

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**

**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Ins) No.966 of 2020**

**IN THE MATTER OF:**

**Mohammed Javed Sultan  
Director(Power Suspended) of  
Corporate Debtor  
M/s. Emerald Mineral Pvt. Ltd.  
Mastan Road, P.O- Buxi Bazar,  
Cuttack – 753 001 Odisha**

**...Appellant**

**Vs.**

**1. M/s. Emerald Mineral Exim Pvt. Ltd.  
Represented by RP (Mr. Pratim Bayal)  
18/1 Tarapukar Main Road, Ghosh Para  
Agarpara, Kolkata – 700 091**

**...Respondent No.1**

**2. Dhanlaxmi Bank Ltd.  
Ideal Plaza Kolkata Branch,  
11/1, Sarat Bose Road,  
Police Station, Bhawanipore,  
Kolkata – 700 020**

**...Respondent No.2**

**3. Bengal Shracchi Housing Development Ltd.,  
Shracchi Tower, 686, Anandpur,  
E.M.Bypass – R.B.Connector Junction  
Kolkata – 700 107**

**...Respondent No.3**

**Present:**

**For Appellant : Mr. Kumud Shekhar, Advocate**

**For Respondents : Mr. Ajay Gaggar, Mr. Robin Singh Sirohi and Ms. Rakhi  
Purnima Paul, Advocates for R-1.  
Mr. A.N. Tiwari, Advocate for R-2.**

## J U D G M E N T

### DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by the Appellant under Section 61 of the 'Insolvency and Bankruptcy Code 2016' (the Code) against the impugned order dated 20.02.2020 passed by the 'National Company Law Tribunal, Cuttack Bench at Cuttack' (the Adjudicating Authority) in TP No. 182/CTB/2019 in COPET No. 55 of 2016.
2. The Appellant has sought the followings reliefs:
  - Admit the Appeal;
  - Issue Rule Nisi calling upon the Respondents as to which order dated 20.02.2020 passed by the Adjudicating Authority shall not be quashed being illegal, arbitrary and barred by limitation etc.
3. The Adjudicating Authority, while passing the impugned order dated 20.02.2020 has observed the followings:

*“We have heard both parties. The applications, documents are perused. The Corporate Debtor, has conveyed the property, under 7 nomination agreement along with the builder dated*

31.03.2013 to and in favour of M/s. Jupiter Pharmaceuticals Limited, in other words, the Corporate Debtor having availed the loan for purchase of commercial property from the applicant bank without the knowledge of the bank. illegally has enter into an agreement, with the concurrence of the builders and has conveyed the property to Jupiter Pharinaceuticals Limited. As per the Nomination Agreement dated 31 March, 2013, the total saleconsideration is sum of Rs. 2.26.77.250/- (Two Crore Twenty-Six Lakh Seventy-Seven Thousand Two Hundred and Fifty). Hence, the property which ought to have been created as an equitable mortgage for the loan availed by the Corporate Debtor in favour of the applicant, without the knowledge of the applicant has been transferred to a 3rd party and the Corporate Debtor has enriched himself by the illegal sale of the commercial property, cheating and defrauding the bank of its lawful dues. Hence,

*the loan what ought to have been a secured loan of the banker, has become unsecured loan. And by no means the applicant banker could have recovered the lawful dues. The applicant had registered FIR against the Corporate Debtor and its Directors in respect of the illegal cheating of the Corporate Debtor under Section 120B/420 of Indian Penal Code (IPC) and dated 25th April, 2015, same is pending. The cheques which was paid towards the repayment of the loan, were dishonoured by the respondent's banker with an endorsement "funds insufficient". Hence, the applicant bank filed CS No. 00007/2015 before Chief Metropolitan Magistrate at Calcutta against the Corporate Debtor and its Directors, the same is pending on the file of the District Court and another in 13th MM. Court CC no: 418064/2014 the same are pending on the file of the District court. Meanwhile, the Applicant bank had also filed application winding up before the Hon'ble High*

*Court of Odisha vide COPET No. 55 of 2016 on 28th September, 2016. After constitution of this Bench, the same has been transferred to this Bench and re-numbered as TP No. 182/CTB/2019 and this application has been taken up under Section 7 of the Code.*

*The debts and the default are proved beyond reasonable doubt. Financial Creditor has suggested the Name of Mr. Pratim Bayal having registration No. IBBI/IPA-003/IP/-N00213/2018-19/12385 and E-mail id:- pratimbayal@gmail.com residence at 18/1, Tarapukur Road, Ghoshpara, Panihati(m), North 24 Parganas, West Bengal. There is nothing on record to say that any disciplinary proceedings against the proposed Insolvency Resolution Process. This application is defect free. Hence, we ADMIT the application”.*

4. The submission made by the Appellant/ pleadings and Written Submission available on record are stated herein below in a summarized manner:

- a. It is the case of the Appellant that the date of default of 'Non-Performing Assets' (NPA) on 05.07.2014 and the Bank/ R2 has filed petition under Section 7 of the Code on 11.12.2019.
- b. There is no default by the Corporate Debtor as the Respondent No.3 i.e. Bengal Sharchi Housing Development Ltd. had agreed through the 'Quadpartite Agreement' (for short 'Agreement') dated 29.06.2011 (appearing at page no. 149 -153 of the Appeal paper book vide clause 7 of the said agreement) to pay the dues of the bank in case of default arising out of any event, sale, transfer of the subject property, which was financed by the R2/Bank.
- c. The Agreement is between M/s. Emerald Mineral Exim Pvt. Ltd (R1), Bengal Shrachi Housing Development Ltd (R3) and West Bengal Housing Infrastructure Development Corporation Ltd (WBHIDCL).
- d. The clause so stated in the said Agreement for brevity and clarity are produced herein below:

*Clause 7 – the Builder assures and confirms that the Said Unit as well as the said building and the appurtenant thereto are not subject to any*

*encumbrance, charge or liability of any kind whatsoever and that the entire property is free and marketable.*

*Clause 8- The Builder also confirms that it has taken necessary permissions/approvals/sanctions for construction of the said building from all the concerned competent authorities and the construction of the building as well as the said unit is in accordance with the approved plans and the said unit is meant for residential purposes as per the sanction.*

*Clause 9- The builder and the Borrower agrees and undertakes to inform and give proper notice to the cooperative housing society as and when formed, about the said unit being so mortgaged to DLB.*

*Clause 10- the Builder has given its consent that the DLB shall have a lien on the Sale Unit and that the Borrower shall furnish the said unit as security for Loan to DLB and create mortgage in favour of the DLB and as and when the sale deed/ lease deed/ deed of apartment of the said unit is executed it will*

*be sent directly to DLB. Borrower (x) Co-Borrower (x) Builder (x)7.*

*Clause 11- The Builder undertakes not to mortgage the said unit to any other financial institutions for raising any loan. The original lease deed/ sale deed executed is in the possession of the Builder.*

*Clause 12- The Builder has no objection to the Borrower mortgaging the said Unit to DLB as security for Loan agreed to be advanced by DLB for the purpose of purchasing the said unit. Subsequent to the sale deed in respect there of having been executed after the Builder has received the entire sale consideration and all related charges for the Flat from the Borrower.*

*Clause 13- The Builder agrees and undertakes not transfer the said unit to any other member or other person without the previous written consent of DLB.*

*Clause 14- In the event of default by the borrower, if DLB enforces the security by sale, the Builder would accept the purchaser/ s of the said unit as a buyer, on such purchaser complying with the necessary*

*formalities which are required to become a buyer of the Builder, DLB may ask the Builder to cancel the agreement to sell with the Borrower in case DLB feels constraint to recall the Loan to the Borrower in terms of this Agreement.*

*Clause 16- The Builder hereby assures that the Builder shall ensure timely completion of the project and shall keep DLB informed in the event of any material changes in the planning of the project.*

