

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD**

SPECIAL BENCH - COURT 1 (VEDIO CONFERENCE)

PRESENT: HON'BLE SHRI BHASKARA PANTULA MOHAN – MEMBER JUDICIAL

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI - MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 28.04.2021 AT 10:30 AM

| | |
|---|--------------------------------------|
| TRANSFER PETITION NO. | |
| COMPANY PETITION/APPLICATION NO. | CP (IB) No. 463/7/HDB/2019 |
| NAME OF THE COMPANY | Mahendra Investment Advisors Pvt Ltd |
| NAME OF THE PETITIONER(S) | Simplex Infrastructure Ltd |
| NAME OF THE RESPONDENT(S) | Mahendra Investment Advisors Pvt Ltd |
| UNDER SECTION | 7 of IBC |

Counsel for Petitioner(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
| | | | |
| | | | |

Counsel for Respondent(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
| | | | |
| | | | |

ORDER

Orders passed vide separate sheets.

MEMBER (TECHNICAL)

MEMBER (JUDICIAL)

**THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.463/7/ HDB/ 2020

**U/S 7 OF I&B CODE, 2016 READ WITH
RULE 4 OF I & B (AAA) RULES, 2016.**

IN THE MATTER OF

Messrs Mahendra Investment Advisors Private Limited

In the matter between :

M/s Simplex Infrastructures Limited
Regd Office: 'SIMPLEX HOUSE'
27, Shakespeare Sarani
Kolkata - 700017
West Bengal.

**.. Petitioner
Financial Creditor**

VERSUS

M/s Mahendra Investment Advisors Private Ltd
Regd Office: Door No.1-7-293
Mahatma Gandhi Road
Secunderabad- 500003.
Telangana, India.

**.. Respondent
Corporate Debtor**

Date of order: 28.04.2021

Coram:

**HON'BLE SHRI BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**

Parties / counsels present:

For the Petitioner : Mr. T.V.L. Narasimha Rao, Advocate

For the Respondent: Mr. A. Venkatesh, Advocate.

Per: SHRI VEERA BRAHMA RAO AREKAPUDI

(Handwritten marks)

(Handwritten signature)

MEMBER (TECHNICAL)

Heard on: 21.12.2020, 16.12.2020, 18.01.2021, 15.02.2021 and 23.02.2021.

AVERMENTS :

The petitioner was originally incorporated as Simplex Concrete Piles (India) Limited on 19.12.1924 under the Companies Act, 1913 and under the name of Simplex Concrete Piles (India) Limited, having duly passed necessary special resolution in terms of section 21/22(1)(a)/ 22(1)(b), 31(1), 43A(4), 44(2)(b) of Companies Act, 1956 and approval of the Central Government signified in writing having been accorded thereto in the Department of Company Affairs.

2. The Assistant Registrar of Companies, West Bengal, Kolkata vide Order dated 08.11.2005 (page 14) has changed name of the company to Simplex Infrastructures Limited pursuant to ROC's letter No.NCR/ CN/ 4969/ 2005 dated 08.11.2005.

3. The Registered Office of the company is situated in West Bengal. The objects of the company are enumerated in the Memorandum of Association (page 17) and Articles of Association (page 30).

4. The respondent/ company is established with an object to provide financial services of investment and advice as mentioned in the Memorandum and Articles of Association (ANNEXURE R-2/ page 16 of the Counter).

5. The present application is filed by the financial creditor/ Messrs Simplex Infrastructure Ltd against Corporate Debtor/ Messrs Mahendra Investment Advisors Pvt Ltd. for a default as under:

Total amount of debt granted .. Rs.5,00,00,000/-
(Rupees five crores only)

Amount claimed to be in default and the date on which the default occurred:

| Number of default | Under what heads | Amount Rs. | Date of default | Page No. |
|-------------------|------------------|------------|-----------------|----------|
| First | Principal | 5.00 crore | 04.01.2012 | 94 |

| | | | | |
|--------|---|---|------------|-----|
| | Outstanding interest payable upto 31.10.2012 | 6.15 crore (Reinvested being principal and interest) | 01.11.2012 | 95 |
| Second | Reinvested principal amount of Rs.6.15 crore | Rs.7.15 crore being outstanding net + interest. | 30.09.2013 | 96 |
| Third | Reinvested amount of Rs.7.15 crore. | Rs.8.20 crore being aggregate + interest | 31.07.2014 | 97 |
| Fourth | Reinvested amount of Rs.8.20 crores. | Rs.9,18,26,520/- being aggregate of principal plus interest. | 31.03.2015 | 98 |
| Fifth | Reinvested amount of Rs. 9,18,26,520/-. | Rs.10,83,55,294/- being reinvested principal + accrued net interest. Order of Hon'ble High Court of Calcutta staying Trial Court's order. | 31.03.2016 | 117 |
| Sixth | Rs.13,68,54,221/- being value of decree as on 31.03.2019. | Legal Notice demanding to pay an amount of Rs.13,68,54,221/- being value of decree as on 31.03.2019. | | 122 |

