Supreme Court of India
Vidarbha Industries Power ... vs Axis Bank Limited on 12 July, 2022
Author: Hon'Ble Ms. Banerjee
Bench: Hon'Ble Ms. Banerjee, V. Ramasubramanian

REPORT

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4633 OF 2021

VIDARBHA INDUSTRIES POWER LIMITED ….. Ap

versus

AXIS BANK LIMITED ….. Res

JUDGMENT

Indira Banerjee, J.

This appeal under Section 62 of the Insolvency and Bankruptcy Code 2016, hereinafter referred to as the 'IBC', is against a judgment and order dated 2nd March 2021 passed by the National Company Law Appellate Tribunal (NCLAT), New Delhi in Company Appeal (AT) (Insolvency) No.117 of 2021 whereby the learned Tribunal refused to stay the proceedings initiated by the Respondent, Axis Bank Limited against the Appellant for initiation of the Corporate Insolvency Resolution Process (CIRP) under Section 7 of the IBC. Signature Not Verified Digitally signed by GULSHAN KUMAR ARORA Date: 2022.07.12 18:32:55 IST Reason:

2. The Appellant is a Generating Company within the meaning of Section 2(28) of the Electricity Act, 2003 and has set up a 600 MW Coal-fired Thermal Power Plant comprising of two units each of 300 MW capacity, within the Butibori Industrial Area in the Nagpur District in Maharashtra.

3. Under the Electricity Act, 2003, and the Rules and Regulations framed thereunder, the business of Electricity Generating Companies is regulated and controlled by the State Electricity Regulatory Commission constituted under the said Act. Under Sections 61 to 63 of the Electricity Act, the State Electricity Regulatory Commission determines the tariff chargeable by Electricity Generating Companies.

4. Through an international competitive bidding process conducted by the Maharashtra Industrial Development Corporation (MIDC), the Appellant was awarded the contract for implementation of a Group Power Project (GPP). The GPP was later converted into an Independent Power Project (IPP).

5. The Appellant was later permitted to expand the capacity of its power plant by adding a second unit of 300 MW as an IPP. By an order dated 20th February 2013, the Maharashtra Electricity Regulatory Commission, hereinafter referred to as "MERC", approved a Power Procurement Agreement between the Appellant and Reliance Industries Limited (RIL) subject to No Objection Certificate (NOC) of MIDC. MIDC granted its NOC to the Power Project Agreement.

6. On 21st June 2013, the Cabinet Committee on Economic Affairs (CCEA) amended the New Coal Distribution Policy 2007, pursuant to which the Ministry of Coal (MOC) issued an order on 17 th July 2013 directing Coal India Limited (CIL) to sign Fuel Supply Agreements (FSA) with Power Projects with an aggregate capacity of 78,000 MW.

7. On 17th July 2013, the Ministry of Power issued a list of Power Projects with an aggregate capacity of 78,000 MW that were eligible to execute FSAs with CIL. The Appellant was not included in the list.

8. On 19th July 2013, the MERC granted approval to RIL to procure power from the Appellant's Unit 1. Accordingly, a consolidated Power Purchase Agreement was executed on 14 th August 2013 between the Appellant and RIL under which the Appellant agreed to supply and RIL agreed to purchase, power generated from both units of the Appellant's Power Plant.

9. On 21st February 2014, the Standing Linkage Committee held a meeting wherein the Appellant's application for conversion of Unit 1 from GPP to IPP for the purpose of executing FSA was approved.

10. On 1st April 2014, the Appellant commenced supply of power to RIL pursuant to the Power Purchase Agreement approved by MERC. By an order dated 9th March 2015, in Case No.115 of 2014, MERC approved the Final Tariff of the power plant of the Appellant for the Financial Years 2014-2015 and 2015-2016.

11. In January 2016, the Appellant filed an application being Case No.91 of 2015 before the MERC for the purpose of truing up the Aggregate Revenue Requirement and for determination of tariff in terms of MERC (Multi Year Tariff) Regulation 2011, in view of, inter alia, the increase in fuel costs, consequential to the rise in the cost of procuring coal for the purpose of running the power plant.

