IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 2 OF 2025
IN
INSOLVENCY PETITION NO. 71 OF 2006

Powertech Tools Pvt. Ltd. ...**Applicant**
Vs.
Anant V. Hegde and Ors. ...**Respondents**

Mr. Naushad Engineer, Senior Advocate alongwith Mr. Sharad Bansal, Ms. Dipali Sheth, Mr. Shubham Mehta, Mr. Mohil Mudaliar and Ms. Ashwini Rajan instructed by Eternity Legal, Advocate for the Applicant.
Mr. A.R. Bamne alongwith Ms. Divya Bamne instructed by M/s.A.R. Bamne & Co., Advocate for the Respondent No.3.
Mr. Ernest Tuscano alongwith Mr. Mark Dbritto instructed by Mr. Anil Dsouza, Advocate for the Respondent No.4.
Ms. C.J. Bhatt, Official Assignee alongwith Mr. Dinesh Iswalkar, 1st Assistant to the Official Assignee and Mr. Subodh Patil, Incharge Registrar/Deputy Official Assignee, present.

CORAM : ABHAY AHUJA, J.
RESERVED ON : 3rd NOVEMBER, 2025
PRONOUNCED ON: 27th NOVEMBER,2025

ORDER :

1. This Notice of Motion has been filed seeking recall and/or variation / modification of the order dated 23rd June, 2011 (corrected to 22nd June, 2011 by order dated 5th August, 2011) passed in Notice of Motion No. 4 of 2011.

2. At the hearing on 15th April 2025, it was brought to the notice of this Court, that by communication dated 24th November 2012, learned Counsel for Sundaram Finance Limited had brought to the notice of the Official Assignee that Flat No. 6A on the 3rd and 4th Floor of the Palm Court Building, Professor Almeida Park Road, Bandra West, Mumbai 400 050 (the “Palm Court Flat”) has been attached by the Sheriff of Mumbai, pursuant to an order dated 16th February 2006 passed by the Madras High Court in Arbitration Application No. 1547 of 2005 and that thereafter an execution application for enforcement of the Award against the Insolvent No.1 by sale of the subject property has been filed. That a warrant of sale dated 16th August 2012 had also been issued by this Court for effecting the sale of the Palm Court Flat, whereafter, the Office of the Commissioner for Taking Accounts of this Court had issued the usual notice to the claimants dated 28th August 2012 as a prelude to the settling of the proclamation of sale. However, when the Sheriff’s Bailiff visited the Palm Court Flat in September 2012 for affixing the notice, it came to light that on 16th March 2012, that the Official Assignee had taken possession of the Palm Court Flat, pursuant to an order dated 20th December 2011 passed by the Insolvency Court in Insolvency Petition No. 71 of 2006 *inter-alia* with respect to the insolvency of Insolvent No.1. At the hearing on 30th April,

2025, the learned Counsel for the Applicant tendered across the bar order dated 16th August 2013 of the Commissioner of Taking Accounts in Execution Application 396 of 2012, filed by Sundaram Finance against the Insolvent No.1 wherein the Advocates for the Claimant therein stated that since the Debtor had been declared as 'Insolvent', the Application be adjourned *sine die.* The Commissioner for Taking Accounts vide the said Order closed the matter with liberty to the Applicant/Judgment Creditor therein to apply for reviving the same, in the event, the insolvency was annulled. It has been submitted that the Case Status of the Execution Application is shown as Disposed/Rejected under Rule 986 of the Bombay High Court (Original Side) Rules, 1980 and that the Execution Application filed by Sundaram Finance for execution against the Insolvent No.1 having been disposed, there is no impediment in deciding the present Notice of Motion in respect of the Palm Court Flat.

3. Mr. Engineer, learned Senior Counsel appearing for the Applicant has submitted that the said Notice of Motion has been filed on account of changed circumstances.

4. Mr. Engineer, learned Senior Counsel for the Applicant has submitted that the Respondent No.4-Company, in which the Respondent No.1-Insolvent is a shareholder, being in requirement of funds had availed of loan from Dena Bank and against the loan by the Respondent No.3,the Respondent No. 4 had issued Non-Convertible Debentures (the "NCDs") to the Dena Bank in the year 1996. As security for repayment towards the said loan, the Respondent No. 4 mortgaged its plant and machinery and other properties including the duplex Palm Court Flat at Bandra (West) which was in the name of the Respondent No.1 to the Respondent No.3. Mr. Engineer submits that earlier the Palm Court Flat was purchased by the Respondent No.1 from Nisha Trust by an Agreement for Sale dated 9th December, 1985, which is not in dispute. That since there was a default on the part of the Respondent No. 4 in payment of the sums due under the NCD, the Respondent No. 3 filed Original Application No. 2815 of 2000 before the Debt Recovery Tribunal No. 1, Mumbai (the "DRT") *inter-alia* against the Respondents No. 1 and 4. On 25th February, 2005, the DRT passed its judgment directing *inter-alia* the Respondents No.1 and 4 to pay the amounts set out therein. Thereafter, on 4th May, 2005, the presiding officer of the DRT issued a Recovery Certificate of Rs. 10,17,76,071/- in favour of the Respondent No.3-bank. On 1st June,

2005, the Recovery Officer of the DRT issued a Demand Notice for the said sums *inter-alia* against the Respondents No. 1 and 4. On 24th July, 2006, the Respondent No.5 filed the Insolvency Petition No. 71 of 2006 against the Respondents No. 1 and 2. On 20th February, 2007, this Court passed an order adjudicating the Respondents No. 1 and 2 as Insolvents.

5. That on 21st August, 2007 and 23rd August, 2007, the Respondent No. 5 proposed a One Time Settlement ("OTS") to the Respondent No. 3. On 6th September, 2007, the Respondent No.3 addressed a letter to the Respondent No. 4 accepting the OTS proposal for a total sum of Rs. 664.24 lacs.

