

**SUPREME COURT – NCLT VESTED WITH
DISCRETIONARY POWERS WHILE ADJUDICATING AN
APPLICATION UNDER S. 7 OF THE IBC**



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SUPREME COURT – NCLT VESTED WITH DISCRETIONARY POWERS WHILE ADJUDICATING AN APPLICATION UNDER S. 7 OF THE IBC

In a recent ruling in **Vidarbha Industries Power Limited v. Axis Bank Limited**[1], the Supreme Court has held that the Adjudicating Authority while examining the existence of debt and default by a corporate debtor in an application for initiation of corporate insolvency resolution process (“**CIRP**”) filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”), has the discretion to admit or not admit such application. The Court held that Section 7(5)(a) of the Code[2] confers a discretionary power on the Authority to admit an application filed by a financial creditor for initiation of CIRP and such power is required to be exercised with caution.

The Corporate Debtor, i.e., Vidarbha Industries Power Limited (“**VIPL**”), a power generating company was permitted by the Maharashtra Electricity Regulatory Commission (“**MERC**”) to execute a Power Purchase Agreement with Reliance Industries Limited (“**RIL**”) under which, VIPL had to supply power to RIL. During the subsistence of the said agreement, certain disputes arose with respect to rise in operational costs and capping of tariff between VIPL and MERC which were eventually adjudicated by the Appellate Tribunal for Electricity (“**APTEL**”). APTEL passed an order awarding VIPL a sum

[1] Civil Appeal No. 4633 of 2021

[2] “7. Initiation of corporate insolvency resolution process by financial creditor. –

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(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”

of INR 1,730.00 crore pursuant to which VIPL filed an application for implementation of this APTEL order before MERC whereas MERC moved an appeal before the Supreme Court against the APTEL order. In view of the appeal, VIPL was short of funds and unable to clear its liabilities.

Meanwhile, Axis Bank Limited (“**Axis Bank**”) initiated insolvency proceedings against VIPL under Section 7 of the Code before the National Company Law Tribunal (“**NCLT**”). Naturally, VIPL requested the NCLT to stay the insolvency proceedings on account of MERC’s pending appeal before the Supreme Court but the same was refused on the ground that no extraneous matter could come in the way of expeditiously deciding insolvency proceedings.

Further, the NCLT opined that satisfaction on two aspects, i.e., existence of debt and default by the corporate debtor, are sufficient to trigger CIRP against a corporate debtor. Upon challenge to the NCLT order, the National Company Law Appellate Tribunal upheld NCLT’s view. Subsequently, the present appeal was filed before the Supreme Court to determine 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. On this issue, the Court examined the view adopted by both Tribunals regarding the timeline to be followed for proceedings under the Code. The Court observed that whilst insolvency proceedings should be resolved expeditiously, the APTEL order awarding INR 1730.00 crore to VIPL could not be completely disregarded as it has the potential to effectively alter the financial position of VIPL.

The Court further stated that the existence of debt and default only qualifies a creditor to apply for initiation of CIRP. For admission of such application, the NCLT is required 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 the Supreme Court, and the overall financial health and viability of the corporate debtor under its existing management.

One of the contentions made during the course of arguments before the Court was that the usage of the word 'may' in Section 7(5)(a) indicates the legislative intent that the Adjudicating Authority need not admit an application by the financial creditor in each and every case. To correctly evaluate this argument, the Court drew comparison between the Section 7(5) and Section 9(5) of the Code [3] and determined that the former provision uses the term 'may' while the latter uses the term 'shall'. Such differentiation in otherwise almost identical provisions relating to initiation of CIRP shows that 'may' and 'shall' in the two provisions intend to convey a different meaning. It is apparent that the legislature intended Section 9(5)(a) to be mandatory and Section 7(5)(a) to be discretionary as it was never the objective of the Code to penalize solvent companies temporarily defaulting in repayment of its financial debts, by initiation of CIRP.

Thus, a discretionary power has been conferred under Section 7(5)(a) to the NCLT by the Legislature to admit an application of a financial creditor and initiate CIRP on satisfaction

[3] "9. Application for initiation of corporate insolvency resolution process by operational creditor. –

xxx

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order."

of the existence of a financial debt and default on part of the corporate debtor in payment of the debt, unless there are good reasons not to admit the petition.

In view of the aforesaid the Supreme Court allowed the appeal holding that the Tribunals committed a grave error in holding that once a debt and default is identified, it has to mandatorily admit the application under Section 7 of the Code and directed the NCLT to reconsider VIPL's application for stay on insolvency proceedings on merits in accordance with law.

By way of this ruling, the Supreme Court has clarified the scope of powers of the NCLT as set out in **Innoventive Industries Limited v. ICICI Bank & Anr.**[4] wherein it was held that the Adjudicating Authority under Section 7 of the Code must admit an application upon satisfaction that there exists a debt and default of such debt by the Corporate Debtor, unless such application is incomplete for which the applicant is given an opportunity to rectify the application within a specified period of time. However, the present judgment now also requires to admit the application under Section 7 of the Code not only upon existence of a debt and default, but also upon consideration of factors which could considerably impact the financial health of the corporate debtor.

[4] Civil Appeal Nos. 8337-8338 of 2017

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