12. By an order dated 20th June 2016, the MERC disposed of Case No.91 of 2015 disallowing a substantial portion of the actual fuel costs as claimed by the Appellant for the Financial Years 2014-2015 and 2015-2016 and also capped the tariff for the Financial Years 2016-2017 to 2019-2020.

13. Being aggrieved, the Appellant filed an appeal being Appeal No.192 of 2016 before the Appellate Tribunal for Electricity (APTEL), challenging disallowance of the actual fuel cost for the Financial Years 2014-2015 and 2015-2016.

14. By an order dated 3rd November 2016, the APTEL allowed the appeal and directed MERC to allow the Appellant the actual cost of coal purchased for Unit-1, capped to the fuel cost for Unit 2 in terms of the FSA that had been executed, till such time as a FSA was executed in respect of Unit 1. The Appellant claims that a sum of Rs.1,730 Crores is due to the Appellant in terms of the said order of APTEL.

15. On or about 8th December 2016, the Appellant filed an application before the MERC for implementation of the directions contained in the order dated 3rd November 2016 of APTEL. MERC however filed Civil Appeal No.372 of 2017 in this Court, challenging the order of APTEL. The Appeal is pending.

16. In view of the pending appeal of MERC in this Court, the Appellant is unable to implement the directions of APTEL. The Appellant is, for the time being, short of funds. According to the Appellant, implementation of the orders of the APTEL would enable the Appellant to clear all its outstanding liabilities.

17. Sections 6 and 7 of the IBC provide:

> "6. Persons who may initiate corporate insolvency resolution process.— Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.
>
> 7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred:
>
> Provided that for the financial creditors, referred to in clauses (a) and
>
> (b) of sub-section (6-A) of Section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:
>
> Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such

allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board. (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): Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same. (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. (6) The corporate insolvency

resolution process shall commence from the date of admission of the application under sub-section (5). (7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

18. On or about 15th January 2020, the Respondent, Axis Bank Limited, as Financial Creditor of the Appellant, filed an application under Section 7 (2) of the IBC being C.P. (IB) No.264 of 2020 before the National Company Law Tribunal (NCLT), Mumbai for initiation of CIRP against the Appellant.

19. The Appellant filed a Miscellaneous Application being M.A. No.570 of 2020 in C.P. (IB) No.264 of 2020, sometime in February 2020, seeking stay of proceedings under Section 7 of the IBC in the NCLT, as long as Civil Appeal No.372 of 2017 was pending in this Court.

20. By an order dated 29th January 2021, the Adjudicating Authority (NCLT) dismissed the application being M.A. No.570 of 2020 filed by the Appellant in C.P. No.264 of 2020 and refused to stay the CIRP initiated against the Appellant.

21. The Adjudicating Authority held:-

> "19. The Code is a special legislation. The chief object of which is to decide the Petition in a time bound manner and take adequate steps to see that the Corporate Debtor remains a going concern even during the process of CIRP.
>
> 20. The Hon'ble Apex Court in Swiss Ribbons v. Union of Indian: (2019) 4 SCC 17 have set the tone for the proceeding before the Adjudicating Authority in order to make all endeavour to dispose of the matter in a time bound manner.

The observation of the Hon'ble Court may profitably be quoted as under:

"As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete.

xxx xxx xxx Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets.

xxx xxx xxx The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

21. The observation would indicate that no other extraneous matter should come in the way of expeditiously deciding a Petition either under Section 7 or under Section 9 of the Code. The inability of the Corporate Debtor in servicing the debts or the reason for committing a default is alien to the scheme of the Code. The averments made in the instant Application would indicate that various factors apparently hindered the Corporate Debtor from carrying on its business. There were disputes between the Corporate Debtor and the recipient of the energy as well as the change in supply chain management of the recipient of the energy may also have contributed to the lack of confidence between the entities. Be that as it may, the dispute of the Corporate Debtor with the Regulator or the recipient would be extraneous to the matters involved in the Company Petition. The decision in the matters pending before the Hon'ble Apex Court and other authorities would hardly have any bearing and impact on the issues involved in the present Company Petition under Section 7 of the Code.