*Clause 17- It is understood between the parties hereto that DLB has/shall obtain the consent of the borrower to retain the custody of the agreement to sell/sale deed/conveyance deed (including any other valid title document), entered /to be entered into between the Borrower and the Builder, till such time the terms and conditions of grant of Loan to the Borrower are complied with.*

*Clause 18- The Borrower shall keep DLB saved, harmless and indemnified against any loss, damages, expenses, claims, actions which the DLB may suffer based on the representations made by*

*the Borrower and Builder, in this Agreement and believing such representations to be true.*

*Clause 19- The Loan amount alongwith other dues is recallable on demand. DLB may recall the entire Loan from the Borrower on any default or event of Default made by the Borrower, or on the Borrower being declared as insolvent or incapable of handling its affairs or for delays in the completion of the project, which, in the opinion of DLB would affect the repayment of the quality of the security or for any reason which, in the sole discretion of DLB, warrants recall of the Loan amount and other dues.*

*Clause 20- DLB reserves its right to transfer or assign this Agreement in favour of any bank, institutions or body in connection with the Loan granted under the Home Loan Scheme of DLB to the Borrower for the purchase of the said unit to be construed by the Builder.*

*Clause 25- This Agreement shall be governed by any construed in all respects with the Laws in India and the parties hereto hereby mutually agree that any*

*matter or issues arising hereunder or any dispute hereunder shall, be subject to the exclusive jurisdiction of Courts and Tribunals at Kolkata. W.B. in India. Nothing in this provision shall prevent the Bank from initiating any other proceedings, in any, part of India, as it deems fit and the Borrower and the Builder/Owner unequivocally and irrevocably consents to the same.”*

- e. The Appellant has also stated that the ‘Nomination Agreement’ dated 31.03.2013 entered into between the parties, is another proof which was signed by the Builder with complete knowledge that the dues of the Bank/R2 has to be paid by R3.
- f. It was also stated by the Appellant that the copy of the Nomination Agreement was handed over to the Bank/R2 as well by the CD on 22.04.2013 (appearing at page 126 &127 of the Appeal paper book) for brevity and clarity, the same is depicted below:

ANNEXURE - A - 1

**EMERALD MINERAL EXIM LIMITED**

GOVERNMENT RECOGNIZED EXPORT HOUSE

Corporate Office: Suite No. 302, Krishna Buildings 3<sup>rd</sup> Floor  
134/4, A. C. Bose Road, Kolkata - 700 017, W.B. INDIA  
Phone: +91 33 2289 1591, Fax: +91 33 2289 1543  
Regd. Off: Mastan Road, Haveli Bazaar, Calcutta - 700012, G.W. INDIA  
E-mail: business@emeraldgroup.co.in, Website: www.emeraldgroup.co.in

Date: 22.04.2013

To: Branch Manager,  
Dhanlaxmi Bank Limited,  
134/4, A. C. Bose Road,  
Kolkata - 700020.



Ref: Loan Account No. DLBKOLCL00000327  
Subject: Meeting with Mr. Subramaniam and resolved thereof

Further discussion with Mr. Subramaniam of your bank and in continuation to our letter dated 03.03.2013, 04.04.2013 & 16.04.2013 and your bank letter dated 12.04.2013 we would like to inform as follows:-

During the course of discussion with Mr. Subramaniam and before communications mentioned above, we asked your officials to provide us with certain necessary documents which we have been asking from the beginning and bank has failed to provide the following

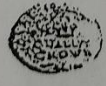
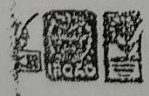
- a) Copy of D.D. of Rs. 1,34,00,000/- dated 01.07.2011 and receipt of the same by Bengal Shrachi Development Limited.
- b) Copy of the NOCs from bankers of Bengal Shrachi Development Limited including SBI & UBI.

Mr. Subramaniam has provided the copies of the above same but no NOC from SBI & UBI has been received till date except one letter dated 14.07.2011 from DGM UBI which is not a NOC.

While going through the documents provided by Mr. Subramaniam and bank's letter dated 12.04.2013 we realized that the bank has handed over the D.D. of Rs. 1,34,00,000/- without obtaining the NOCs from the bankers of Bengal Shrachi Development Limited.

It was already informed to Mr. Subramaniam during the course of meeting that bank has played foul with us by handing over the D.D. to the builder and illegally imposed the loan on us from 01.07.2011.

Mr. Subramaniam informed that the officials of the bank who played foul has already left the bank including the branch head and suggested to find a solution to this serious problem and requested not to file any complaint against the bank otherwise it will badly damage the reputation of the bank.



1



Deal with Confidence

Fitch Ratings



# EMERALD MINERAL EXIM LIMITED

(A GOVERNMENT RECOGNIZED EXPORT HOUSE)

Corp. Off: Sakta No. ME, Krishna Building, 3<sup>rd</sup> Floor  
D-1A, A. J. C. Bose Road, Kolkata - 700 017, W.B. INDIA  
Phone: +91 33 2280 1591, Fax: +91 33 22891592  
Regd. Off: Alakha Road, Badli House, Chhatak - 753001, Orissa, INDIA  
E-mail: business@emeraldgroupindia.com, Website: www.emeraldgroupindia.com

It was also discussed that we sale the property and recover our actual dues and Bengal Shrauchi Development Limited will refund the loan amount to the bank along with due interest. Any surplus over & above the cost incurred by us including the cost of finance received by us should be refunded to the builder so that they can liquidate the dues of the bank and bank will take responsibility of the same.

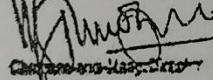
Accordingly, we first proposed the builder to by back the property from us so that our and bank's dues are cleared but builder organized a buyer name M/s Jupiter Pharmaceuticals Limited through their broker.

The price of the property was finalized at Rs. 2,14,98,550/- and accordingly nomination agreement was signed by all the three parties including Bengal Shrauchi Development Limited, Emerald Mineral Exim Pvt. Ltd. and Jupiter Pharmaceuticals Limited. Copy of the nomination agreement dated 31.03.2013 is enclosed for your reference.

We were informed that the builder, Bengal Shrauchi Development Limited had assured that they will liquidate the bank's dues before transfer of the property to Jupiter Pharmaceuticals Limited.

Thanking you,

Emerald Mineral Exim (Pvt.) Ltd.

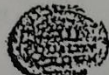


Chairman and Managing Director

Note: If we don't receive any reply within 2 weeks, it shall be deemed assumed that the bank has accepted the above same.

#### Enclosure:

1. Copy of letter dated 14.07.2011 of DGM, UBI
2. Copy of D.D. of Rs. 1,34,00,000/- dated 01.07.2011 received by Bengal Shrauchi Development Limited on 13.09.2011.
3. Copy of Nominations agreement dated 31.03.2013
4. Copy of banks letter dated 12.04.2013.