6. Particulars of financial debt as claimed by the applicant in Part-V, Form-1 is as under:

6.1 The applicant has approached the Hon'ble High Court of Calcutta against the respondent/ Corporate Debtor and the Hon'ble High Court

decreed the claim of the Financial Creditor for a sum of **Rs.10,83,55,294/-** and directed the same to be paid by the Corporate Debtor in 20 EMIs. In default the Financial Creditor is entitled to interest @ 12% p.a. on the net amount defaulted. Order dated 20.09.2017 of the Hon'ble High Court at Calcutta in GA No.422 of 2017/ CS No.10 of 2017 is at ANNEXURE-I(p), page 104). Aggrieved by the said order the respondent has preferred appeal. Admitting the appeal the Hon'ble High Court of Calcutta issued interim directions vide order dated 12.10.2017 (ANNEXURE-I(r), page 117 of the petition) that,

" the appellant (Mahendra Investment Advisors Pvt Ltd) to deposit the aforesaid sum as and by way of security within four weeks from the date with the Registrar, Original Side. The Registrar, Original Side shall invest the said money into a short term fixed deposit in any nationalised bank and shall go on renewing the same until further order that may be passed in the instant appeal.

There shall be an unconditional stay of the operation of the judgment an decree for a period of four weeks. During the aforesaid interregnum period, the appellant is restrained from alienating, encumbering and disposing of any of the assets either belonging to the company or to tis directors without the leave of the court."

6.2 It is submitted in Form-1, Part-V of Othe petition that the Corporate Debtor has failed to deposit the amount as confirmed by the Assistant Registrar, High Court of Calcutta vide letter dated 22.12.2017 (ANNEXURE I(s), page 121). Thus, the decree dated 20.09.2018 reached finality.

6.3 However, as can be seen from the status of appeal filed at ANNEXURE R-11 to the counter that the appeal is pending.

7. **COUNTER DATED 22.10.2019 FILED BY THE RESPONDENT/ CORPORATE DEBTOR.**

7.1 It is submitted that Reserve Bank of India has issued Notice dated 17.02.2014 (ANNEXURE R3) under section 45 IA of RBI Act, 1934 questioning qualification of the Corporate Debtor to be a non-banking financial company as the RBI was under apprehension that the respondent was accepting deposits from public. The respondent vide letter dated 08.03.2014 (ANNEXURE R4) had clarified that it is not accepting deposits from public. The RBI has been periodically verifying

the status of the respondent as a non-banking financial company (NBFC).
(para 5)

7.2 It is submitted that the respondent/ company being NBFC is regulated by RBI and would fall within the scope of financial service provider as defined under the Act and therefore, not amenable to the provisions of the I&B Code. (para 6)

7.3 It is further submitted that CIRP process can be initiated only against a corporate person as defined under the Act and under section 3(7) of the I&B Code, CIRP cannot be initiated against any financial service provider as they are exempted under the Code. Said section is reproduced hereunder:

“3. Definitions. – *In this Code, unless the context otherwise requires, -*

(7) “corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;”

7.4 It is submitted that the respondent is engaged in Non-Banking Finance business and the applicant is a NBFC. (para II (8))

7.5 It is further submitted that the applicant/ company entered into a contract dated 12.04.2010 with the respondent’s group company, viz. M/s Gati Infrastructure Bhasmey Power Pvt Ltd., for the purpose of executing an erection work and other necessary works in connection with power plant at Bhasmey, Sikkim. The applicant has breached several terms of the contract causing huge loss of more than Rs.500 crores to the respondent’s group company. The respondent’s group company has initiated arbitration proceedings, which are pending. (para 9)

7.6 It is further submitted that the applicant during the time of execution of work had a contractual obligation to furnish guarantee/ security under the Contract dated 12.04.2010. The applicant has failed to provide bank guarantee and has offered to furnish corporate guarantees. The applicant has paid an amount of Rs.5,00,00,000/- (Rupees five crores only) as security. Hence transaction dated 04.07.2011

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even though termed as **Inter Corporate Deposit**', (ANNEXURE R5, page 41 to the Counter) the same is taken as **security** furnished by the applicant for execution of the contract dated 12.04.2010. (para 10)

7.7 It is submitted that the applicant committed several breaches of the terms of contract. Several commercial OP's were filed under section 9 of the Arbitration and Conciliation Act before the Hon'ble XXIV Additional Chief Judge cum Commercial Court and the same has been disposed of. The dispute has been referred to the Arbitral Tribunal and the proceedings are at the stage of final hearing. Copy of Claim Statement, Statement of Defence and Counter Claim are at ANNEXURES R6 to R8 to the Counter.