22. This Authority is required only to see whether there has been a debt and the Corporate Debtor defaulted in making the repayments. These two aspects when satisfied would trigger Corporate Insolvency. Therefore, the decision of the Authorities as well as of the Hon'ble Apex Court would not affect the proceedings before this Authority one way or the other. Therefore, we are of the considered opinion that this Authority need not stay its hands from considering the Company Petition as prayed for. As it is, there has been a considerable delay in disposal of the Company Petition. It will accordingly be appropriate that the Company Petition is disposed of as expeditiously as possible. Hence ordered.

ORDER The Application be and the same is rejected on contest. There would however be no order as to costs."

22. The Appellant filed an appeal before the NCLAT, against the aforesaid order dated 29th January 2021. The said appeal has been dismissed by the judgment and order dated 2 nd March 2021 impugned in this Appeal.

23. By the judgment and order impugned, the NCLAT held:

> "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."

24. Mr. Jaideep Gupta, Senior Advocate appearing on behalf of the Appellant submitted that the Appellant had applied for stay of the proceedings before NCLT, Mumbai in extraordinary

circumstances, where the Appellant had not been able to pay the dues of the Respondent, only because an appeal filed by MERC, being Appeal No.372 of 2017, against an order dated 3 rd November 2016 passed by APTEL in favour of the Appellant, was pending in this Court. Since the aforesaid appeal is pending in this Court, the Appellant is unable to realize a sum of Rs.1,730 Crores, which is due and payable to the Appellant, in terms of the order of APTEL.

25. Mr. Gupta submitted that considering the special nature of the business of the Appellant of production of electricity, tariff whereof is regulated by MERC and APTEL, the application under Section 7 of the IBC should not have been admitted against the Appellant.

26. Mr. Gupta, referred to Section 7(5)(a) of the IBC which provides that where the Adjudicating Authority is satisfied that a default has occurred, and the application under sub-Section (2) is complete, and there is no disciplinary proceeding pending against the proposed Resolution Professional, it may by order, admit such application.

27. Mr. Gupta submitted that a bare perusal of the aforesaid provision shows that the word used in Section 7(5)(a) of the IBC is 'may', which must be interpreted to say that it is not mandatory for the NCLT to admit an application in each and every case, where there is existence of a debt.

28. Mr. Gupta argued that discretion conferred by Section 7(5) (a) of the IBC enables NCLT to reject an application, even if there is existence of debt, for any reason that the NCLT may deem fit, for meeting the ends of justice and to achieve the overall objective of the IBC, which is revival of the company and value maximization. Mr. Gupta argued that if legislature had intended that an application must be admitted upon existence of a debt, then the terminology used in Section 7(5)(a) of IBC would have been 'shall' and not 'may'.

29. Mr. Gupta has also relied on Rule 11 of the National Company Law Tribunal Rules, 2016, hereinafter referred to as the "Rules", set out hereinbelow:

> "11. Inherent Powers- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal"

30. Mr. Gupta submitted that a conjoint reading of Section 7(5)(a) of the IBC with Rule 11 of the Rules makes it abundantly clear that NCLT, on examining the existence of debt and its default, by a Corporate Debtor, has the discretion to admit or not admit an application for initiation of CIRP. It cannot be said that NCLT has no power, except to examine whether a debt exists or not and accordingly accept or reject the application under Section 7 of the IBC.

31. To demonstrate that power under Section 7(5)(a) of the IBC to admit a CIRP application is discretionary and not mandatory, an analogy of that Section has been drawn to Section 10(4) of the IBC, which has been held by this Court to be discretionary and not mandatory, in Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors.1, where this Court held:

> "24. Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not 1 (2017) 16 SCC 143 gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible."

32. Mr. Gupta argued, and in our view rightly, that the object of the IBC is to first try and revive the company and not to spell its death knell. This objective cannot be lost sight of, when exercising powers under Section 7 of the IBC or interpreting the said Section. Mr. Gupta argued that, where there are favourable orders in favour of the Corporate Debtor, implementation of which would enable the Corporate Debtor to liquidate its debt, the NCLT is not denuded of the power to defer the hearing of the petition under Section 7 of the IBC.

33. Mr. Gupta argued that the Appellant is in its current situation for no fault of its own, but due to the statutory authorities as noted by APTEL in Appeal No.192 of 2016. MERC has prevented the Appellant from availing the benefit of favourable orders passed by APTEL.