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Decide with Confidence

FitchRatings

- g. The Builder being the owner of the property sold the property to third party on 10.06.2013 without taking a 'No Dues Certificate' from Bank

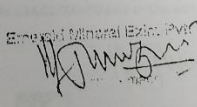
fraudulently and the R3 has enriched himself by collecting 3.79 Crore for a property of Rs. 2.26 Crore and the same is depicted below:

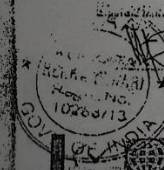


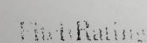
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**EMERALD MINERAL EXIM LIMITED**  
(A GOVERNMENT RECOGNIZED EXPORT HOUSE)  
 Corp. Off. : Suite No. 302, Keshava Building, 3<sup>rd</sup> Floor  
 224A, A. J. C. Bose Road, Kolkata - 700 017, W.B., INDIA  
 Phone : +91 33 2289 1591, Fax : +91 33 2289 1592  
 Regd. Off. : Mainan Road, Badli Bazar, Cuttack - 753001, Orissa, INDIA  
 E-mail : business@emeraldgroup.co.in, Website : www.emeraldgroup.co.in

Statement of accounts of payments made by Emerald to Shrachi on account of the property

Sl.No.	DATE	RECEIPT No./PARTICULARS	AMOUNT
1.	19.02.2011	2856/Shrachi (BSHDL)	23,30,500=00
2.	07.04.2011	3017/Shrachi(BSHDL)	34,02,088=00
3.	03.06.2011	3179/Shrachi(BSHDL)	34,00,000=00
4.	28.03.2013	S100/Shrachi(BSHDL) paid by "Jupiter" (JPL) on behalf of Emerald	32,22,718=00
5.	10.06.2013	S210/Shrachi(BSHDL)	2,78,118=00
		Total payment made by Emerald to Shrachi	1,26,33,424=00
7.	13.09.2011	Dhanalaxmi Bank Ltd.(DLB) D. D. No. 133271 dated 01.07.2011	1,24,00,000=00
8.		Total payment received by Shrachi On account of the property	2,50,33,424=00
9.		Total EMI paid to Dhanalaxmi bank Ltd. by Emerald as per statement filed by DLB before DRT-3, Kolkata in O.A.104	82,93,549=09
10.	01.07.2011	Insurance on the loan amount paid to Shrachi(BSHDL) by DLB	1,00,000=00
11.	02.05.2013	Brokerage paid to "Pioneer Properties"	5,00,000=00
12.		Interest on down payment to Shrachi From 19.2.2011 to 10.6.2013 @ 14.75	30,30,877=64
13.		Total payment received by Shrachi plus Costs, Insurance & interest on down Payment on loan & property	3,79,57,850=73

Emerald Mineral Exim Pvt  


The sale deed signed by the builder mentions that the properties free from all encumbrances.

h. It was also stated by the Appellant in OA No. 104 /2016 before the DRT-3 Kolkata, the Builder proposed to pay Rs. 1.50 Crore as Security against the claim of Bank for Rs. 1.80 Crore (included Leftover principal

and interest accumulated) and the amount is still lying with the bank as per the order of DRT-3 Kolkata vide order dated 29.04.2022, annexure 1 enclosed has given below:

Annexure 1

4

DEBTS RECOVERY TRIBUNAL - 3, KOLKATA  
JeevanSudha Bldg. 8th Floor, 42/C, J.L.Nehru Road, Kolkata - 700071  
Before Shri A. K. CHATURVEDI, Presiding Officer

IA No. 216 of 2022  
[arising out of O.A. No. 104 of 2016]

**Dhanalaxmi Bank Ltd.,**  
**Vs**  
**M/s. Emerald Mineral Exim LTD. & ORS.**

Present:  
For Applicant: Ms. M. Ghosh, Id. counsel  
For Defendant 1 to 5: None  
For Defendant No. 6: Mr. A. Banerjee, Id. counsel.  
For Intervener: Mr. N. Mishra, Id. counsel.

ORDER

Passed on 29th April, 2022.

This I.A. arising out of O.A. 104 of 2016 has been filed by the O.A. defendant no.6 seeking relief for a direction upon the applicant bank to refund Rs.1.5 crore along with interest from the date of actual payment till realisation. Affidavit in opposition; rejoinder and written notes of argument filed by the parties are taken into consideration.

2. Main O.A. was instituted on 28.01.2016 seeking realization of Rs.01,80,32,125.00 along with further interest accrued till the date of realisation from the five defendants and issuance of recovery certificate. Applicant bank by a letter dated 01.02.2016 informed Indian Bank Association alleging perpetration of fraud played by O.A. defendant no.6, instant I.A. applicant, as such, defendant no.6's name was blacklisted which was alleged to have been jeopardised their construction business. On a contested hearing this Tribunal vide its order 20.09.2016 directed defendant no.6 to deposit of Rs.1.5 crore as security and on such deposition applicant bank was directed to withdraw the letter dated 02.02.2016. In compliance with aforesaid order defendant no.6 had deposited Rs.1.5 crore on 26.09.2016 which was accepted by the bank and kept in a no lien account. Thereafter defendant no.6 has made a prayer for a direction upon the

applicant bank to make a fixed deposit account of aforesaid Rs.1.5 crore instead of keeping no lien account. Upon consideration of the prayer this Tribunal on 22.08.2017 directed applicant bank to make a fixed deposit in the name of Registrar and submit it within seven days. Aforesaid order was not complied with. However, applicant bank had preferred an appeal to the said order which was dismissed by the Hon'ble DRAT affirming order of the Tribunal. Applicant bank again preferred a revisional application being CO. No. 1019 of 2018 before Hon'ble High Court at Calcutta. By an order dated 03.01.2022 said revisional application was disposed of with the direction that defendant no.6 is at liberty to approach DRT for refund of the money if deposited in terms of the order dated 20.09.2016 along with accrued interest thereon.

3. Applicant bank by filing affidavit affirmed by Shri K.S.Ramakrishnan, Senior Manager, has submitted that bank had moved an application before Hon'ble NCLT, Cuttack which was admitted and resolution professional was appointed. Thereafter defendant no.1 company is in liquidation and Liquidator was appointed. By virtue of aforesaid order applicant bank has relinquished its security right over the property mentioned in the schedule to the O.A. However, aforesaid order was challenged before Hon'ble NCLAT which is pending for disposal.

4. Learned counsel appearing for defendant no.6 vehemently argued that this tribunal passed a conditional order on 20.09.2016 that subject to deposit of Rs.1.50 crore as security applicant bank shall withdraw the letter dated 02.02.2016 whereby defendant no.6 was blacklisted. Applicant bank after accepting security of Rs.1.50 crore did not withdraw the letter dated 02.02.2016 and instead thereof they preferred an appeal before Hon'ble DRAT. That appeal was dismissed affirming Tribunal's order. However, in the revisional application DRAT's order was set aside. Learned counsel further argued that since Hon'ble High Court has set aside DRAT's order

which affirmed the DRT's order, the order impugned passed by this Tribunal has also been quashed or set aside. Therefore, Rs.1.50 should be refunded in accordance with the provision of Section 144 of CPC. Learned counsel further argued that applicant bank cannot exercise general lien u/s 171 of the contract Act such lien can only be exercised over the property of the customer who is debtor. Defendant no.6 neither customer nor debtor.

5. Heard learned counsel for the parties, perused records and considered facts and circumstances of the case.

6. Adjudication of this case is limited to the prayer made in the instant I.A. wherein O.A. defendant no.6 sought for refund of Rs.1.5 crore which was deposited in compliance with the order of this Tribunal. According to defendant no.6 that deposit was made with the precondition that applicant bank will withdraw the letter by virtue of which defendant no.6 was blacklisted. However withdrawal of aforesaid letter is not under purview of adjudication in this I.A.

7. The issue to be adjudicated in this I.A. is whether security of Rs.1.50 crore deposited by defendant no.6 by virtue of the order dated 20.09.2016 shall be refunded. Fact remains order passed by this Tribunal on 20.09.2016 was affirmed by Hon'ble DRAT vide its order 14.02.2018 and appellate order dated 14.02.2018 was set aside by Hon'ble Calcutta High Court vide its order dated 03.01.2022 in CO 1019 of 2018. In the first Para Hon'ble High Court has observed that "*revisional petition is directed against the order dated 14.02.2018 passed by DRAT thereby affirming the order dated 20.09.2016 passed by this Tribunal*". In third Para at page 4 Hon'ble High Court further observed that "*be that as it may, in view of the scope of a proceeding u/s 19 of the Act of 1993, the application filed by OP No.6 in the said proceeding is not maintainable, as such, the order impugned is not sustainable and is set aside*". A harmonious reading of aforesaid two paragraphs makes it clear that order impugned is DRAT order affirming

Tribunal's order and impugned order is set aside means both DRAT order and Tribunal order are not sustainable and set aside. In other words, when an appellate order affirming order of the court below is set aside by higher court, the appellate order and order passed by court below are both set aside. However, by virtue of giving liberty defendant no.6 has filed present I.A. claiming refund of Rs.1.50 crore on the basis of argument that DRT order was conditional one and since that order was set aside and condition of withdrawal was failed, security of Rs.1.50 crore should be refunded to them u/s 144 of CPC. However, the case in hand is not so simpliciter to resolve.