7.8 It is submitted that the applicant has filed a suit before the Hon'ble High Court of Calcutta being GA No.422 of 2017 and CS No.10 of 2017 seeking to recover Rs.12,51,61,644/-. The Hon'ble High Court passed decree dated 20.09.2017 (ANNEXURE R9) against the respondent. Aggrieved by the same the respondent preferred appeal vide PA No.19 of 2017. The Hon'ble High Court has admitted the appeal vide order dated 12.10.2017 (ANNEXURE R-10) and granted conditional stay that the respondent had to deposit decree amount by way of security within four weeks. It is submitted that the appellate proceedings before the Hon'ble High Court of Calcutta as well as arbitration proceeding are pending. Hence the petition is liable to be dismissed. (paras 12 and 13)

7.9 The respondent contended that the applicant has approached the Tribunal by suppressing material facts and by misleading the Tribunal. (para 14)

7.10 The respondent denies the contents of Form-1, Part-IV of the application. The applicant has issued **Inter-corporate Deposit only as an alternative to the security**/ guarantee, which is to be issued as contractual obligation under the contract entered between the group's company of the respondent and the applicant. Thus, there is neither debt nor default to initiate CIRP. Even otherwise the respondent being NBFC does not come under section 7 of IBC. (para 16)

7.11 It is alleged that the applicant is trying portray the deposit of amount towards Performance Bank Guarantee under the contract dated





12.04.2017 (sic.) with respondent's group company, as a separate transaction of 'Inter-Corporate Deposit' (ICD). The applicant has not explained why the Financial Creditor has not taken action against the respondent for non-payment of alleged ICD and interest thereon for six years. (para 18)

7.12 It is further submitted that an exception is carved out while enacting the I&B Code that Financial Service Provider are kept outside the purview of the Code. It is submitted that the Code cannot be applied to Financial Service Providers including non-banking financial companies and MFI Banks, which have been kept outside purview of the Code. (para 19)

8. REJOINDER DATED 06.11.2019 FILED BY THE PETITIONER.

8.1 The petitioner contended that the respondent/ Corporate Debtor does not deny the extent of liability to the petitioner and that the Corporate Debtor has even admitted the same before the Hon'ble Calcutta High Court in GA No.422/ 2017 and CS No.10/ 2017.

8.2 It is submitted that the respondent/ Corporate Debtor has not produced any evidence to claim that the Corporate Debtor is recognised and registered as NBFC by RBI under section 45 IA of RBI Act, 1934. In this regard the petitioner has relied on para 20 of order dated 24.10.2019 passed by this Tribunal in CP (IB) No.193/7/ HDB/ 2019 (in the matter between **SEW Infrastructures Ltd Vs. Mahendra Investment**).

8.3 Paras 4 to 7 deal with the proceedings before the Hon'ble Calcutta High Court. Said proceedings are dealt with in subsequent paras.

8.4 The petitioner denied the allegation of suppression of material facts levelled by the Corporate Debtor as the Financial Creditor has filed copy of court orders at Annexure I(r), page 117-119 along with the petition.