34. Mr. Dhruv Mehta, Senior Advocate appearing on behalf of the Respondent Financial Creditor, has strenuously opposed this appeal, emphasizing on the fact that the Appellant Corporate Debtor had admittedly defaulted in payment of its dues to the Respondent Financial Creditor. He submitted that the Appellant being in admitted default, the Adjudicating Authority (NCLT) rightly declined stay of proceedings initiated by the Respondent Financial Creditor under Section 7(5) of the IBC.

35. In support of his aforesaid submission, Mr. Mehta cited Swiss Ribbons Private Limited and Anr. v. Union of India and Ors. 2. The relevant portion of the judgment relied upon by Mr. Mehta in this context is set out hereinbelow:-

> "64. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation."

36. Mr. Mehta argued that Section 7(5)(a) of the IBC cast a mandatory obligation on the Adjudicating Authority to admit an application of the Financial Creditor, under Section 7(2), once it was found that a Corporate Debtor had committed default in repayment of its dues to the Financial Creditor. This is what the Adjudicating Authority (NCLT) has done.

37. Mr. Mehta argued that the application under Section 7 of the IBC was filed by the Respondent Financial Creditor before the NCLT, Mumbai on 15th January 2020. The debt due from the Appellant to the Respondent Financial Creditor was approximately Rs.553 Crores. The total debt owed by the Appellant to the consortium of lenders of which the Respondent Financial Creditor is the lead bank was approximately Rs.2727 Crores.

2 (2019) 4 SCC 17 (Para 64)

38. Mr. Mehta argued that the Appellant Corporate Debtor has, on one pretext or the other, attempted to delay the insolvency proceedings, notwithstanding the concurrent findings of NCLT and NCLAT that occurrence of default is not disputed. Mr. Mehta submits that since the application under Section 7 of the IBC had been filed in the NCLT, it has been listed on innumerable occasions, without any effective hearing.

39. Mr. Mehta submitted that the application for stay filed by the Appellant was heard on 14th July 2020 and later re-heard on 29th January 2021, on which date the application was rejected. Even after the order dated 29th January 2021, rejecting the Appellant's application for stay, proceedings under Section 7 of the IBC have not progressed at all.

40. Mr. Mehta emphatically argued that the object of the IBC was to set up an effective legal framework for resolution of insolvency and bankruptcy in a time bound manner, to encourage entrepreneurship and facilitate investment for higher economic growth and development.

41. Referring to sub-section (4) of Section 7 of the IBC, Mr. Mehta argued that the Adjudicating Authority (NCLT) is mandatorily required to ascertain existence of the default from the records of an information utility or on the basis of other evidence furnished by the Financial Creditor under sub-section (3) of Section 7, within 14 days of receipt of an application under sub-section (2) of Section 7 of the IBC. If the Adjudicating Authority does not ascertain the existence of default, it is bound to record its reasons in writing for not doing so.

42. Mr. Mehta argued that in this case, there was no dispute that the Appellant had defaulted in payment of its dues to the Respondent Financial Creditor. The Adjudicating Authority was obliged to admit the application under Section 7 of the IBC in terms of Section 7(5)(a) of the IBC. There are no grounds to interfere with the concurrent findings of the NCLT and the NCLAT.

43. Mr. Mehta also relied on the judgment of this Court in Innoventive Industries Ltd. v. ICICI Bank and Another 3 to argue that the object of the IBC was to provide a framework for expeditious and time bound insolvency resolution. Section 7(5)(a) of the IBC had, therefore, necessarily to be construed as mandatory in the light of the objects of the IBC.

44. The IBC has been enacted for reasonably expeditious, time bound insolvency resolution of, inter alia, corporate bodies as observed by this Court in Swiss Ribbons (supra). As observed by this Court in Swiss Ribbons (supra) timely resolution of a Corporate Debtor, who is in the red, by an effective legal framework and process, would go a long way to support the development of the 3 (2018) 1 SCC

407 credit market.

45. As per the Statement of Objects and Reasons of the IBC, and its preamble, the objective of the IBC is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals, in a time bound manner, inter alia, for maximization of the value of the assets of such persons, promoting entrepreneurship and availability of credit, balancing the interest of all the stakeholders and matters connected therewith or incidental thereto.

46. Prior to enactment of the IBC, there was no single law in India that dealt with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies could be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and the Companies Act, 2013. These statutes provided for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts.

