such

statutory prohibition. On the other hand, there are indications to the contrary."

18. The next judgment relied by learned counsel for the Applicant is judgment of Hon'ble Supreme Court in *"(2005) 13 SCC 777, Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning & Weaving Mills Ltd. & Anr.".* The Hon'ble Supreme Court in the above case had occasion to consider nature of power of review. It was held that power of Court or Quasi-judicial Authority to review its judgment must be conferred by law expressly whereas procedural review is different which is inherent in the Court or Tribunal. In Para 19 following has been laid down:

"19. Applying these principles it is apparent that where a Court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date

fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again."

19. Another judgment relied by learned counsel for the judgment is judgment of the Hon'ble Supreme Court in *"(2018) 11 SCC 470, SERI Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd.",* where the Hon'ble

Supreme Court referring to the judgment of Hon'ble Supreme Court in *Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra)* made following observation in Para 24:

> *"24. It is true that power of review has to be expressly conferred by a Statute. This Court in Paragraph 13 has also stated that the word review is used in two distinct senses. This Court further held that when a review is sought due to a procedural defect, such power inheres in every tribunal. In Paragraph 13, following was observed:-*
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> > *"13. .... The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.""*

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

21. Now we come to two three-member bench judgments of this Tribunal which have been noted and referred to in the order, which are *"Agarwal Coal Corporation Private Limited vs. Sun Paper Mill Limited & Anr."* and *"Rajendra Mulchand Varma & Ors vs. K.L.J Resources Ltd & Anr.". Agarwal Coal Corporation Private Limited* was a case where an I.A. was filed in decided Company Appeal seeking to place on record fraudulent acts of the Respondent and prayed for exercise of inherent power in allowing the application. Appellate Tribunal in the above case vide its judgment dated 16.10.2019, refused to interfere in the order of the Adjudicating Authority while dismissing the Appeal. A three-member bench had occasion to consider the ambit of review and power of recall. This Tribunal held that power of review is not inherent power, with which there can be no quarrel. On power to recall, in Para 27 to 30, following has been held:

> *"27. It is the well laid down proposition of law that 'in the absence of any power of 'Review' or 'Recall' vested*

with the 'Adjudicating Authority' – 'Appellate Authority', an order/ judgment passed by it cannot be either Reviewed or Recall as opined by this Tribunal.

28. As far as the present case is concerned, it is to be pointed out pertinently that the Applicant/Appellant filed MA No.677/2018 on the file of the National Company Law Tribunal, Chennai against the rejection of it claim. As a matter of fact, before the Resolution Professional the Appellant/Applicant's claim was permitted to a sum of Rs.2173/- as against the claim of Rs.2,39,33,935/- and that the said MA No.677/2018 came to be dismissed on 14.03.2019, as against the said dismissal order, Comp App (AT)(Ins) No.412/2019 was preferred by the Appellant before this Tribunal, which resulted in dismissal on 16.10.2019.

29. It is not in dispute that as against the judgment dated 16.10.2019 in Comp App (AT)(Ins) No.412/2019 (in the matter of Agarwal Coal Corporation Pvt Ltd V Sun Paper Ltd & Anr) passed by this "Appellate Tribunal'' dismissing the Appeal, the Applicant/Appellant has not preferred an "Appeal'' to the Hon'ble Supreme Court of India as per Section 62 of the I&B Code, 2016. Therefore, it is crystalline and clear that the judgment dated 16.10.2019 passed by this Tribunal in Comp. Appl. (AT)(Ins) No.412/2019 between the parties inter se has become 'conclusive', 'final' and 'binding'.

30. A mere reading of the contents of IA No.265/2021 in Comp App. (AT)(Ins) 412/2019 indicates latently

> *and patently that although in the preamble it is mentioned as "Recall Application'' yet it is only an "Application'' praying for "Review'' of the Order dated 16.10.2019 passed in Comp App. (AT)(Ins) No.412/2019 by this Tribunal, in stricto sense of the term."*

22. In para 27, Tribunal has observed that order passed by Adjudicating Authority or Appellate Tribunal cannot be either reviewed or recalled. From reasons given in the judgment, it is clear that against the order of the Tribunal dismissing the appeal on 16.10.2019 an appeal was filed under Section 62 of the I&B Code before the Hon'ble Supreme Court, which appeal was dismissed as not pressed. Three-member bench held that the judgment of this Tribunal dated 16.10.2019 has become final between the parties. It was further noted in Para 30 that recall application is only an application praying for review of the order. Thus, the reason for rejecting the application are contained in Para 29 and 30, however, observations in Para 27 were made in wide terms that Adjudicating Authority and Appellate Tribunal has no power to review or recall. The above judgment of This Tribunal holding that there is no power to recall a judgment cannot be held to be laying down a correct law. Power to recall a judgment is an inherent power which is in the Tribunal as has been so declared by Rule 11.

23. Next judgment of this Tribunal in *"Rajendra Mulchand Varma & Ors. vs. K.L.J Resources Ltd. & Anr."* was a judgment where judgment of *"Agarwal Coal Corporation Private Limited"* was relied. In Para 8 of the said judgment following observations have been made:

> *"8. It is noted that in the matter of Agarwal Coal Corporation Pvt. Limited vs. Sun Paper Mills Limited (2018) 1 SCC 407 passed by the NCLAT, it is held that "in the absence of any power of 'review' or 'recall' vested with the Adjudicating Authority/Appellate Authority, any order/judgment passed by it cannot be either reviewed or recalled". It is further held by NCLAT in the same judgment that a judgment passed by the Tribunal becomes 'conclusive', 'final' and 'binding' and the Applicant cannot take recourse to rule 11 of the NCLAT Rules, 2016, which provide 'inherent powers'. The same judgment held that appropriate course of action open to the applicant is to approach the Hon'ble Supreme Court under section 62 against the said judgment, if the Applicant so desires."*

24. After relying on judgment of *"Agarwal Coal Corporation Private Limited"*, the three-member bench held that prayer made in the I.A. No. 3303/2022 cannot be accepted. Para 13 is as follows:

> *"13. In the light of the above, we are of the opinion that this tribunal cannot accept the prayer made by the Applicant in IA No. 3303 of 2022 using the power given in rule 11 of the NCLAT Rules, 2016. We follow the judgment of the coordinate bench of this Tribunal given in the case of Agarwal Coal Corporation Pvt. Limited vs. Sun Paper Mills Limited (supra) where this Tribunal has held that NCLAT does not have power to review or recall its own order, in the absence of any specific provision in the IBC. Therefore, the application filed by the Applicant bearing IA No. 3303 of 2022 is rejected."*

25. Judgment of this Tribunal in *"K.L.J Resources Ltd. & Anr."* makes it clear that that judgment only followed the judgment in *"Agarwal Coal Corporation Private Limited"*, which we have already noticed above.

26. In view of the law laid down by Hon'ble Supreme Court which holds that the Tribunal has inherent power to recall its judgment on appropriate grounds, the three-member bench judgment in *"Agarwal Coal Corporation Private Limited"* and *"K.L.J Resources Ltd. & Anr."* observing that the Tribunal does not have power to recall cannot be approved. The three-member bench judgments of this Tribunal insofar as observation that this Tribunal has no power to review, no exception can be taken to that part of the judgment. We, however, hold that the judgment laying down that this Tribunal has no power to recall the judgment does not lay down correct law.

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.

28. We having answered the questions referred to this Bench, let this order be placed before the appropriate bench for consideration of I.A. No. 3961 of 2022.

[Justice Ashok Bhushan]
Chairperson

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI

25th May, 2023

Archana