6. Mr. Engineer submits that Clause 5 of the terms and conditions of the Settlement stated that on payment of the entire OTS amount, the securities held by the Respondent No.3 would be transferred to the borrower/ finance company.

7. On 6th October, 2007, the Respondent No. 4 addressed a letter to the Respondent No. 3 confirming the acceptance of the settlement terms.

8. On 4th December, 2007, the Respondent No. 3 addressed a letter to the Official Assignee stating that the Palm Court Flat had been mortgaged in favour of the Respondent No. 3 as security for the amount due and payable by the Respondent No. 4 and the Official Assignee was requested not to take any steps for taking custody of the Palm Court Flat.

9. On 6th February, 2010, the Official Assignee filed a Report No.82 of 2010 before this Court *inter-alia* seeking physical possession of the Palm Court Flat from the licensee and permission to sell the said flat for the benefit of the first Respondent's Creditors.

10. On 29th March, 2010, the Respondent No. 4 addressed a letter to the Respondent No. 3 stating that the Applicant has paid the amount as per the terms of the settlement to the Respondent No. 3 and accordingly, the Debenture Certificates and securities held by the Respondent No. 3 be transferred in the name of the Applicant. The Respondent No. 3 was specifically requested to hand over the original title deeds of all the securities including the Palm Court Flat to the Applicant. It is submitted that alongwith the said letter, the Respondent No. 4 also enclosed a copy of its board resolution in support of its letter.

11. On 31st March, 2010, the Respondent No. 4 addressed a letter to the Applicant requesting for issuance of three cheques to buyout the debt from the Respondent No. 3 along with the underlying securities for a total sum of Rs. 1,14,76,454/-. It was also stated that along with the buyout of the debt, a Deed of Assignment, securities including those of the Palm Court Flat would be given to the Applicant. On 1st April, 2010, the Applicant issued the three cheques for a sum of Rs. 1,14,76,454/-.

12. Mr. Engineer, has submitted that pursuant to the aforesaid payments, the original title deeds of the Palm Court Flat were handed over to the Applicant, which as will be seen has been disputed by the Defendant No. 3-bank.

13. On 2nd April, 2010, the Respondent No.4 addressed a letter to the Applicant confirming that the originals of the Debenture Certificates held by the Respondent No. 3 issued in the years 1996 and 1997 had been transferred in the Applicant's name, which fact also as will be seen has been disputed by the Respondent No.3-bank.

14. On 6th April, 2010, this Court, in the Official Assignee's Report No. 82 of 2010, *inter-alia* directed the licensee to hand over vacant possession of the Palm Court Flat to the Official Assignee. On 30th April, 2010, the Official Assignee filed another report seeking to take forcible possession of the Palm Court Flat and to sell the flat.

15. Mr. Engineer, learned Senior Counsel for the Applicant has fairly submitted that on 24th July, 2010, the Respondent No. 4 addressed another letter to the Respondent No.3, in supersession of the letter dated 29th March, 2010, stating that the Respondent No. 4 had paid the OTS amount and consequently, sought the original title deeds of the securities from the Respondent No.3. Mr. Engineer, submits that however, this letter was addressed without any Board Resolution of the Respondent No.4 authorizing the issuance of such letter. That on 24th July, 2010, itself the Respondent No. 3 addressed a letter to the Respondent No.4 recording the handover of the original title deeds *inter-alia* in respect of the Palm Court Flat to the Respondent No.4.

16. Mr. Engineer submits that on 17th September, 2010, the Applicant was provided with a Title Certificate in respect of the Palm Court Flat at the time of assignment of debt by the Respondent No.3. It is submitted

on 21st January, 2011, the Applicant filed the Notice of Motion No. 4 of 2011 *inter-alia* seeking a declaration that the Applicant has an exclusive charge on the Palm Court Flat and that the flat stands outside the purview of insolvency proceedings of the Respondent No.1.

17. Mr. Engineer submits that on 18th April, 2011, the Respondent No.3 filed reply to the said Notice of Motion submitting that the original title deeds of the Palm Court Flat had been handed over to the Respondent No.4 and that the Respondent No.3 had not transferred or assigned any Debenture Certificates or any security in favour of the Applicant.

18. Thereafter, on 23rd June, 2011, this Court dismissed the Notice of Motion No. 4 of 2011. Mr. Engineer submits that the said Notice of Motion was dismissed *inter-alia* holding as under:-

(a) The Applicant's statement that Respondent No.3 had handed over the original title deeds of the Palm Court Flat to the Applicant is incorrect.

(b) The letter dated 24th July, 2010 issued by the Respondent No. 4 to the Respondent No.3 had superseded the instructions under the letter dated 29th March, 2010.

(c) The original title deeds of the Palm Court Flat were returned by the Respondent No.3 to the Respondent No.4.

(d) There was no agreement between the Applicant and Respondent No. 4 on the sanction of any amount by the Applicant in favour of the Respondent No.4.

(e) The Applicant had failed to produce any document on which it had crave leave to refer to and reply upon.

(f) There was no security created in favour of the Applicant by the Respondent No. 4 in respect of the Palm Court Flat.

(g) Despite opportunities having been given to the Applicant to produce the documents, it had failed to do so.

(h) The Official Assignee was directed to take possession of the Palm Court Flat and to sell the same.

19. Mr. Engineer has submitted that from 2009 to 2016, the Applicant shared its registered office with the sister entity named Trinity Academy for Corporate Training Limited ("Trinity"). In 2016, the Applicant's registered office was shifted to its current address. Mr. Engineer has submitted that in September, 2024, the records of Trinity were reorganized during which it was discovered that the Applicant had filed a Notice of Motion No. 4 of 2011 asserting its right over the Palm Court Flat. Mr. Engineer has submitted that the Applicant discovered the file containing the original title deeds and the share certificate of the Palm Court Flat from the records of Trinity and upon this caused inquiries to be made on the outcome of the Notice of

Motion and thereby discovered the facts pertaining to the same. That, thereafter, on 4th January, 2025, after taking legal advice the present Notice of Motion has been filed.