47. The framework that had existed for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delay. After a lot of deliberation and discussion and pursuant to reports of various committees including, in particular, the Bankruptcy Law Reforms Committee (BLRC), the IBC has been enacted to provide an effective legal framework for timely resolution of insolvency and bankruptcy.

48. In Innoventive Industries Ltd. v. ICICI Bank (supra), this Court speaking through Nariman J., referred to the Report of the BLRC and observed:

> "16. At this stage, it is important to set out the important paragraphs contained in the Report of the Bankruptcy Law Reforms Committee of November 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:
>
> "...India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt.
>
> ....the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.
>
> When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend....

> The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned...

Speed is of essence Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay....

The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

(1) Low time to resolution.

(2) Low loss in recovery.

(3) Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

Principles driving the design The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework: I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

(1) The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency....

II. The Code will enable symmetry of information between creditors and debtors.

(5) The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

(6) The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

(7) The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional. III. The Code will ensure a time-bound process to better preserve economic value.

(8) The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

IV. The Code will ensure a collective process.

(9) The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution. V. The Code will respect the rights of all creditors equally.

(10) The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency. VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding. (11) The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases...."

49. The new Insolvency and Bankruptcy framework has been designed, inter alia, to facilitate the assessment of viability of an enterprise at a very early stage, and to ensure a time bound Insolvency Resolution Process to preserve the economic value of the enterprise.

50. Section 6 of the IBC provides that where any Corporate Debtor commits a default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate the CIRP in respect of such Corporate Debtor.

51. Under Section 7(1) of the IBC, a Financial Creditor may, either by itself, or jointly with other financial creditors, file an application for initiating CIRP against a Corporate Debtor, before the Adjudicating Authority (NCLT) when a default has occurred. Default includes a default in respect of a financial debt owed not only by the applicant Financial Creditor but to any other Financial Creditor of the Corporate Debtor.

52. Under Section 7(2) of the IBC, a financial creditor is required to make an application in the prescribed form and manner, along with the prescribed fee. Along with an application, the financial creditor is required to furnish record of the defaults recorded with the information utility or such

other record or evidence of default as may be specified, the name of the Resolution Professional proposed to act as an Interim Resolution Professional and any other information as may be specified by the Board.

53. From a perusal of the application filed by the Respondent Financial Creditor under Section 7(2) of the IBC in the statutory form, a copy whereof is included in the Paper Book, it is apparent that the Respondent Financial Creditor filed the application in the NCLT for initiation of CIRP against the Appellant in its individual capacity and not as lead bank on behalf of the other creditors. The Respondent Financial Creditor claimed that a total amount of Rs.553,27,99,322.78 was due from the Appellant Corporate Debtor to the Respondent Financial Creditor, of which Rs.42,83,45,538.32 was on account of the interest and further Rs.11,21,68,673.81 towards penal interest. The principal outstanding amount was Rs.499,22,85,110.65.

54. When an application is filed under Section 7(2) of the IBC, the Adjudicating Authority (NCLT) is required to ascertain the existence of a default from the records of the information utility or any other evidence furnished by the financial creditor under sub-section (3) of Section 7 of the IBC, within 14 days of the date of receipt of the application,

55. Section 7(5)(a) of the IBC, on which much emphasis has been placed both by Mr. Gupta and Mr. Mehta, provides that where the Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application under sub-Section (2) of the IBC is complete and there is no disciplinary proceeding against the proposed Resolution Professional, it may by order, admit such application. If default has not occurred, or the application is incomplete, or any disciplinary proceeding is pending against the proposed Resolution Professional, the Adjudicating Authority (NCLT) may reject such application in terms of Section 7(5)(a) of the IBC, but after giving the applicant opportunity to rectify the defect.

56. Both, the Adjudicating Authority (NCLT) and the Appellate Tribunal (NCLAT) proceeded on the premises that an application must necessarily be entertained under Section 7(5)(a) of the IBC, if a debt existed and the Corporate Debtor was in default of payment of debt. In other words, the Adjudicating Authority (NCLT) found Section 7(5)

(a) of the IBC to be mandatory. The Adjudicating Authority (NCLT) was of the view that Section 7(5)(a) did not admit any other interpretation, with which the Appellate Tribunal (NCLAT) agreed.

