

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 117 of 2021

(Arising out of Order dated 29.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, in I.A. No.570/2020 in CP(IB) No.264/MB/2020)

IN THE MATTER OF:

Vidharbha Industries Power Limited
H-Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai -400 710.

...Appellant

Versus

Axis Bank Limited
Office at : "Trishul", 3rd Floor,
Opp. Smartheshwar Temple,
Near Law Garden, Ahmedabad,
Gujarat – 380006.

and its Corporate office at:
"Axis House", C-2, Wadia International Centre,
Pandurang Budhkar Marg,
Worli, Mumbai – 400 025.

...Respondent

Present:

**For Appellant: Mr. Himanshu Satija, Mr. Divyang Chandiramani,
and Ms. Aashna Agarwal, Advocates**

**For Respondent: Mr. Chetan Kapadia, Mr. Nitesh Jain and
Ms. Manini Bharati, Advocates.**

J U D G M E N T

BANSI LAL BHAT, J.

Respondent Axis Bank Limited (Financial Creditor) initiated Corporate Insolvency Resolution Process (for short 'CIRP') against Vidharbha Industries

Power Limited (Corporate Debtor) by filing Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'). It happened sometime in January 2020. The Corporate Debtor filed IA No.570 of 2020 in the aforesaid Company Petition being CP(IB) No.264/MB/2020 seeking stay of further proceedings in the Company Petition by projecting its inability in servicing the debts in respect whereof default was alleged by the Financial Creditor by projecting disputes between the Corporate Debtor and the recipient of energy as well as change in supply chain management of the recipient of energy hindering it from carrying on its business, in respect whereof disputes were pending determination before the Hon'ble Apex Court and other Authorities. On consideration of the Application of Corporate Debtor the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court No.II (Special Bench) passed order dated 29th of January, 2021 rejecting the Application of Corporate Debtor with observation that the dispute of the Corporate Debtor with the Regulator or the recipient of energy would be extraneous to the matters involved in the Company Petition and the decision in matters pending before Hon'ble Apex Court and other Authorities would hardly have any impact on the issues involved in Company Petition under Section 7 of the I&B Code. Thus, the Adjudicating Authority declined to stay its hands from considering the Company Petition. It is this order of the Adjudicating Authority which has been impugned in the instant Appeal preferred by the Corporate Debtor.

2. The Corporate Debtor is a power generating Company claiming to be operating a 600 MW Coal-fired Thermal Power Plant in Maharashtra with two units having capacity of 300 MW each. It claims to be supplying power to Reliance Infrastructure Limited (RIL) with effect from 1st April, 2014 as per Power Purchase Agreements (PPA) duly approved by Maharashtra Electricity Regulatory Commission (MERC). According to the Appellant/Corporate Debtor it has been reeling under massive financial stress due to problems confronting the power sector and its claims relating to the recovery of dues before Hon'ble Apex Court and MERC are substantial in nature and sufficient to repay the dues of the Respondent/Financial Creditor. According to Appellant/ Corporate Debtor there has been delay in adjudication of the legal matters for which it could not be penalized by way of admission of CIRP initiated at the instance of Respondent. According to Appellant the dues of Respondent/ Financial Creditor payable by the Appellant/ Corporate Debtor are approximately Rs.553 crores.

3. It is submitted on behalf of Appellant that Appellant's petition before MERC for revision of tariff was disallowed by MERC vide order dated 20th June, 2016 and the Appellant had filed Appeal No.192 of 2016 before APTEL against MERC's order dated 20th June, 2016. APTEL vide order dated 3rd November, 2016 directed MERC to allow the Appellant's actual cost of coal purchased from unit 1, capped to the coal cost of unit 2 till the Fuel Supply Agreement (FSA) of unit 1 was executed by Coal India Limited with the Appellant. However, MERC filed Civil Appeal No.372 of 2017 before the

Hon'ble Apex Court challenging the aforesaid APTEL order dated 3rd November, 2016 which is pending adjudication at the final hearing stage. Appellant's recovery of fuel costs including carrying costs aggregating to Rs.2100 crores stands impacted. It is submitted that implementation of the APTEL judgment would aid in settling the claims of Respondent and obviate any need for the initiation of CIRP against the Appellant. It is submitted that the admission of Application of Respondent under Section 7 of the I&B Code would adversely impact the outcome of the litigation as regards revision tariff in order to recover its actual costs. It is further submitted that the Coal India Limited, did not execute an FSA for unit 1 with the Appellant as this unit did not figure in its list of Power Plants having capacity of 78000 MW. Coal India Limited even did not execute FSA for unit 1 of Appellant for allocating coal linkages under the notified SHAKTI Policy. This is said to have compelled the Appellant to file Writ Petition No.10614 of 2017 before the Hon'ble High Court of Delhi which is still pending adjudication. It is further submitted on behalf of the Appellant that MERC delayed its verdict for over two years causing unprecedented financial stress to Appellant. It is further submitted that the Respondent is pursuing substitution under PPA before Hon'ble Apex Court while simultaneously pursuing the CIRP in I&B proceedings initiated against the Appellant. The Appellant intends to settle the dues of Respondent by way of its recovery from the pending Hon'ble Supreme Court Appeal and this Appeal is not intended to stall or delay the CIRP proceedings initiated under Section 7 of I&B Code. It is submitted that the admission and continuation of

Section 7 proceedings would be prejudicial to all stake holders of Corporate Debtor including the Respondent-Financial Creditor and five other Public Sector Banks who are lenders to the Appellant.