20. Mr. Engineer has submitted that the Notice of Motion No. 4 of 2011 which was filed by the Applicant *inter alia* seeking a declaration that the Palm Court Flat owned by the Respondent No. 1 was mortgaged with and held by Dena Bank (now Bank of Baroda) as a security since June, 1997 to secure the due repayment / redemption of the debentures and that the order of adjudication dated 28th February, 2007 declaring the Respondent No. 1 as Insolvent, did not affect the power of Dena Bank to deal with its security viz. The Palm Court Flat, was dismissed by this Court solely on the ground that the Applicant was unable to produce the documents in support of the case pleaded in the said Motion. Mr. Engineer has submitted that the order dated 23rd June, 2011 was passed on the basis that the Applicant does not have the original title deeds of the Palm Court Flat. That since the Applicant has now been able to locate the original title deeds and the share certificate, the basis of the said order dismissing the Notice of Motion No. 4 of 2011 no longer survives. That further now since the original title deeds and the share certificates in respect of the Palm Court Flat

are available with the Applicant, the Applicant has approached this Court for recall / variation / modification of the order dismissing the Notice of Motion No. 4 of 2011.

21. Mr. Engineer has further submitted that now that the original title deeds/ documents with respect to the said Palm Court Flat are available, this Court may review / recall / modify the order of dismissal and hold that the Palm Court Flat is not part of the Insolvent's assets which vest in the Official Assignee as the said Flat was exclusively charged in favour of Dena Bank as a secured creditor and could not have vested in the Official Assignee as being the property of the Insolvent -Respondent No 1 for being divisible amongst his creditors in view of Section 17 of the Presidency Towns Insolvency Act, 1909 (the "PTIA").

22. Mr. Engineer elaborates that the registered office of the Applicant from 2009 to 2016 was Shreeji Krupa, Plot No. 5/B, Qureshi Nagar Kurla East, Mumbai – 400070 and the said registered office of the Applicant was shared with Trinity, a registered public company which was also an associate company of the Applicant and due to common directors, shared resources and shared space some of the records of the

Applicant were mixed up with the records of the Trinity. That the registered office of the Applicant was shifted in April 2016 to its current registered office i.e. Unit No. 1 Ground Floor, Raheja Plaza - 1 L.B.S. Road Ghatkopar (West), Mumbai City, Mumbai Maharashtra, 400086. During the same period registered office of Trinity was shifted to adjoining Unit No. 2, Ground Floor, Raheja Plaza – 1 L.B.S. Road, Ghatkopar (West), Mumbai City, Mumbai Maharashtra, 400086. That recently around September, 2024, the record of Trinity was reorganized from which it was discovered by the Applicant that on January, 2011 the Applicant had filed Notice of Motion No. 4 of 2011 in Insolvency Petition No. 71 of 2006 asserting its right over the Palm Court Flat.

23. That it was only some time in or about September, 2024 that the Applicant found the file containing the original Title Deeds and Share Certificate of the Palm Court Flat from the records of the Trinity at its office situate at Unit No. 2, Ground Floor, Raheja Plaza – 1 L.B.S. Road, Ghatkopar (West), Mumbai City, Mumbai Maharashtra, 400086 along with copy of the Notice of Motion No. 4 filed by the Applicant in January, 2011. Mr. Engineer has further submitted that, however, none of the orders passed by this Court were a part of the said file and when this file was brought to the attention of the Director of the Applicant,

he immediately caused inquiries to be made on the outcome of the said Notice of Motion and it was discovered that vide order dated 23rd June, 2011, (corrected to 22nd June, 2011 vide order dated 5th August, 2011) this Court had dismissed the Notice of Motion as the Applicant was unable to produce the original documents in order to corroborate its case pleaded therein.

24. Mr. Engineer has submitted that during the course of this inquiry the Applicant also attempted to contact Mr. Promod Jadhav, its then authorised officer, who had affirmed the affidavit in support of Notice of Motion No. 4 of 2011. The Applicant also attempted to contact all the personnel in the administration department of the Applicant in 2011, however, the Applicant did not get any correct record of what had undergone during the relevant time. It is submitted that Mr. Suresh Hegde, the Key Managerial Person of the Applicant passed away on 31st July, 2024 and hence, the applicant was unable to assess the situation and therefore unable to produce the original title deeds in possession of the Applicant before this Court.

25. Mr. Engineer has submitted that it was under such circumstances that the Applicant contacted its present Advocates who pulled out the

entire record and proceedings, which is when the Applicant became aware of the order passed by this Court dismissing the Notice of Motion, wherein it has been stated that the Palm Court Flat is in the possession of the Official Assignee. Mr. Engineer has further submitted that the order dated 23rd September, 2024 also mentions that the Official Assignee proposes to sell the Palm Court Flat, and it was brought to the Applicant's notice that the charge created in favour of the Applicant upon payment of the outstanding dues on behalf of Electrex (India) Limited ("Electrex") to Dena Bank is neither reflected nor registered over the Palm Court Flat. Mr. Engineer has submitted that upon becoming aware of the charge of the Official Assignee over the Palm Court Flat and the proposed sale, the Applicant filed a proof of debt with an affidavit of claim before the Official Assignee. That the Applicant subsequently filed a praecipe seeking copies of documents and the entire proceedings from the Official Assignee.