57. The Appellate Tribunal (NCLAT) affirmed the finding of the Adjudicating Authority (NCLT) that the Adjudicating Authority was only required to see whether there had been a debt, and the Corporate Debtor had defaulted in making the repayments. These two aspects, when satisfied, would trigger Corporate Insolvency. Since the Adjudicating Authority (NCLT) did not consider the merits of the contention of the Respondent Corporate Debtor, the only question in this appeal is, whether Section 7(5)(a) is a mandatory or a discretionary provision. In other words, is the expression ‘may’ to be construed as ‘shall’, having regard to the facts and circumstances of the case.

58. Referring to the judgment of this Court in Swiss Ribbons (supra), the Adjudicating Authority (NCLT) held that the imperativeness of timely resolution of a Corporate Debtor, who was in the red, indicated that no other extraneous matter should come in the way of expeditiously deciding a petition under Section 7 or under Section 9 of the IBC.

59. There can be no doubt that a Corporate Debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the Corporate Debtor are not extraneous matters.

60. The Adjudicating Authority (NCLT) found the dispute of the Corporate Debtor with the Electricity Regulator or the recipient of electricity would be extraneous to the matters involved in the petition. Disputes with the Electricity Regulator or the Recipient of Electricity may not be of much relevance. The question is whether an award of the APTEL in favour of the Corporate Debtor, can completely be disregarded by the Adjudicating Authority (NCLT), when it is claimed that, in terms of the Award, a sum of Rs.1,730 crores, that is, an amount far exceeding the claim of the Financial Creditor, is realisable by the Corporate Debtor. The answer, in our view, is necessarily in the negative.

61. In our view, the Appellate Authority (NCLAT) erred in holding that the Adjudicating Authority (NCLT) was only required to see whether there had been a debt and the Corporate Debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP. The Adjudicating Authority (NCLT) was require to apply its mind to relevant factors including the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control, the impact of MERC's appeal, pending in this Court, order of APTEL referred to above and the over all financial health and viability of the Corporate Debtor under its existing management.

62. As pointed out by Mr. Gupta, Legislature has, in its wisdom, chosen to use the expression "may" in Section 7(5)(a) of the IBC. When an Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application of a Financial Creditor is complete and there are no disciplinary proceedings against proposed resolution professional, it may by order admit the application. Legislative intent is construed in accordance with the language used in the statute.

63. The meaning and intention of Section 7(5)(a) of the IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.

64. Ordinarily the word "may" is directory. The expression 'may admit' confers discretion to admit. In contrast, the use of the word "shall" postulates a mandatory requirement. The use of the word "shall" raises a presumption that a provision is imperative. However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.

65. It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation, as held by this Court in Lalita Kumari v. Government of Uttar Pradesh and Ors.4 If Section 7(5)(a) of the IBC is construed literally the provision must be held to confer a discretion on the Adjudicating Authority (NCLT).

66. In Hiralal Rattanlal v. State of Uttar Pradesh 5, this Court held:-

4 (2014) 2 SCC 1 (para 14) 5 (1973) 1 SCC 216 "22. ... In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear."

67. In B. Premanand v. Mohan Koikal6, this Court held:-

> "9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. SEBI [(2004) 11 SCC 641] ."

68. In Lalita Kumari v. Government of Uttar Pradesh (supra), this Court construed the use of the word "shall" in section 154 (1) of the Code of Criminal Procedure 1973 and held that Section 154(1) postulates the mandatory registration of an FIR on receipt of information of a cognizable offence. If, however, the information given does not disclose a cognizance offence, a preliminary enquiry may be ordered, and if the enquiry discloses the commission of a cognizable offence, the FIR must be registered.

69. As argued by Mr. Gupta, had it been the legislative intent that Section 7(5)(a) of the IBC should be a mandatory provision, 6 (2011) 4 SCC 266 Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in Section 7(5)(a) of the IBC. Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction.

70. Section 8 of the IBC relates to the initiation of CIRP by an Operational Creditor. There are noticeable differences between the procedure by which a Financial Creditor may initiate CIRP and the procedure by which an Operational Creditor may apply for CIRP.