8. Facts which led to impleade defendant no.6 in the O.A. is required to be narrated. Defendant no.6 being builder developer has a contractual obligation to sell flat to O.A. defendant no.1, who is main borrower. Instead of selling the flat to defendant no.1, defendant no.6 sold the flat to a third party and executed sale deed in favour of third party thereby right title interest of the secured asset had gone to the third party. As such, defendant no.6 has been impleaded to the O.A. and defendant No.6 in course of hearing of the impugned I.A. admitted that they had sold out the property to third party violating contractual obligation. Owing to that violation of contractual obligation which led to loss of secured asset, applicant bank wrote a letter dated 02.02.2016 to Indian Bank Association for blacklisting defendant no.6. Defendant no.6 agreed to deposit Rs.1.50 crore as security not only as a pre-condition to withdraw the impugned letter but also as security against aforesaid flat because of violation of contractual violation. This Tribunal made a conditional order on 20.09.2016, which has since been set aside by the higher court. Hon'ble High Court has observed clearly that in view of the provision of Sec. 19 of the Act of 1993, the impugned I.A. filed by defendant no.6 is not maintainable and is set aside. Therefore, the conditional order passed by this Tribunal is non-est. If that be

so, security for creating third party interest violating contractual obligation remains.

9. O.A. is pending for adjudication since 28.01.2016 wherein Rs.01,80,32,125.00 along with further accrued interest is claimed to be realised from the defendants no. 1 to 6. Undisputedly defendant no.6 was agreed to deposit Rs.1.50 crore as security against their sell of flat to a third party violating contractual obligation. Learned counsel for the defendant no.6 may argue that order directing to deposit Rs.1.50 crore was also set aside. Therefore, on the basis of principles of restitution aforesaid amount should be refunded. When the matter of refund was remanded to this Tribunal for further adjudication, it goes to say that liberty was also given to the Tribunal to make judicial scrutiny afresh on the question of refund.

10. Admittedly defendant no.6 has violated contractual obligation by creating a third party interest over the secured asset of the applicant bank and for this reason only they have been impleaded in the O.A. in spite of the fact that they have neither customer nor borrower mortgagor. Applicant bank submitted on affidavit that Rs.1.50 crore so deposited by defendant no.6 was kept in a no lien account. Fact remains that conditional order passed by this Tribunal was set aside. Moreover, O.A. defendant no.1, main borrower, is under liquidation by the order of Hon'ble NCLT. Liquidator was appointed. Applicant bank has relinquished its security right over the property mentioned in the schedule to the O.A.

11. Considering the peculiar fact and circumstances of the case and further considering the scenario of recovery, this tribunal is of the opinion that refund of Rs.1.50 crore shall be kept in abeyance till disposal of the O.A. and shall be further adjudicated at the time of disposal of the O.A.

12. The objects and reasons of RDB Act, 1993 is for expeditious adjudication and recovery of debts due to banks and financial institutions.

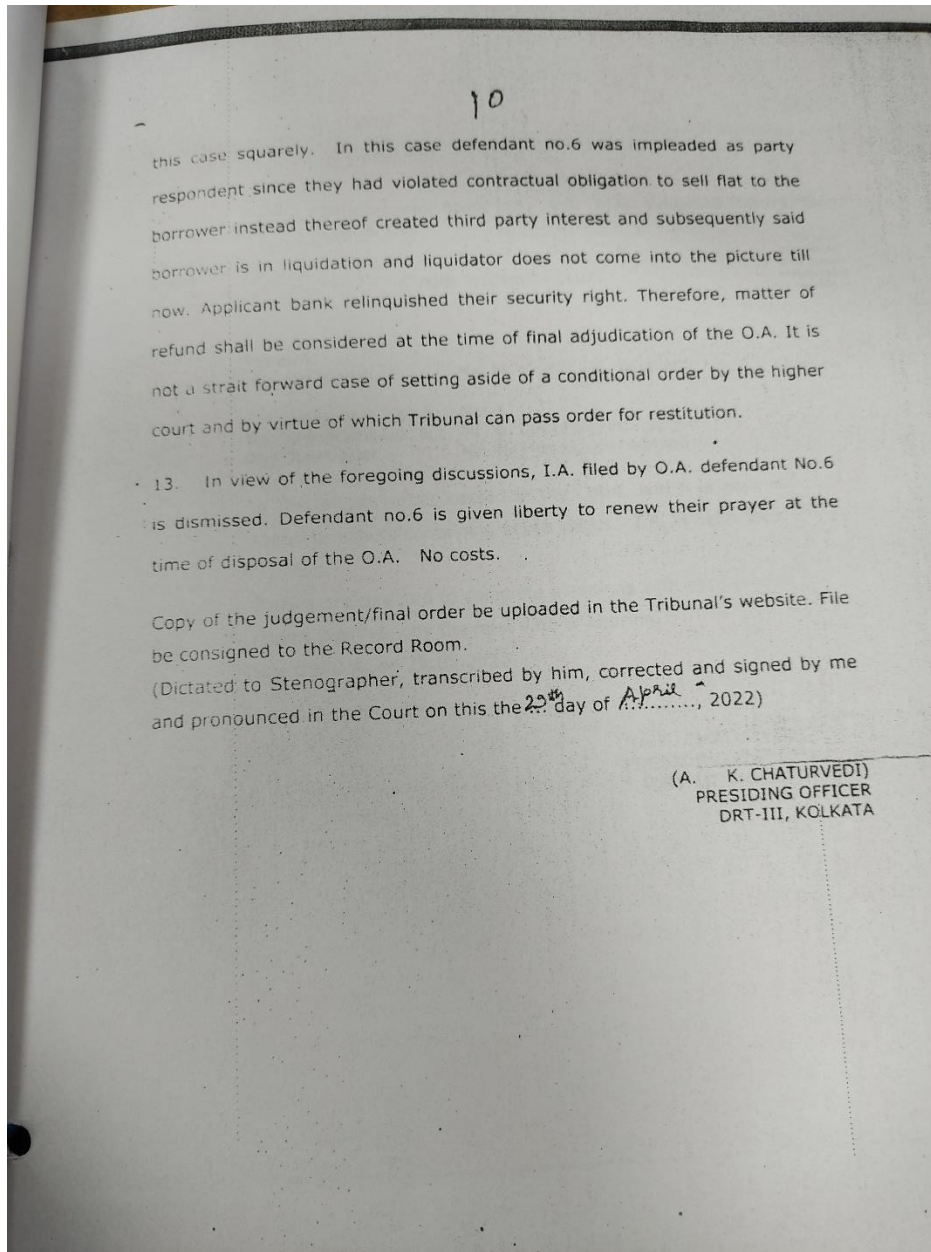
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This Tribunal is a creature of statute. Therefore, this Tribunal is duty bound to dispose of the O.A. as early as possible for the sake of speedy recovery. If before disposing of O.A. refund order is passed that may cause delay in recovery since defendant no.6 violating contractual obligation created third party interest, more so, main borrower is under liquidation and learned Liquidator does not come into the picture. As such, refund of Rs.1.50 crore which has been deposited by defendant no.6 shall be considered only at the time of disposal of the O.A. filed u/s 19 of the Act of 1993.