4. Per contra Respondent-Axis Bank Limited (Financial Creditor) would submit that while the Respondent sought initiation of CIRP against Corporate Debtor by filing Application under Section 7 of I&B Code on 15th January, 2020, proceedings remained pending till 29th January, 2021 i.e. the date of impugned order. The Respondent would further submit that the Appellant has not disputed the existence of debt owed to the Respondent nor did it dispute the occurrence an event of default. Respondent would further submit that the Adjudicating Authority only needs to ascertain the existence of debt and default in the payment of such debt. The Appellant has challenged neither legal nor the factual basis of the conclusion in regard to debt and default and the issues raised have no relevance to the Company Petition. Corporate Debtors alleged liquidity issues or its pending litigation proceedings are immaterial for adjudication of Application filed under Section 7 of I&B Code. No proceedings pending before any other Forum can be used to stall a petition under Section 7 of the I&B Code as the admissibility of Application under Section 7 of I&B Code is solely governed by the provisions of the Code.

5. Heard learned Counsel for the parties and perused the record.

6. Admittedly, Petition under Section 7 of I&B Code filed by the Respondent Bank is still at the pre-admission stage and the Appellant-Corporate Debtor has, by raising the issue of problems confronted by the

Power Sector resulting in inflicting of heavy financial loss to the power generating Companies like the Appellant, been able to stall the CIRP proceedings initiated by the Respondent (Financial Creditor) against it by filing Application under Section 7 of I&B Code. It is flabbergasting to find that by raising the liquidity issue and pending litigation proceedings the Corporate Debtor put a spoke in the wheel of Corporate Insolvency Resolution Process stalling its commencement at the hands of Adjudicating Authority who was required, in terms of mandate of Section 7(4) & (5) of I&B Code to pass an order of admission or rejection of such Application within fourteen days of the receipt of the Application. The relevant provisions are reproduced herein below: -

Section 7(4) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

(5) *Where the Adjudicating Authority is satisfied that—*

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
- (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against*

the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority,”

7. The commencement of CIRP takes effect from the date of admission of Application as specifically laid down under sub-section (6) of Section 7 of the I&B Code. All that the Adjudicating Authority is required to do is to ascertain the existence of default and on being satisfied that a default has occurred and the Application is complete, the Adjudicating Authority is required to admit the Application. The existence of default in respect of financial debt would be ascertainable from the records of an Information Utility or on the basis of other evidence furnished by the Financial Creditor. Where the Adjudicating Authority is satisfied that there is no financial debt payable in law or infact or that default has not occurred, it may reject such Application but if the Application is incomplete, the Financial Creditor has to be provided an opportunity of rectifying the defect in the Application within seven days of notice received from the Adjudicating Authority. All that should be present to the mind of Adjudicating Authority is that there is an obligation on the part of Corporate Debtor to pay the financial debt and that the Corporate Debtor has failed in such obligation. The Adjudicating Authority, upon determination of

default, is bound to admit the Application and commence CIRP initiated by the Financial Creditor by filing Application under Section 7 of I&B Code. The issues raised by the Appellant are anterior to the considerations governing admission of Application under Section 7 of I&B Code and commencement of CIRP upon its admission. The liquidity issues raised by the Appellant (Corporate Debtor), who may or may not succeed in the litigations pending before Hon'ble Apex Court and other Fora in regard to revision of tariff have no bearing and should not impact the admission of Application under Section 7 of I&B Code when the existence of financial debt which the Corporate Debtor is obliged to pay and default in discharging of such obligation is admitted. The fortunes of Corporate Debtor may wax or wane depending upon the outcome of litigation but same cannot be permitted to impede the course of insolvency resolution proceedings contemplated under the I&B Code, object whereof, inter alia, is maximisation of value of assets of corporate person by reorganization and insolvency resolution in a time bound manner. The dictum of law laid down by the Hon'ble Apex Court in ***"Innoventive Industries Ltd. Vs. ICICI Bank and Anr. - (2018) 1 SCC 407"*** on this proposition of law is loud and clear and same has been reiterated in host of judgments thereafter, which is now the settled and established position of law.

8. It is significant to notice that the Application filed by the Corporate Debtor seeking stay of proceedings before the Adjudicating Authority did neither dispute the existence of debt owed to the Respondent Bank nor did it

raise any issue in regard to the event of default as alleged by the Respondent Bank. Its therefore, clear that debt and default are not disputed. The financial woes of the Appellant and the liquidity problems faced by it, whether forced upon it or of its own making, have no bearing on commencement of insolvency resolution and cannot be permitted to be a stumbling block in triggering of CIRP at the instance of Financial Creditor. The commencement of CIRP proceedings has already been delayed by one year much to the chagrin of Respondent (Financial Creditor) who has been virtually compelled to be a spectator helplessly watching the assets of Corporate Debtor getting depleted in value. It is relevant to notice that besides the Respondent (Financial Creditor) there are five Public Sector Banks who are lenders to the Appellant and with delay in admission of the Application, their fate is hanging in balance.

9. On consideration of the issues raised in this Appeal we are of the considered opinion that the Appellant has no justification in stalling the process and seeking stay of CIRP, which in essence has manifested in blocking the passing of order of admission of Application of Respondent under Section 7 of I&B Code. There is no merit in Appeal as we find no legal infirmity in the impugned order. The Adjudicating Authority is conscious of the mandate of law and the course it has to take as per I&B provisions, which practically stands stalled. This is impermissible. The flow of legal process cannot be permitted to be thwarted on considerations which are anterior to

the mandate of Section 7(4) & (5) of I&B Code. The Appeal being devoid of merit is dismissed. However, we do not propose to impose any costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

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

New Delhi

2nd March, 2021

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