71. The Operational Creditor is, on occurrence of a default, required to serve on the Corporate Debtor, a demand notice of the unpaid Operational Debt, or a copy of an invoice demanding payment of the amount involved in the default of the Corporate Debtor. Within ten days of receipt of the demand notice or copy of the invoice, the Corporate Debtor may respond by drawing the notice of the Operational Creditor to the existence of a dispute, in relation to the claim or to the payment of the unpaid operational debt.

72. Section 9 prescribes the mode and manner by which an Operational Creditor can make an application for initiation of CIRP. After expiry of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the Corporate Debtor or notice of dispute, the Operational Creditor may file an application before the Adjudicating Authority (NCLT) for initiation of CIRP.

73. Sub-Section (5) of Section 9 of the IBC reads:-

> "9(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order
>
> (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,--
>
> (a) the application made under sub-section (2) is complete;
>
> (b) there is no payment of the unpaid operational debt;
>
> (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
>
> (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
>
> (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.
>
> ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if--
>
> (a) the application made under sub-section (2) is incomplete;
>
> (b) there has been payment of the unpaid operational debt;
>
> (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

74. Sub-section (5) of Section 9 of the IBC provides that the Adjudicating Authority (NCLT) shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of Section 9, admit the application and communicate the decision to the Operational Creditor and the Corporate Debtor, provided, the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied. The Adjudicating Authority (NCLT) must reject the application of the Operational Creditor in the circumstances specified in clauses (a) to (e) of Section 9(5)(ii) of the IBC.

75. Significantly, Legislature has in its wisdom used the word 'may' in Section 7(5)(a) of the IBC in respect of an application for CIRP initiated by a financial creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor.

76. The fact that Legislature used 'may' in Section 7(5)(a) of the IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority 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 Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

78. The Legislature has consciously differentiated between Financial Creditors and Operational Creditors, as there is an innate difference between Financial Creditors, in the business of investment and financing, and Operational Creditors in the business of supply of goods and services. Financial

credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the Corporate Debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a Financial Creditor cannot be compared with that of an Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an Operational Creditor than on a financial creditor.

79. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.

80. The IBC, as observed above, is intended to consolidate and amend the laws with a view to reorganize Corporate Debtors and resolve insolvency in a time bound manner for maximization of the value of the assets of the Corporate Debtor.

81. The title “Insolvency and Bankruptcy Code” makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.

82. The Adjudicating Authority (NCLT) failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise. Moreover the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same.

83. In Swiss Ribbons (supra) this Court considering the vires of the IBC observed as follows:-

> “43. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a ”default” occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a

> default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected."

84. The judgment of this Court Swiss Ribbons (supra), which was rendered in the context of a challenge to the vires of the IBC, does not consider the question of whether Section 7(5)(a) of the IBC is mandatory or discretionary. It is well settled that a judgment is a precedent for the question of law that is raised and decided. The language used in a judgment cannot be read like a statute. In any case, words and phrases in the judgment cannot be construed in a truncated manner out of context.

85. Legislature has, in its wisdom made a distinction between the date of filing an application under Section 7 of the IBC and, the date of admission of such application for the purpose of computation of timelines. CIRP commences on the date of admission of the application for initiation of CIRP and not the date of filing thereof. There is no fixed time limit within which an application under Section 7 of the IBC has to be admitted.

86. Even though Section 7 (5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

87. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition.

88. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realisation. The example is only illustrative.

89. In this case, the Adjudicating Authority (NCLT) has simply brushed aside the case of the Appellant that an amount of Rs.1,730 Crores was realizable by the Appellant in terms of the order

passed by APTEL in favour of the Appellant, with the cursory observation that disputes if any between the Appellant and the recipient of electricity or between the Appellant and the Electricity Regulatory Commission were inconsequential.

90. We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC.

91. For the reasons discussed above, the appeal is allowed. The impugned order dated 29th January 2021 passed by the Adjudicating Authority (NCLT) and the impugned order dated 2 nd March 2021 passed by the Appellate Authority (NCLAT) dismissing the appeal of the Appellant are set aside. The NCLT shall re-consider the application of the Appellant for stay of further proceedings on merits in accordance with law.

.....J [INDIRA BANERJEE] .....J [J.K. MAHESHWARI] JULY 12, 2022;

NEW DELHI.