26. Mr. Engineer, learned Senior Counsel has submitted that the Applicant sought the entire pleading in Notice of Motion No. 4 of 2011 in Insolvency Petition No. 71 of 2006 including the Notice of Motion and the affidavit filed by Dena Bank. It is submitted that the Applicant was thus completely unaware and shocked as to why if the original title

deeds and share certificate was available with its officers, the same was not produced before this Court on 21st June, 2011 or 22nd June, 2011 and why the said Notice of Motion No. 4 of 2011 was permitted to be dismissed. Mr. Engineer submits that the Applicant was also unaware as to why no steps were taken by its officers pursuant to the said order dated 23rd June, 2011 (corrected as 22nd June, 2011) especially when it's rights were severely prejudiced and affected as a result of. Mr. Engineer submits that the persons concerned failed to apprise the management at that time that this lack of information has directly led to the delay in filing this Notice of Motion and asserting its rights over the Palm Court flat.

27. Mr. Engineer, learned Senior Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of ***Government of NCT of Delhi and Anr v K.L. Rathi Steels Limited and Ors.***[1] to submit that Order 47 of the Civil Procedure Code, 1908 (the "CPC") does not end with the circumstances, as Section 114 of the CPC, the substantive provision does. That the power of review under Section 114 read with Order 47 of the CPC is available to be exercised if the following grounds are set up:-

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(i) discovery of new and important matter or evidence; or
(ii) mistake or error apparent on the face of the record; or
(iii) any other sufficient reason.

28. Mr. Engineer has submitted that as far as (i) is concerned the Review Petitioner has to show that such evidence was actually available on the date the Court made the order/decree and with reasonable care and diligence, it could not be brought by him before the Court at the time of the order/decree, that it was relevant material for a decision and by reason of its absence a miscarriage of justice has been caused in the sense that had it been produced and considered by the Court, the ultimate decision would have been otherwise.

29. Mr. Engineer has submitted that in the facts of this case the evidence of the original title deeds and the share certificates was in fact available on the date the Court passed the order dated 23rd June, 2011 (corrected to 22nd June, 2011), but even with reasonable diligence and care the same could not be brought before the Court at the time of the said order and that it was relevant material for the said decision. That by reason of its absence a miscarriage of justice has been caused in the sense that had it been produced and considered by the Court, the ultimate decision would have been otherwise.

30. Mr. Engineer has submitted that the Notice of Motion, which is founded on the Applicant having been able to locate the original title documents of the Palm Court Flat in September 2024, which is around the time, the present management of the Applicant also learnt of the Notice of Motion No. 4 of 2011 and the order passed therein. That thereafter, the Applicant has diligently pursued and addressed the letter dated 11th October 2024 to the Respondent No.3 seeking a no dues certificate and transfer of charge in favour of the Applicant and the Notice of Motion came to be filed on 4th January 2025. Mr. Engineer has submitted that in the circumstances, therefore, there has been a delay which is inadvertent and beyond the control of the Applicant and that, therefore, the inadvertent delay in filing the Notice of Motion be condoned as the same is *bona fide* arising as the person concerned did not a apprise the management of the Applicant about directions of this court to produce original title deeds and also did not maintain any records with the Applicant. That this Court therefore exercise its inherent powers under Section 151 of the CPC to condone the same and grant reliefs sought for by the Applicant in the interest of justice.

31. Mr. Engineer has submitted that the Palm Court Flat owned by the Respondent No.1, who created the equitable mortgage in respect of

the Palm Court Flat for the NCDs issued by the Respondent No.4 to the Respondent No. 3 was created in the year 1997 i.e. well before the date of declaration of insolvency of the Respondent No.1 on 20th February, 2007. Mr. Engineer submits that upon the 4th Respondent's default to pay the sums due to the Respondent No.3, the Respondent No. 3 entered into a settlement with the Respondent No. 4 and the Applicant paid a sum of Rs. 1,14,76,454/- to the Respondent No.3 towards the settlement and consequently the Respondent No. 3 handed over the original title documents to the Applicant and therefore, the Applicant is a mortgagee of the Palm Court Flat. Mr. Engineer submits that the Palm Court Flat stands as security for the debt of the Respondent No. 4, which was transferred by the Respondent No.3 to the Applicant in 2010. That, therefore, in view of the mandate of the proviso to Section 17 of the PTIA, the Applicant is entitled to realize or deal with its security and it does not vest with the Official Assignee of the Respondent No. 1. Mr. Engineer seeks to rely upon the decision of this Court in the case of ***Ashok Mohansingh Bajaj Vs. Devang B. Mehta***[2]. Mr. Engineer, therefore, submits that the Palm Court Flat does not form part of the assets of the Respondent No. 1, which are subject to the insolvency proceedings and that, therefore, this Court direct the Official

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Assignee to hand over the possession of the Palm Court Flat to the Applicant.

32. Mr. Engineer has submitted that therefore on account of changed circumstances, this Court after condoning the delay in filing the Notice of Motion, exercise inherent powers and recall / modify / vary the order dated 23rd June, 2011 (corrected to 22nd June, 2011) passed in Notice of Motion No. 4 of 2011 in the changed circumstances and after holding that the Palm Court Flat being the security outside Section 17 of the PTIA, is not part of Insolvent's assets does not vest in the Official Assignee, direct the Official Assignee to hand over possession to the Applicant.

33. Although the Respondent No.1 has not been represented, the Respondent No.1 has filed an affidavit in reply dated 31st March 2025 where apart from pointing out that there is a delay of more than 14 years in filing the present written statement, which cannot be condoned as there is no specific reason given by the Applicant, it has been confirmed that the Palm Court Flat was mortgaged to Respondent No.3 and subsequently, as per the OTS payment made by the Applicant all the related documents were handed over to the Applicant, which as

will be seen has been vehemently denied by the Respondent No.3 – Bank.

34. On the other hand, Mr. Bamne, learned Counsel, appearing for the Respondent No.3-Bank has submitted on the basis of Affidavit dated 12th March 2025 that pursuant to a request made by the Respondent No.4, the Respondent No.3 had invested a sum of Rs.5.00 Crores in 20% NCD of the Respondent No.4 against the mortgage of properties of the Respondent No.1, M/s. Colouroid Instasystems (India) Pvt. Ltd. and M/s. Industrial Products Marketing Company and also against the hypothecation of the movable properties of the Respondent No.4 viz.,

(i) Duplex Apartment, Flat No.6 A, Palm Court Building, 3rd & 4th Floor, Almeida Park Road, Bandra (West), Mumbai – 400 050, viz the Palm Court Flat.