9. REVISED WRITTEN SUBMISSIONS DATED 08.01.2020 FILED ON BEHALF OF THE PETITIONER.

9.1 The petitioner has furnished chronology of events of default as under:



| Date | Event | Anne-xure | Page No. |
|-----------------------------------|---|-----------|----------|
| 04.07.2011 | Petitioner placed Rs.5.00 crore as ICD with the respondent. | I (d) | 91 |
| 06.04.2012 | CD issued balance confirmation of Rs.5,66,88,525/- to the petitioner. | I (k) | 99 |
| 01.11.2012 (FIRST DEFAULT) | CD defaulted in repayment of principal and interest. The net accrued amount of Rs.6.15 crores was reinvested for 3 months. | I (g) | 95 |
| 01.04.2013 | CD issued balance confirmation of Rs.6,60,79,644/-. | I(l) | 100 |
| 01.10.2013 (SECOND DEFAULT) | CD defaulted in repayment of principal and interest. The net accrued amount of Rs.7.15 crore was reinvested for 6 months. | I (h) | 96 |
| 01.04.2014 | CD issued balance confirmation of Rs.7,79,17,370/-. | I (m) | 101 |
| 26.09.2014 (THIRD DEFAULT) | CD defaulted in repayment of principal and interest. The net accrued amount of Rs.8.20 crore was reinvested for 8 months | I (i) | 97 |
| 01.04.2015 | CD issued balance confirmation of Rs.9,18,26,520/- | I (n) | 102 |
| 30.03.2016 (FOURTH DEFAULT) | CD defaulted in repayment of principal and interest. The net accrued amount of Rs.9,18,26,520/- was reinvested repayable on demand. | I (j) | 98 |
| 01.04.2016 | CD issued balance confirmation of Rs.10,83,55,294/- | I (o) | 103 |
| FIFTH DEFAULT | CD defaulted in repayment of principal and interest. The net accrued amount of Rs.10,83,55,294/-. | | |

9.2 As discussed hereinabove the Corporate Debtor has failed to deposit the amount as directed by the Hon'ble Calcutta High Court, as

confirmed by the Assistant Registrar, High Court of Calcutta vide letter dated 22.12.2017 (ANNEXURE I(s), page 121).

9.3 The Hon'ble High Court of Calcutta has dismissed the appeal preferred by the Corporate Debtor for default vide order dated 19.12.2019 (page 7 of these Written Submissions). (para 16)

9.4 The petitioner has relied on newspaper report that the Corporate Debtor and the co-promoters of M/s Gati Ltd. have entered into an agreement with M/s Allcargo Logistics Solutions Limited to part with 44% of shares of the former to the latter.

9.5 The petitioner, in para 21 of this Revised Written Submissions, has relied on para 20 of order dated 24.10.2019 passed by this Tribunal in CP (IB) No.193/7/ HDB/ 2019 (in the matter between SEW Infrastructures Ltd Vs. Mahendra Investment). The said para is reproduced hereunder:

*"20. It is true, except letter and reply, **Corporate Debtor has not filed any authorisation** or registration given by RBI recognising Corporate Debtor as **financial service provider**. Therefore, the Corporate Debtor cannot take any protection on the ground that it is NBFC and objects of the company is also to do financial services."*

10. AFFIDAVIT DATED 17.11.2020/ 18.11.2020 FILED BY THE PETITIONER.

10.1 It is submitted that the Hon'ble Calcutta High Court has restored the appeal to the file on 13.02.2020 on an application filed by the respondent/ Corporate Debtor vide GA No.72 of 2020 in APD No.474 of 2017, while no stay was granted on the impugned decree. During the pleadings of restoration application, the respondent/ Corporate Debtor has paid Rs.25 lacs to the petitioner on 17.02.2020 by Demand Draft. A copy of order dated 13.02.2020 passed by the Hon'ble Calcutta High Court is at page 5 of this Affidavit. (para 7)

10.2 The Hon'ble Calcutta High Court of Calcutta vide order dated 24.03.2020 (page 7 of this Affidavit) passed in GA 791 of 2020 with APD 474 of 2017, CS 10 of 2017 observed as under:



“Since the operation of the decree has not been stayed, it is open to the respondent (Simplex Infrastructure Limited) to levy execution and seek the necessary protection. The injunction sought would not fall within the scope of appeal.”

11. AFFIDAVIT DATED 21.11.2020/ 14.12.2020 FILED BY THE RESPONDENT.

The respondent by way of this Affidavit narrates the chronology of proceedings before the Hon'ble Calcutta High Court and gives updated status of appeal preferred by the Corporate Debtor as '**pending**' and that there is '**no subsisting interim orders as on date**'.

12. UPDATED BRIEF WRITTEN SUBMISSIONS DATED 11.12.2019/ 14.12.2019 FILED BY THE PETITIONER.

12.1 The petitioner gives chronology of proceedings before the Hon'ble Calcutta High Court, which were discussed in the preceding paras. The petitioner further provides dates on which the Corporate Debtor gave balance confirmations, which too were discussed in preceding paras.

12.2 The petitioner deals with the main contentions of the Corporate Debtor, which are as under:

- (1) The Company Petition is barred by limitation.

The petitioner submits that as per section 238A of the I&B Code read with Article 137 of the Limitation Act, 1963, Company Petition can be filed within three years from the date of cause of action. On this issue the petitioner relies on decision of the Hon'ble Supreme Court in the matter of **JIGNESH SHAH Vs. UNION OF INDIA** in WP (Civil) No.455 of 2019.