13. Learned counsel has referred the case of **Puni Devi Sahu & Anr. Vs. Jagannath Mochapatra** [AIR 1994 ORI 240 (243)] wherein a short question that whether the decree of the trial judge can be said to have been modified or varied, in answer to the query Hon'ble High Court observed that relief of restitution could not have been granted. Learned counsel has also referred the case of **Mahadeop Prosad Shaw Vs. Calcutta Dyeing & Cleaning Co.** [AIR (1961) cal 70]. In this case landlord got decree for possession, which was set aside in appeal and further appeal was made by the landlord for restitution of possession. Appeal was dismissed since restitution was not possible as structure was demolished. Learned counsel further referred the case of **Banchanidhi Das Vs. Bhanu Sahuani & Ors.** [AIR 1974 ORI 148 (150-151)] This is also an appeal for restitution and it was also dismissed with costs. Learned counsel has also referred further two judgements which were dismissed.

12. Learned counsel for the applicant submitted that this I.A. has been filed on the principle laid down in Section 144 of the CPC. Aforesaid Section provides where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise. Provisions of aforesaid Section is not applicable in

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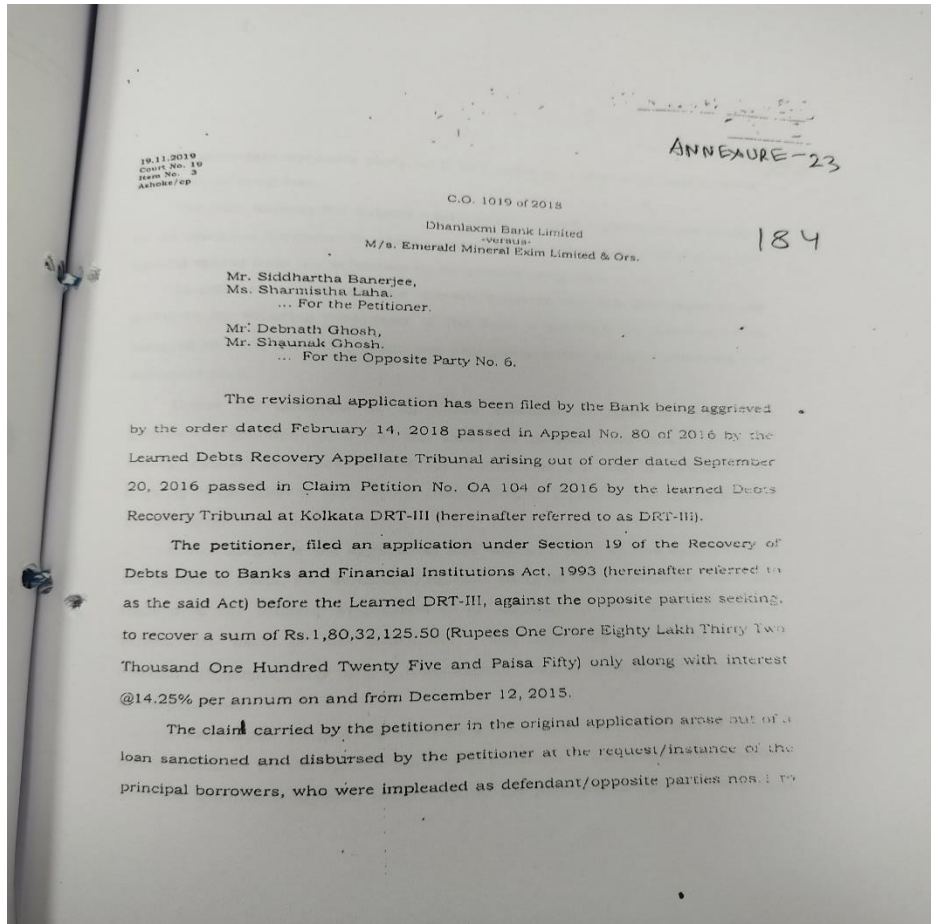
- i. It was also stated by the Appellant that the DRT proceedings are still going on and has blamed Resolution Professional (RP) that he is not representing properly to the CD being biased and acting for the Applicant Bank. He has also levelled allegation that the RP and Bank

- is working in consortium to harm the CD rather to maximize the assets or find resolution. It was also stated that the Builder (R3) who deliberately avoided to appear before this Appellate Tribunal even after ex parte order dated 12.02.2021 is continuously pursuing its matter before DRT -3 Kolkata (for short DRT) and the Bank/R2 is deliberately not informed the DRT regarding the ongoing CIRP & Liquidation proceedings and R1 is not deliberately represented by the Liquidator before the said court at the behest of the Bank/R2.
- j. The Bank/R2 has failed to recover its dues from the Builder (R3) before the Adjudicating Authority in CA No. 120 of 2018, later started to illegally recover its dues from the Appellant and R1 Company by filing an application under Section 7 of the Code before the Adjudicating Authority which is illegal, arbitrary and unsustainable in law.
- k. It was also stated that the Appellant through R1 Company by letter dated 22.04.2013 has informed the Bank/R2 that it has been illegally & deliberately disbursed the partial loan of Rs. 1,34,00,000/- to the Builder (R3) without received the required documents including the NOCs from the Bankers and illegally & fraudulently imposed the loan on the Appellant and R1 Company w.e.f. 01.07.2011 against the provisions given in the Agreement dated 29.06.2011. In spite of

repeated request, the builder (R3) or the Bank/R2 have miserably failed to produce the said NoCs before any forum.

- l. It was also stated that the Appellant has accused the R2/Bank of Foul play & fraud as the process to sale the property was initiated after informing the R2/bank as stated (supra).
- m. The R2/Bank failed to reply the said letter and so also miserably failed to resolve the issue with the Builder (R3) and the Builder never gave possession of the property or transferred the property to the R1 Company. Hence, the power to transfer the property was with the Builder (R3) only and not with the Appellant or R1 Company.
- n. The Appellant has also stated that as per Clause 6 of the said Agreement dated 29.06.2011, the R3/Builder shall clear the dues of the R2 Bank before transferring the said property to any buyer, the Builder/R3 has failed to do so but subsequently deposited the dues of the R2/Bank amounting to Rs. 1,50,00,000/- on 26.09.2016 in pursuant to order dated 20.09.2016 passed by the DRT (appearing at page no. 177 of the Appeal Paper book).
- o. It was also stated that the Hon'ble Calcutta High Court by order dated 19.11.2019 vide C.O. 1019 of 2018 also found that the R2/Bank has made out an arguable case against the Builder (R3) and also recorded the submission in its interim order that the Builder (R3) has

perpetuated fraud. The copy of the said order is depicted below:



4. The defendant/opposite party no.5 had stood as a guarantor guaranteeing repayment of such loan. 185

The loan forming the subject matter of the original application was availed by the principal borrowers in order to purchase an office space and also six car parking spaces from the defendant no.6/opposite party no.6.

In order to ensure that the relevant property was duly mortgaged to the petitioner for securing repayment of the loan, a quadripartite agreement was executed on June 29, 2011, which was consciously entered into by, inter alia, the defendant no.6.

Under the quadripartite agreement executed on June 29, 2011, the defendant/respondent no.6 was put under an obligation not to sell, transfer, convey, alienate or dispose of and not to otherwise deal with or encumber the property-in-question or any portion thereof without a prior written consent from the petitioner.

It was alleged in the application that without a prior written approval from the petitioner bank, the defendant/opposite party no.6 surreptitiously sold and transferred the property-in-question to an undisclosed third party purchaser behind the back of the petitioner. The sale was conducted by the defendant/opposite party no.6 in a clandestine manner without any information to the petitioner.

It was further alleged that the loan amount was sanctioned and disbursed by the petitioner for the specific purpose of purchase of the property-in-question from the defendant/opposite party no.6 by the principal borrowers. The loan

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amount made over by the petitioner to the opposite party no.6 was only on its specific undertaking not to sell the property to any other person without a prior written consent from the bank. According to the petitioner the defendant/opposite party no.6 was not at all authorized to sell the property or any portion thereof to anyone other than the principal borrowers. The petitioner also filed a complaint dated February 2, 2016 before the Indian Banks Association, alleging such fraud.