(ii) Office No.1103, Dalamal Tower, 11th Floor, Nariman Point, Mumbai 400 021.

(iii) Unit No.10, Owner's Industrial Premises Co-Op. Society Ltd., 505, Pitamber Lane, Mahim, Mumbai – 400 016.

35. Mr. Bamne has submitted that since the amounts due to the Respondent No.3 under the NCDs could not be paid by the Respondent

No.4, the Respondent No.3 filed Original Application No.2815 of 2000 in the Mumbai Debts Recovery Tribunal-I against the Respondent No.1 as well as Respondent No.4 and the mortgagors and the guarantors for recovery of the amounts due under the NCDs and for enforcement of the mortgaged and hypothecated securities. It is submitted that thereafter on 25th February 2005 the Original Application was allowed with costs and Recovery Certificate No.65 of 2005 was issued in favour of the Respondent No.3. It is submitted that Respondent No.4 Company had in the year 2007 given OTS proposal to the Respondent No.3 and Respondent No.3-Bank had accepted the OTS proposal in terms of the sanction letter dated 6th September 2007. That the Respondent No.4-Company and the guarantors accepted the terms and conditions of the sanction letter dated 6th September 2007 by their letter dated 6th October 2007. That thereafter the Respondent No.4-Company made payment of Rs.141.00 Lacs to the Respondent No.3-Bank by five separate demand drafts and Rs.25.00 lacs by cheque issued by Dragon Power Tools Pvt. It is submitted that the Respondent No.4-Company also issued 24 post-dated cheques of Rs.20,76,008/- each issued by the Respondent No. 4 towards the balance OTS amount Rs.4,98,24,192/-. Thereafter, demand drafts were issued replacing the cheques and also certain payments were made by RTGS. Mr. Bamne submits that admittedly in the RTGS remittance slips it is indicated that some payments were made by the Dragon Power Tools Pvt. Ltd., Shakti Power Tools Pvt. Ltd., Precision Components Services, Western India Traders as well as the Applicant. That the original repayment schedule was extended by six months at the request of the Respondent No.4-Company. That the Respondent No.4 vide letter dated 29th March 2010 forwarded a copy of the resolution passed at the meeting of the Board of Directors of the Respondent No.4-Company and requested the Respondent No.3-Bank to handover debenture certificates, the securities and the original title deeds to the Applicant. Mr. Bamne has submitted that however, the Respondent No.4-Company subsequently in supersession of their earlier letter dated 29th March 2010, by letter dated 24th July 2010 informed the Respondent No.3-Bank requested the Respondent No.3 to handover the Debenture Certificates, the securities and the original title deeds to the Respondent No.4-Company alongwith blank transfer forms. Mr. Bamne has submitted that another mortgagor Company, i.e. M/s. Coloroid Instasystems (India) Pvt. Ltd. being the owner of the mortgaged Gala No.10 had requested the Respondent No.3 to handover the original title deeds of the said Gala to the Respondent No.4. Same was the case with the other mortgagor M/s. Industrial Products Marketing Company who also requested the

Respondent No.3-Bank to handover the Debenture Certificates duly discharged and the Bank returned all the original title deeds in respect of the mortgaged properties including Palm Court Flat to the Respondent No.4 vide covering letter dated 24th July 2010 which has been duly acknowledged by the Respondent No.4. Mr. Bamne has submitted that vide terms and conditions of the OTS sanction letter dated 6th September 2007, the Respondent No.3 – Bank had agreed that on payment of the entire OTS amount, the securities which were held by the Bank would be transferred to the borrower/finance company as per the request of the Respondent No.4 borrower company by duly executing the assignment of debt or other documents incorporating the recompense clause. Mr. Bamne has submitted that however, the Respondent No.3 Bank has not transferred or assigned any debenture certificate or any securities in favour of the Applicant and no deed of assignment has been executed, transferring or assigning the debts or securities held by Respondent No.3 in favour of the Applicant. That the original debenture certificate discharged by the Respondent No.3 was returned and handed over to the Respondent No.4. That similarly all the original documents of title which were deposited with the Respondent No.3 at the time of creation of the mortgage were also returned and handed over to the Respondent No.4

vide letter dated 24th July 2010. That therefore, the submission of the Applicant as regards the assignment of debt or handing over the securities to the Applicant is not correct as the Respondent No.3 has handed over original deeds to the Respondent No.4 and not to the Applicant. Mr. Bamne submits that accordingly, this Court may pass appropriate orders in accordance with law.

36. The Respondent No.4 erstwhile borrower company has in its affidavit confirmed that since the NCDs were issued by the Respondent No.3 and in addition to mortgage of the plant and machinery of the company, since additional securities were to be given, the Palm Court Flat owned by the Respondent No.1 was also mortgaged in favour of the Dena Bank. That thereafter since repayment could not be made, recovery proceedings were initiated before the Debts Recovery Tribunal after which a recovery certificate was issued. Since the Respondent No.1 had offered the Palm Court flat he had on behalf of the Respondent No.4 negotiated an OTS which was accepted by the Dena Bank and the Applicant-Company upon a request made by the Respondents No.1 and 4 offered to pay sum of the OTS amounts on behalf of the Respondent No.4. That by letter dated 31st March 2010 by the Respondent No.4-Company to the Respondent No.1 as well as

the Applicant particulars of the amounts to be paid to the creditors of the Company were given and the Applicant-Company had issued three cheques in favour of the three creditors and upon these payments having been made, the properties kept as securities were released by the Respondent No.3. It has been submitted that the Respondent No.1 holds 631420 shares in the Respondent No.4 Company which constitutes 6.67% of entire paid-up capital of the company.

