

Insolvency and Bankruptcy Board of India
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14th November, 2022

Subject: Judgment¹ dated 12th July, 2022 of the Hon’ble Supreme Court (SC) in the matter Vidarbha Industries Power Limited Vs. Axis Bank Limited [Civil appeal No. 4633 of 2021].

I. Brief Background:

Vidarbha Industries Power Limited (Corporate Debtor/CD) is a Power Generating Company under the Electricity Act, 2003 and had set up a Thermal Power Plant in Maharashtra. It had debt of approximately Rs.553 crore due to the Axis Bank Limited and the total debt of approximately Rs.2727 crore due to the consortium of lenders.

2. Axis Bank Limited (FC), filed an application under section 7 of the Code before the AA (Mumbai Bench) for initiation of CIRP against the CD. CD sought the stay of proceedings on the grounds that an appeal filed by the Maharashtra Electricity Regulatory Commission (MERC) against the order passed by the Appellate Tribunal for Electricity (APTEL) in terms of which a sum of Rs.1,730 Crores was due to the CD was pending before Hon’ble Supreme Court (SC). The sought was sought citing reasons that the implementation of the order of APTEL would enable it to clear all its outstanding liabilities. By an order dated 29th January 2021, the AA refused to stay the proceedings. CD filed an appeal before the NCLAT, against the said order of AA, which was also dismissed vide order dated 2nd March 2021. Then CD filed the instant appeal against NCLAT order before SC. Hon’ble SC, allowed the appeal of CD and made the following observations:

- When AA is satisfied that a default has occurred and the application of a FC is complete and there are no disciplinary proceedings against proposed IRP, it may by order admit the application.
- Legislature has, in its wisdom, chosen to use the expression “may” in section 7(5)(a) of the Code. Legislature intended section 9(5)(a) to be mandatory and section 7(5)(a) of the Code to be discretionary. An application of an OC for initiation of CIRP under section 9(2) of the Code is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the Code. However, in the case of an application by a FC, the AA might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the CD. If facts and circumstances so warrant, the AA can keep the admission in abeyance or even reject the application.

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- It is certainly not the object of the Code to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. However, the SC cautioned the AA, that even though section 7(5)(a) may confer discretionary power on the AA, such discretionary power cannot be exercised arbitrarily or capriciously.

Analysis-

- The above ruling of the SC, is in view of peculiar facts such as the CD is an electricity generating company operated under statutory control, the impact of MERC's appeal pending in SC, order of APTEL in its favour and the overall financial health and viability of the CD under its existing management. AA should not have disregarded the award of APTEL when it was claimed that, in terms of the Award, a sum of Rs.1,730 crores, which is far exceeding the claim of the FC, and is due for realisation by the CD. While allowing the Appeal of CD the SC had categorically cautioned that the discretion to admit or reject an CIRP application under section 7 cannot be exercised *arbitrarily or capriciously*.
- In a review petition² filed by FC, the SC observed that its judgment and observations are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case. It clarified that the elucidations in its judgment were made in the context of the case at hand.
- The judgement of SC is case specific, and guidance given on interpretation of section 7, by SC in its earlier judgements still prevail.

² Axis bank limited Vs. Vidarbha Industries Power Limited [Review Petition (Civil) No. 1043 Of 2022 In Civil Appeal No. 4633 of 2021]