The opposite party No.6 filed an application before the DRT-III for deletion of its name from the original application and alternatively for cancellation of the afore-mentioned letter upon it securing the loan.

The main grievance of the petitioner in this application is that the presiding officer of Debts Recovery Tribunal-III and the Chairman, Debts Recovery Appellate Tribunal at Kolkata, committed error of jurisdiction. It was submitted that the DRT-III erred in passing the order dated September 20, 2016 on the application of the opposite party No.6 directing the letter of complaint dated February 2, 2016 issued by the Bank to the Indian Banks Association to be withdrawn and/or treated to be withdrawn, if the opposite party no. 6 secured an amount of Rs.1.50 crores which was to be kept in a separate interest bearing account. It is the contention of the petitioner that the power of the Tribunal was confined to the provision of Section 17 of the said Act and not beyond the scope of that section.

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The petitioner referred to the preamble to the said Act which was promulgated to provide for establishment of a tribunal for expeditious adjudication and recovery of debts due to banks and financial institutions. According to the petitioner the jurisdiction of the Tribunal, DRT-III was confined to exercise of powers and jurisdiction to entertain and decide the applications filed by banks and other financial institutions for recovery of dues of those the banks and financial institutions.

It is argued that when a bank or financial institution had to recover a debt from any person, it could make an application before the Tribunal. It is further, argued that although the Tribunal had the power to make such order and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice yet, the Tribunal did not have the power to direct or to pass a mandatory order treating the letter dated February 2, 2016 written by the Bank to the Indian Banks Association in terms of the guide lines of the Reserve Bank of India as withdrawn.

The learned advocate for the petitioner relies on an unreported decision of the Hon'ble Apex Court in the matter of Standard Chartered Bank - vs- Dharminder Bhoji & Ors., passed in a Civil Appeal No. 8486 of 2013. In the said decision it has been held that the power of the Tribunal was restricted to the four corners of the statute. In this case it is submitted that the Tribunal has exceeded its jurisdiction by passing an order treating the letter dated February 2,

2016 as withdrawn, inasmuch as, the said letter did not have any bearing in the proceedings before the Tribunal. It is urged that the Appellate Tribunal erred in law by upholding the said order on the ground that Rs.1.50 crores had been paid to the petitioner bank and the property was secured, being under a Receiver. 188

The learned advocate for the opposite party no. 6 submits that the letter dated February 2, 2016 was not issued in terms of the RBI guidelines. No opportunity of hearing was given to the said opposite party. There was no decision on the issue of fraud as alleged. Although it was alleged that the opposite party no. 6 had perpetrated the fraud in the entire transaction especially by acting in breach of the quadripartite agreement, the same was not proved and no opportunity was given to the opposite party No.6 before by the bank to rebut such allegation.

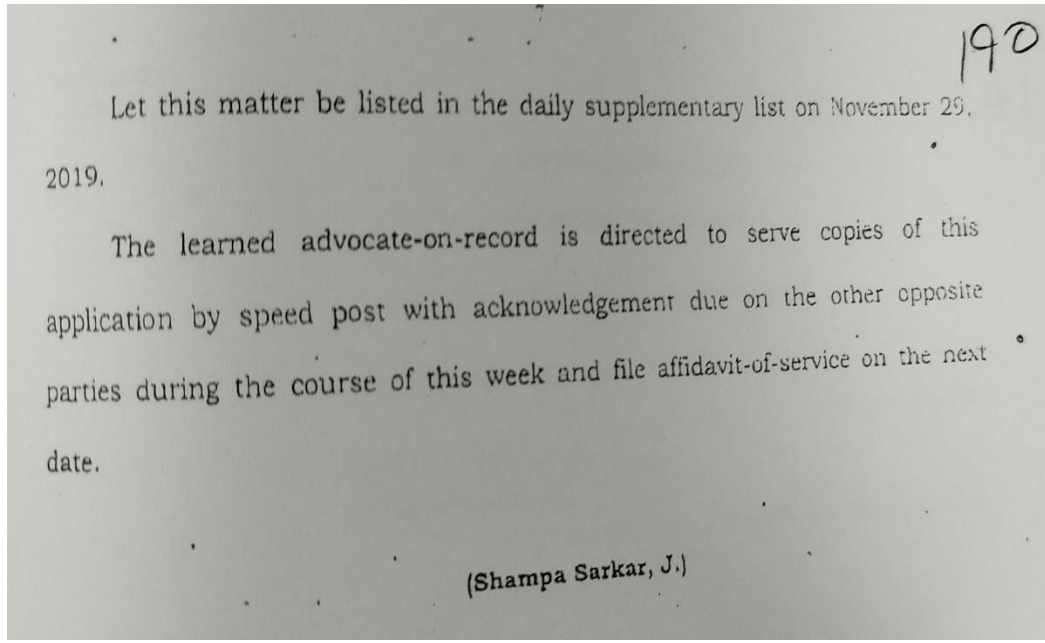
He has relied on the decision of the Hon'ble Apex Court in the matter of B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others, reported in (2006) 11 SCC 548. He has submitted that unless and until the opposite party no. 6 was given an opportunity of hearing and an order was passed holding the said opposite party to be guilty of fraud, the question of issuing the letter dated February 2, 2016 did not arise. He further relies on the decisions of this Court in the matter of Kingfisher Airlines Limited v. Union of India, reported in 2014 SCC Online Cal 19873, where the same principle was reiterated. He further relied on a decision of the Hon'ble Madras High Court in the matter of ICICI Bank Limited v. The Debts Recovery Appellate Tribunal, reported in 2011 (6) CTC 70, and submits that that the Debt Recovery Tribunal in order to secure the ends of

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justice had the power even to impound a passport and as such the order of DRT-III did not suffer from any illegality as the Tribunal has passed the order balancing the convenience of bothsides. He further submitted that the allegation of fraud was baseless as the loan was secured by his client.

Admittedly the Debt Recovery Tribunal derives its power from the statute and the powers and procedures have been prescribed under Sections 17 and 19 of the said Act. Prima facie I find that Section 19 (25) cannot be interpreted to mean that the Tribunal had the power to decide on issues beyond what had fallen for adjudication under Section 17 of the said Act. It is also seen that the Tribunal had disposed of the application filed by the opposite party no. 6 by passing an order in the nature of a final relief thereby treating the letter dated February 2, 2016 as withdrawn.

It is also true that the application filed by the opposite party no. 6 praying for deletion of its name with a further prayer for cancellation of the letter dated February 2, 2016 upon securing the amount has been disposed of, which means that the question whether the tribunal had the authority to cancel and/or treat that letter as withdrawn was no more left for adjudication. This point was overlooked by the learned appellate tribunal.

The petitioner has made out an arguable case. The portion of the order dated September 20, 2019 by which the letter dated February 2, 2016 has been treated to be withdrawn by the DRT-III, and also upheld by the Appellate Tribunal will remain stayed for a period of three weeks from date.