37. I have heard the learned Senior Counsel for the Applicant, the learned Counsel for the Respondent No. 3-Dena Bank as well as the Counsel in the matter and considered their submissions and the affidavits filed.

38. The question that arises in this *lis* is whether the Palm Court Flat is security of the Applicant and whether the Applicant is a secured creditor who can proceed as if Section 17 of the PTIA does not exist.

39. Therefore, let us first examine Section 17 of the PTIA, which is usefully quoted as under:-

> "17. Effect of order of adjudication- On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as

> directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:
>
> Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

(emphasis supplied)

40. As can be seen Section 17 provides for the effect of the order of adjudication, i.e., on the making of an order of adjudication, the property of the Insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors and no creditor to whom the Insolvent is indebted in respect of any debt provable in Insolvency shall during the pendency of the insolvency proceedings have any remedy against the property of the Insolvent in respect of the debt or shall commence any suit or legal proceedings except with the leave of the Court. The only exception that is available is provided in the proviso to Section 17 which is the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with if this Section had not been passed. The proviso says that the secured creditor can proceed as if Section 17 does not exist. The rights of a

secured creditor are wholly unaffected by the order of adjudication. The vesting contemplated by Section 17 does not adversely affect the rights of the secured creditor to realise or otherwise deal with the security given to him. This view has been affirmed by this Court in the case of *Ashok Mohansingh Bajaj Vs. Devang B. Mehta (supra).*

41. It is not in dispute that the Palm Court Flat was purchased by Respondent No.1 from Nisha Trust by an Agreement for Sale dated 9th December, 1985. That while securing the loan granted by the Respondent No. 3-Dena Bank to the Respondent No. 4 (in which the Respondent No.1 holds 6.67% of shareholding) for issuance of 20% NCDs to the Dena Bank in addition to the other assets of Respondent No. 4, the Palm Court Flat had also been mortgaged as security for repayment of the debt to Dena Bank, who is now Respondent No.3-Bank of Baroda. Since the amounts could not be repaid by the Respondent No.4 or the guarantors, the Bank had instituted proceedings before DRT-1, Mumbai and the DRT-1, Mumbai passed an order dated 25th February, 2005, after which a Recovery Certificate No.65 of 2005 was issued in favour of the Dena Bank. Later by letters dated 21st August 2007 and 23rd August 2007, the Respondent No.4 Company, sent a one time settlement proposal to the Respondent No.3

Bank. Pursuant to negotiations between the Respondent No.4 and the bank, the bank accepted the OTS proposal for Rs.664.24 lacs on the terms and conditions in the sanction letter dated 6th September, 2007, acceptance whereof was confirmed by the Respondent No.4 on 06th October 2007.

42. The Respondent No. 4-Company made payments of Rs. 141 lacs to the Respondent No.3 by 5 separate Demand Drafts and Rs. 25 lacs by cheque dated 28th December, 2007 issued by Dragon Power Tools Pvt. Ltd. Towards the payment of balance OTS amount of Rs. 4,98,24,192/-, some of the payments were made by the Respondent No.4 and some were made by Dragon Power Tools Pvt. Ltd., Shakti Power Tools Pvt. Ltd., Precision Components Services, Western India Traders as well as the Applicant. Admittedly an amount of Rs.1,14,76,454/- was paid by the Applicant to the Respondent No.4. As per the terms of the OTS, on payment of the entire OTS amount, the Respondent No.3-Bank was to not only assign the debt by transferring the Debenture Certificates to the borrower Company/financing company but also handover the Debenture Certificates and the original title deeds of all the securities. However, although it has been stated by the Applicant as well as the Respondent No. 1 that the original title deeds were handed over to the

Applicant, however, the said fact is completely belied by the Respondent No.3-Bank and the material placed before this Court including letter dated 24th July, 2010 from Dena Bank to the Respondent No.4. No doubt, by letter dated 29th March 2010, the Respondent No.4 had requested the Respondent No.3-Bank to transfer the securities held by the Bank by duly transferring the Debenture Certificates to the Applicant/financing company as per clause No.5 of the OTS sanction letter dated 6th September 2007 and handover the Debenture Certificate and the original title deeds of all the securities held by the Bank to them also requesting for issuance of a no dues certificate. By letter dated 24th July, 2010 from the Respondent No. 4 to the Respondent No. 3 – Bank in supersession of communication dated 29th March, 2010, the Respondent No. 4 has requested the bank to deliver the the mortgaged securities (original title deeds) of properties to the Respondent No. 4 and not to the Applicant as the Respondent No.4- Company has made payment of the OTS amount in full.

43. A perusal of the communication dated 24th July, 2010 from the Respondent No.4 to the Respondent No.3-Bank clearly indicates that in supersession of the letter dated 29th March, 2010, the Respondent No.4 informed the Respondent No.3 that since the company had made

payment of OTS amount in full, the Respondent No.3-Bank has been requested to deliver the mortgaged securities viz. original title deeds of properties to the Respondent No.4.

44. I have also perused the communication dated 24th July, 2010 (at page 273) from Dena Bank to the Respondent No.4, which clearly indicates that the Original Agreement for Sale dated 9th December, 1985 in respect of the Palm Court Flat along with original share certificate no. 8 of the Palm Court Coop. Hsg. Society Ltd. has been handed over to the Respondent No. 4 and received on behalf of the Respondent No. 4. A scanned copy of the said communication clearly indicating the receipt of originals by the Respondent No. 4 is set out here under:-

देना बैंक
DENA BANK

HEAD OFFICE, DENACORPORATE CENTRE,
4TH FLOOR,C-10, G BLOCK,
BANDRA KURLA COMPLEX, MUMBAI - 400 051
TEL.NO.26545494/ 26545439/ 26545472
FAX NO.26545402/26545474

DB/TREASURY/BONDS/ 200 /2010-11

EXHIBIT I 87

24/07/2010

M/s Electrex (India) Ltd,
21-d1 Peenya Industrial Area,
2nd Phase
Bangalore 560058

Dear Sir,

Sub: **Delivery of original Title Deeds/debenture certificates/Original share certificates** Against OTS settlement.

We refer your letter dated 24/07/2010 and resolution requesting us to return original Title deeds of Mortgaged properties, Original Share certificates and Original debentures duly discharged by us We enclose herewith as under

1) Original Debenture Certificates No.A-07 duly discharged.

2) Original agreement for sale dated 09/12/1985 in respect of property of Shri A.V. Hegde in Palm Court, Bandra, Mumbai Along with Orignal Share certificate no 8 of The Palm Court Coop Hsg Society Ltd.

3) Original agreement for sale dated 21/7/1986 in respect of property at Mahim, Mumbai - 16 in Owners Industrial Cooperative society belonging to M/s. Colorid Instasystems (India) Pvt Ltd along with original Share Certificate No.63

4) Original agreement for sale dated 23/11/1984 in respect of property at 1103, Dalamal Towers,11th Floor, Nariman Point, Mumbai - 400 021 along with original share certificate no.158 belonging to Industrial Products Marketing Co.

You are requested to kindly acknowledge the receipt of the same by signing the duplicate copy of this letter enclosed herewith.

Thanking you

Yours faithfully

Asst. Gen. Manager ,Treasury

Recd Originals
ELECTREX INDIA LIMITED
24-7-2010

True Copy
Eternity Legal
Advocate for the Plaintiffs / Petitioner / Respondent / Appellant

45. Further although the Applicant as well as the Respondent No.1 have claimed that there was an assignment of debt/debentures certificates, the same has been clearly denied by the Respondent No.3-Bank, there is no document that has been brought before this Court and as had also been observed in the order dated 23rd June, 2011 (Corrected to 22nd June, 2011) which is sought to be recalled / reviewed / modified that there was no such document assigning the debt to the Applicant.

46. The Respondent No.3 has consistently maintained in its affidavits filed in the earlier Motion as well as in this Motion that the original title deeds of the Palm Court Flat had been handed over to the Respondent No.4 and that the Respondent No.3 had not transferred or assigned any debenture certificates or any security in favour of the Applicant. As noted herein that even before this Court no material to the contrary has been placed by the Applicant. Moreover, who better than the Respondent No.3-Bank can state the correct facts, particularly in view of the communication dated 24th July, 2010 from Dena Bank to the Respondent No.4, which has also not been disputed.

47. The facts that emerge are that the original title deeds and the share certificate in respect of the Palm Court Flat had been handed over by the Respondent No.3-bank to the Respondent No.4 and not to the Applicant.

48. In my view therefore, the non-existence of a Board Resolution along with the superseding communication dated 24th July, 2010, would not make any difference although it must be noted that the Respondent No.3-Bank has disputed the non-existence of such a resolution and on the contrary submitted that there was a supporting resolution to the said communication.

49. The following original documents had been furnished by the Applicant for the perusal of this Court (i) Electrex India Pvt Ltd – Debenture Certificate, (ii) Share Certificate of Society bearing No. 8, (iii) Agreement for Sale – Palm Court dated 20th January 1982, (iv) Agreement for Sale of the Palm Court Flat dated 09th December 1985, (v) Valuation Report of Duplex Flat Main Report Copy dated 18th June 1997, (vi) Title Certificate Copy by Majmudar Singh Chatterji & Co. and the (vii) NOC (No Dues Certificate) of Dena Bank to Electrex India Pvt Ltd.

50. Therefore, although today the Applicant may have the original Agreements for Sale and the share certificate viz. the title documents with respect to the Palm Court Flat, one thing is clear that the said documents were not handed over by the Respondent No. 3-bank to the Applicant upon payment under the OTS, even though the Applicant may have contributed to the said payment. There is also no deed of assignment of debt or transfer of debenture certificates that has been brought to my notice. Accordingly, in my view, there has been no transfer or assignment of the debt in favour of the Applicant. There is also no document brought before me to demonstrate or to establish that an equitable mortgage was created by deposit of title deeds in

favour of the Applicant. There is no equitable mortgage charge created or registered in favour of the Applicant, nor any MCA / ROC filings demonstrating the same have been brought to my notice. Therefore, the submission of Mr. Engineer that the equitable mortgage was created in respect of the Palm Court Flat in the year 1997 prior to the declaration of the insolvency of the Respondent No.1 on 20th February, 2010 would not be relevant as by communciation dated 24th July, 2010 upon payment of the entire OTS amount, the original title deeds as well as the share certificate in respect of the Palm Court Flat had been returned by Dena Bank to the Respondent No. 4 and not to the Applicant as has been evidenced by the acknowledgment on the said communication and also as there has been no assignment of debt.

51. Therefore, the Applicant is not a secured creditor nor do the possession of the original title deeds of the Palm Court Flat and the share certificates demonstrate or prove in any way that the same is a security with the Applicant for repayment of the debt of the Respondent No. 4 or that the same has been obtained by the Applicant in enforcement of the said security as upon payment of the entire OTS amount the originals of the title deeds and the share certificate were given by the Dena Bank to the Respondent No.4. Even the existence of

a Title Certificate in respect of the Palm Court Flat with the Applicant, in my view, does not further the case of the Applicant.