- p. The Appellant has again reiterated the issue that the date of NPA on 05.07.2014 and the petition was filed before the Adjudicating Authority on 11.12.2019 which is barred by limitation under Article 137 of the Limitation Act, 1963.
- q. The Appellant has cited various judgments for supplementing its claims:
- Mediquip Systems (P) Ltd Vs. Proxima Medical System GMBH, Civil Appeal No. 1811 of 2005
  - Mobilox Innovations (P) Ltd. Vs. Kirusa Software (P) Ltd. (2018) 1 SCC 353.
  - Hamza Haji Vs. State of Kerala and Anr. (2006) 7 SCC 416
  - Union of India Vs. Ramesh Gandhi (2012 (1) SCC 476

- S.P.Chengalvaraya Naidu (Dead) By Lrs. Vs. Jagannath (Dead) by Lrs. & Ors. (1994) 1 SCC 1
- A.V.Papayya Sastry and ors. vs. Government of A.P and Ors. (AIR) 2007 SC 1546
- State of AP & Anr. Vs. T Suryachandra Rao (2005) 6 SCC 149
- Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. (2005) 7 SCC 605

5. The submission made by the Respondent No.2/ pleadings and Written Submission available on record are stated herein below in a summarized manner:

- a. The Ld counsel for the R2/ Bank has stated that Sanction letter dated 27.04.2011 of Rs. 1.5 Crore was issued to Respondent No.1 company for purchasing flat from the Builder/ R3 and disbursed of Rs. 1.34 crore directly to the Builder/R3.
- b. The learned counsel for the R2/Bank has sought permission to mortgage the flats to be built by Builder and supposed to go to R1 Company and the Bank has obtained Corporate Guarantee also.
- c. It was also stated by the Ld counsel for the R2/Bank that the CD was making payment of the dues in installment alongwith interest to the R2/ Bank till 12.04.2014 and the CD has already paid a sum of Rs. 54,13,999.87 to the R2. Thereafter postdated cheques for repayment of

- loans started dishonoring or bouncing on its dues which promoted the R2 bank to initiate proceedings under Section 138 of the Negotiable Instrument Act, 1881.
- d. The R2/Bank has also filed a criminal complaint against the CD and its Directors before the 'Chief Metropolitan Magistrate' in Calcutta. In the meantime, the CD without seeking permission or consent from the R2/Bank executed a 'Nomination Agreement' dated 31.03.2013 alongwith the Builder and transferred the said property/unit in favour of M/s. Jupiter Pharmaceuticals Ltd. The R1 acted in a fraudulent manner of entering into the said 'Nomination Agreement' which was in complete breach on the Agreement dated 29.06.2011.
- e. It was also stated by R2 that the R1 to repay the loan borrowed from the R2/ bank, the Bank initiated proceedings before the DRT against the builder/CD/Guarantors etc. by filing O.A No.104 of 2016 before the DRT for recovery of a sum of Rs. 1,80,32,125.50 as on 11.12.2015 alongwith future interest till the date of realization.
- f. The R2 has also filed a complaint letter dated 06.02.2016 to IBA bringing out the malafide intention of the builder. The builder filed an application bearing IA No.742 of 2016 in the said O.A no. 104/2016 before the DRT for withdrawal of the letter dated 06.02.2016 sent to IBA by the R2/Bank. The Builder agreed to deposit an amount of Rs.

1.50 Crores with the R2 Bank as a security for withdrawal of the said letter. Thereafter, the DRT vide its order dated 20.09.2016 directed to R2/Bank to withdraw the letter subject to the deposit of the said amount of Rs. 1.50 Crores by the builder on 26.09.2016 against the DRT order, appeal was made by the R2/Bank before the DRAT, Kolkata which got dismissed and thereafter, the Bank has filed 'Revisional Appeal CO No. 1019 of 2018 before the Hon'ble High Court of Calcutta.

g. It was also stated by the R2/ bank that the Bank has filed a petition bearing no. 55/2016 on 28.09.2016 under Sections 433, 434 and 439 of the Companies Act against the CD before the Hon'ble High Court of Cuttack and, thereafter, the Hon'ble High Court vide order dated 19.04.2019, transferred the petition to NCLT, Cuttack by virtue of Notification dated 07.12.2016 of the Central Government and the Adjudicating Authority has admitted the said application and initiated CIRP against the R1 company.

6. The submission made by the Respondent No.1/ pleadings and Written Submission available on record are stated herein below in a summarized manner:

a. It was stated by the R1 that the CD was declared as a NPA on 05.07.2014.

- b. It has also stated that the case has filed before the Hon'ble High Court under the provisions of the Companies Act and thereafter it was transferred to Adjudicating Authority.
  - c. It was also stated that the bank has disbursed the money to the builder without taking permission of the CD. The said allegation is not correct as per the Agreement as stated above. The amount of Rs. 1.50 Crore deposited by the Builder against the loan borrowed by the CD has not been interpreted correctly.
7. We have carefully gone through the pleadings of the parties and extant provisions of the Code including their written submissions and we are having the following observations:
- a. It is not in dispute that the Debt has become NPA on 05.07.2014 and Section 7 application for initiation of 'Corporate Insolvency Resolution Process' has been filed on 11.12.2019 by R2/Bank.
  - b. It is also not in dispute that the bank/ R2 has filed a petition before the Hon'ble High Court of Orissa and the same was transferred to NCLT, Cuttack Bench in terms of Notification dated 07.12.2016 of the Central Government.
  - c. The various lists of dates which is appearing in appeal paper book are enumerated herein below:

LIST OF DATES

- |   |            |
|---|------------|
| 1. Agreement for Sale with the Builder  | 06.04.2011 |
| 2. Bank Sanction letter   | 27.06.2011 |
| 3. Quadruplicate agreement signed   | 29.06.2011 |
| 4. Sanction Cheque of Rs.1,34,00,000=00   | 01.07.2011 |
| 5. Disbursement & handover of Cheque to Builder   | 13.09.2011 |
| 6. Company's letter to bank raising objection after Internal Audit in March, 2013.  | 19.03.2013 |
| 7. Company's letter as no response from Bank  | 09.04.2013 |
| 8. Bank's letter to Company asking pending Documents Including Builder's bankers NOC From SBI & UBI After 21 months of disbursement(13.09.2011) | 12.04.2013 |
| 9. Company's letter to Bank with strong objection Against bank's letter dated 12.04.2014  | 16.04.2013 |
| 10. Company's letter accusing bank of foul play   | 22.04.2013 |

& illegal imposing of loan

11. Sale of property to "Jupiter Pharmaceuticals Ltd." 30.06.2013  
By the Builder
12. "Acknowledgement Of Liability" signed by the 22.07.2014  
Company, its Directors & Guarantor accepted  
& duly sealed & signed by the Applicant bank  
(Forged by the bank by putting anti-dated as  
25.4.2014)
13. Criminal Complaint No.153 filed by Bank 25.04.2015
14. CS No.0000007 of 2015 before 20<sup>th</sup> MM Court  
Filed by Bank under Section 138 of N.I. Act by  
Utilising Security Cheque of Guarantor
15. CS No.0385529 of 2014 before 13<sup>th</sup> MM Court  
Filed by Bank under Section 138 of N.I. Act by  
Utilising Security Cheque of Company
16. Recovery Letter of the bank to Builder, 18.02.2015  
copy to Company
17. O.A. No.104 of 2016 filed by the Bank before 28.01.2016  
DRT-3, Kolkata
18. Order passed by DRT-3, Kolkata against Bank 20.09.2016  
To withdrew complaint letter against Builder  
And Builder to deposit Rs.1.50 Crores
19. Compliance report along with Cheque 27.09.2016

- No.000272 of Rs.1,50,00,000=00 dt.  
26.09.2016 submitted by the Builder  
before DRT-3, Kolkata
20. Insolvency application filed against the  
Company before Cuttack High Court 28.09.2016
21. Appeal filed by the Bank before DRAT, Kolkata  
Against order dated 20.09.2016
22. Order of Hon'ble DRAT dismissal of bank appeal  
14.09.2017
23. Civil Revision No. 1019/2018 filed by the Before 07.05.2018  
Calcutta High Court filed by the Bank against  
Order dated 20.9.2016(DRT) & 14.09.2017(DRAT)
24. IBC application against the builder before 05.07.2018  
NCLT, Kolkata filed by the bank under Section  
7 of the IBC Code, 2016
25. IBC application dismissal order passed by  
NCLT, Kolkata against the Bank
26. Calcutta High Court stay order against the Builder 19.11.2019  
Staying withdrawal of complaint by the bank to  
"Indian Banking Association" for fraud.
27. Order No.05 passed by Registrar,  
Learned DRT-3, Kolkata (Company  
Raised objection on "Acknowledgement  
Of Liability). 25.11.2019