52. The Respondent No.1 was adjudicated as Insolvent on 20th February, 2007. The original title deeds and the share certificate with respect to the Palm Court Flat have been returned by the bank to the Respondent No. 4 after repayment of the OTS amount on 24th July, 2010 pursuant to letter of the same date of the Respondent No. 4 to the Respondent No. 3 bank to do so. It has not been disputed by any of the parties, that the Palm Court Flat was sold to the Respondent No. 1 by Nisha Trust on 9th December, 1985 and to secure the loan by Dena Bank to the Respondent No. 4, the Respondent No. 1 had given the originals of the title deeds of the Palm Court Flat as security for repayment of the debt to the Respondent No. 3. It is borne out from the communication dated 24th July 2010 as well as the Affidavit of Dena Bank that after the payment of OTS amount to the bank, the original title deeds and the share certificate of the Palm Court Flat had been returned to the Respondent No. 4. The Respondent No.1 is the owner of the Palm Court Flat as can be seen from the share certificate. After the payment of the OTS amount and return of the original title deeds and share certificate by Dena Bank to Respondent No. 4 on 24th July, 2010 without any

assignment of debt or debenture, there cannot be any security for repayment of loan. The Respondent No. 4 has also stated in its affidavit that since the Respondent No. 1 is the owner of the Palm Court Flat, the said flat would be an asset of the Respondent No.1.

53. As noted above, under Section 17 of the PTIA upon the making of an order of adjudication the property of the Insolvent wherever situate vests in the Official Assignee. Accordingly the said property had vested in the Official Assignee on 20th February, 2007. Pursuant to the order dated 23rd June, 2011, the Official Assignee has also taken the possession of the Palm Court Flat and has been directed to sell the property to recover the monies for the benefit of the creditors.

54. In my view, therefore, the Palm Court Flat is neither security of the Applicant nor the Applicant is a Secured Creditor. Clearly the case would no fall within the proviso of Section 17 of the PTIA and the Applicant cannot say that it is wholly unaffected by the order of adjudication. In other words, the benefit of the proviso to Section 17 cannot be availed of by the Applicant.

55. The order dated 23rd June, 2011, in respect whereof a recall/review/modification has been sought, also clearly observes in

paragraphs 4 and 5 that there is no mention or information that the Palm Court Flat is mortgaged in favour of the Applicant. In paragraph 10, it has been observed that there is not a single document to show that there exists any agreement between the Applicant and the Respondent No.4 to the effect of any security created in favour of the Applicant by the Respondent No.4. In paragraph 11, it has been recorded that the Advocate for the Applicant is not even in a position to give the dates of the documents allegedly executed by and between the Applicant and the Respondent No.4. In paragraph 12, it was observed that there is no security created in favour of the Applicant by the Respondent No. 4 in respect of the Palm Court Flat belonging to the Insolvent No. 1-Shri Anant Hegde, who is the Respondent No. 1 herein. It is on this basis that the Court held that despite opportunities being given to the Applicant to produce the documents, the Applicant has failed to do so and only sought more time to produce the documents without giving any reason. It has been held that the entire basis of the Application, that Dena Bank has on instructions from the Respondent No. 4 transferred and handed over the title deeds in respect of the Palm Court Flat to the Applicant is false and belied by the affidavit of the Dena Bank and Exhibits ‘E’ and ‘F’ thereto. The findings in the order dated 23rd June, 2011, which has been reproduced in paragraph 18 above, have been summarised by the Applicant itself in the list of dates and events at serial no. 29, submitted by the learned Senior Counsel to this Court on 3rd November, 2025, neither of which findings in my view require any modification / review or recall, as the original title deeds and the share certificate in respect of the Palm Court Flat, which have been found would not make any difference to the said findings.

56. In view of the above, it cannot, therefore, so simply be said that since now the Applicant has been able to locate the original title deeds and the share certificate, the basis of the said order dismissing the Notice of Motion No. 4 of 2011 no longer survives.

57. Nevertheless, the facts above indicate that the original Agreement for sale dated 9th December, 1985 and share certificate No. 8 with respect to the Palm Court Flat were not available with the Applicant at the time the order dated 23rd June, 2011 (corrected to 22nd June, 2011) was passed and the said originals became available only in September, 2024. This Court is therefore, inclined to accept the explanation for the delay, although, as observed above, the availability of the said original documents would not change the outcome, but a case for sufficient cause for condoning the delay in filing the Notice of Motion, has been made out. However, no case has been made out to

modify or review or recall the order dated 23rd June, 2011 (corrected to 22nd June, 2011) passed in Notice of Motion No. 4 of 2011.

58. Although the principles elucidated by the Hon'ble Supreme Court in the decision of *Government of NCT of Delhi and Anr v K.L. Rathi Steels Limited and Ors.(supra)* as presented by Mr. Engineer, learned Senior Counsel for the Applicant, are settled law, however, I am afraid that even upon exercise of the said power, I am unable to come to any conclusion different from the one in order dated 23rd June, 2011 in Notice of Motion No. 4 of 2011.

59. In view of the aforesaid, it would not be necessary to deal with the other submissions / arguments of the learned Senior Counsel / Counsel.

60. Accordingly the delay in filing the Notice of Motion is condoned. However, for the aforesaid reasons, the Notice of Motion is dismissed. No costs.

61. The Applicant to forthwith hand over to the learned Official Assignee the original documents including the following:-

(i) Electrex India Pvt Ltd – Debenture Certificate, (ii) Share Certificate of Society bearing No. 8, (iii) Agreement for Sale – Palm Court dated 20th January 1982, (iv) Agreement for Sale of the Palm Court Flat dated 09th December 1985, (v) Valuation Report of Duplex Flat Main Report Copy dated 18th June 1997, (vi) Title Certificate Copy by Majmudar Singh Chatterji & Co. and the (vii) NOC (No Dues Certificate) of Dena Bank to Electrex India Pvt Ltd.

62. The Official Assignee to expeditiously proceed with the sale of the Palm Court Flat as directed by order dated 23rd June, 2011.

63. After the order is pronounced, Mr. Engineer, learned Senior Counsel appearing for the Applicant requests for deferment of the operation of the order.

64. The operation of the order is deferred for a period of four weeks from the date of uploading of this order.

(ABHAY AHUJA, J.)