28. IBC application dated 04.12.2019 filed by the bank 11.12.2019 against Company before NCLT, Cuttack under Section 7 of the IBC Code 2016.
29. Dismissal application dated 02.01.2020 filed by the 10.01.2020 Company registered Vide CA No.19 of 2020 before NCLT, Cuttack
30. Order dated passed under section 13&15 of the 20.02.2020 IBC Code, 2016 against the Company along with dismissal of CA No. 19 of 2020 by NCLT, Cuttack
31. Order dated 15.9.2020 passed by Hon'ble Orissa 15.09.2020 High Court in WP(C) No. 10966 of 2020 but Uploaded on official website on 23.9.2020 only.

d. There are several issues involved in this case:

- i. The Debt was disbursed to the Builder for Rs. 1.34 Crore without receipt of necessary documents including NOCs from the Banks (SBI & UBI) of the Builder.
  - ii. The Bank/R2 has also filed C.A No. 120/2018 before the Adjudicating Authority for recovery a due from the builder.
  - iii. The Bank/R2 has filed multiple proceedings before the DRT-3 Calcutta and simultaneously persuade for recovery against the CD/ Appellant under Section 138 of the Negotiable Instrument Act, 1881 apart from filing criminal complaint which is barred under Section 18 and 34 of the 'RDDBFI Act, 1993'. When the OA No. 104 /2016 was filed before the DRT then what was necessity of enforcing criminal complaint and approaching under Negotiable Instruments Act, 1881.
- e. The Appellant was not aware of the winding up petition filed before the 'Hon'ble Orissa High Court' on 28.09.2016 and came to know about only when the Adjudicating Authority issued notice to the Appellant. The Bank has already received Rs.1.50 Crore from the builder and Rs. 54,13,999.87 from the CD. The deliberation made by all the parties as one feature common with the loan has been directly disbursed to Builder/R3 and the Bank/R2 as failed to be cautious while releasing the money to the builder

without taking NOC from their bankers and has initiated in all these legal proceedings.

- f. It is a grey area, where even Hon'ble Supreme Court Judgment in the case of 'State of A.P.& Anr. Vs. T.Suryachandra Rao reported in (2005) 6 SCC 149 has held that suppression of a material document could also amount to a fraud on the court. A similar observation was also made by the Hon'ble Supreme Court in the case of Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. (2005) 7 SCC 605, wherein it was noted that suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud, it can be evidence of fraud. A reference is also invited in the case of Nova Scotia (2003) 2 Comp LJ129 (Del), Hon'ble Delhi High Court held that the winding up petition would not be maintained, once proceedings are filed by the bank before the DRT that the Company judge was also to undertake the same task, namely, whether there is any debt which may amount to adjudication of the claim of the petitioning creditor. This is clear from the following observations:

*“14. It is trite law to state that a winding up petition is not akin and similar to legal proceedings for the recovery of money. The jural reality is that the Petitioning creditor has only one objective in mind while invoking Section 433 & 4334 of the Companies*

*Act, and that is for effecting a recovery of his outstanding. In the present day and age when legal proceedings are costly, cumbersome and time consuming, it would be difficult, may well nigh impossible to find an altruistic person who initiates legal action solely with the humorous creditors of a sinking company in mind. Even at the stage of issuing notice of a winding up petition, the company judge is not expected to act mechanically, since winding-up orders have wide dimensions and fatal consequences. The Judge examines whether a prima facie case has been made out to disclose the respondent company's recalcitrance or inability to pay its debts. The Company Judge thereafter perforce carefully considers the defence put forward by the respondent company. Till this stage, the judge does nothing that is contrary (to) or different (from) adjudication which according to the Concise Oxford Dictionary is to decide judicially regarding a claim, etc. After the introduction of the RDR Act, I find it difficult to accept the preservation of the jurisdiction*

*of the Company Judge to adjudicate upon matters which fall within the purview of the Act. Experience shows that although a clear admission of debt may be absent at the stage of the issuance of notice on the winding –up petition, it may become apparent after the pleadings have been completed. Conversely, there may be an admission of debt, which proves to be palpably illusory after consideration of the defense put forward on behalf of the respondent company. In the first case, the company judge would admit the petition and in the second case would dismiss it. The entire activity is one of the adjudication.”*

- g. The Hon’ble Supreme Court in the case of Venture Global Engineering Llc Vs. Tech Mahindra Ltd & Anr. Etc (1, November, 2017) held as follows:

*“It is a well settled principle of law that commission of fraud, misrepresentation, suppression of material facts from the adversary in the judicial proceedings and the Court/Arbitrator result in vitiating the entire judicial/arbitral proceedings including judgment/order/award passed thereon once come to the knowledge of the party concerned. On proving existence of*

*commission of fraud, misrepresentation, suppression of material facts by the party concern, the judicial/ arbitral proceedings are rendered illegal and void ab initio. This principle applies to arbitral proceedings in question and to Award dated 03.04.2006 and thus renders both void ab initio.”*

h. This case is also reflecting that the Bank has not disbursed the money to the Corporate Debtor directly. However, as alleged by the CD, they have taken some blank cheques and have up filled the amount and other thing which is subject to verification whether a fraud has been committed or not. A disbursement of financial debt from a creditor to CD is critical and a mandatory requirement, when there is no disbursement of debt from creditor to CD in the nature of financial debt, the creditor cannot be termed as Financial Creditor for the purpose of Section 7 of the Code as held in the following judgments:

- Anuj Jain (IRP for Jaypee Infratech) V. Axis Bank  
(2020) 8 SCC 401
- Indiabulls Housing Finance Ltd. Vs Rudra Buildwell  
in CA(AT)(Ins) No. 172 of 2019

- Vistara ITCL (India) Ltd. Vs. Dinkar Venkatasubramanian & Ors. in CA(AT) (Ins) No. 703 of 2020

- i. This case finally reflects that this is a forum shopping being done by a private sector bank which is not healthy. The Code cannot be used a recovery mechanism when the Hon'ble High Court of Orissa has already taken a particular view and DRT has also taken appropriate decision to get the amount realized to the Bank & the Bank/R2 has realized Rs. 1.5 Crore from Builder/R3 and Rs. 54,13,999/- from CD/R1 against disbursal of Rs. 1.34 Crore. CIRP mechanism is not for a debt recovery as Hon'ble Supreme Court has already settled the law on this aspect. Hence, CIRP cannot be used for bringing a Corporate Debtor to liquidation & thereby enriching Private Sector Bank.
- j. In view of the above facts and circumstances of the case as also law laid down on the subject; We feel that the Corporate Debtor for the reason(s) aforesaid, we set-aside the impugned order dated 20.02.2020 passed by the Adjudicating Authority ('National Company Law Tribunal, Cuttack Bench at Cuttack') in TP No. 182/CTB/2019 in COPET No. 55 of 2016. In the result, 'Corporate Debtor' – 'Emerald Mineral Exim Pvt. Ltd' is released from the rigour

of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional'/ 'Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The Resolution Professional is directed to handover the records and assets of the 'Corporate Debtor' to the Director of the 'Corporate Debtor' immediately.

- k. The Appeal is allowed with the aforesaid observations and directions. Pending application, if any, stands disposed of.

Interim order, if any, stands vacated. No order as to costs.

**[Justice M.Venugopal]**  
**Member (Judicial)**

**(Dr. Ashok Kumar Mishra)**  
**Member(Technical)**

***2<sup>nd</sup> August, 2022***

**New Delhi**

*Raushan.K*