- (2) The Corporate Debtor claims to be NBFC and hence it is Financial Service Provider. In this context the petitioner relies on order dated 24.10.2019 passed by this Tribunal in CP (IB) No.193/7/ HDB/ 2019 between SEW Infrastructure Ltd Vs. MIAPL.

- (3) The petitioner and GIBPPL are engaged in arbitration proceedings for reciprocal claim and counter claim while the latter amount is more than the former amount. GIBPPL is a group company of the respondent. Under the hypothetical assumption of succeeding in the above arbitration in favour of GIBPPL, the respondent/





Corporate Debtor intends to avoid its liability against the counter claim receipt of its group company.

- (a) The petitioner contends that hypothetical success of GIBPPL against the petitioner cannot be a defence for avoiding the claim of the petitioner.
- (b) If GIBPPL succeeds against the petitioner/ Financial Creditor in its counter claim, it has separate and independent remedies to recover without any privity to the respondent/ Corporate Debtor.
- (c) No set off is possible for liabilities between the petitioner Vs. GIBPPL on one hand and between the petitioner/ Financial Creditor Vs. respondent/ Corporate Debtor on the other.
- (d) ICD by respondent/ Corporate Debtor with petitioner/ Financial Creditor is never an alternative security to guarantee the performance by petitioner/ Financial Creditor in the project assigned by GIBPPL.

13. UPDATED BRIEF WRITTEN SUBMISSIONS DATED 18.12.2020/ 21.12.2020 FILED BY THE PETITIONER.

The contents of these submissions are reiteration of earlier submissions, viz. amount reinvested from time to time, proceedings before the Hon'ble Calcutta High Court, petition being time-barred, Corporate Debtor being NBFC, etc. Such contentions were discussed in the preceding paras.

14. UPDATED BRIEF WRITTEN SUBMISSIONS DATED 23.02.2021 FILED BY THE PETITIONER.

No new contention/ submission could be found in these Written Submissions. The contents of these submissions are reiteration of earlier submissions, viz. amount reinvested from time to time, proceedings before the Hon'ble Calcutta High Court, petition being time-barred, Corporate Debtor being NBFC, etc. Such contentions were discussed in the preceding paras.

WRITTEN ARGUMENTS DATED 10.03.2021/ 12.03.2021 BY THE RESPONDENT.

15. It is submitted that a decree-holder is not a Financial Creditor under section 5(8) of the I&B Code, 2016. To emphasise the contention, the respondent relies on decision of the Hon'ble NCLAT in the matter of

SUSHIL ANSAL Vs. ASHOK TRIPATHI AND OTHERS, 2020 SCC Online NCLAT 680 (paras 20 and 23).

16. It is further submitted that the petitioner herein on one hand has filed suit for recovery of the alleged amount and on the other hand has invoked jurisdiction under section 7 of the I&B Code. Such an action attracts section 65 of the I&B Code. The respondent relies on the following decisions of the Hon'ble NCLAT:

- (i) HDFC Bank Ltd Vs. Bhagwan Das Auto Finance Ltd., 2019 SCC Online NCLAT 1338 (paras 3-6),
- (ii) International Asset Reconstruction Co. Pvt Ltd Vs. Jayant Vitamins Ltd., 2019 SCC Online NCLAT 1293 (paras 2 and 3), and
- (iii) C. Shivakumar Reddy Vs. Dena Bank and others, 2019 SCC Online NCLAT 907. (paras 12 and 13).

17. On the point of limitation the respondent relies on decisions in the matter of (i) B.K. Educational Services Pvt Ltd Vs. Parag Gupta, (2019) 11 SCC 633 (paras 12 to 22, 34 to 42), and (ii) Babulal Vardharji Gujar Vs. Veer Gujar Aluminium Industries Pvt Ltd & another, 2020 SCC Online SC 647 (para 90).

18. On the point that the petitioner tried to enlarge the scope of limitation on the ground that the petitioner was pursuing litigation before the Hon'ble High Court of Calcutta. To contend that such claim is not permissible the respondent relied on decisions in the matter of (i) Digamber Bhondwe Vs. JM Financial Asset Reconstruction Company Ltd., 2020 CC Online NCLAT 399 (paras 17-21), and Jagdish Prasad Sarada Vs. Allahabad Bank, 2020 SCC Online NCLAT 621.

OBSERVATIONS

19. We have heard the learned counsel for the petitioner/ Financial Creditor as well as the learned counsel for the respondent/ Corporate Debtor through videoconference. Both sides filed Written Submissions/ Counter/ Rejoinder. Summary of such Written Submissions on both the sides is stated supra.



20. In the present case the following questions arise for our consideration:

- (i) Whether debt and default are proved?
- (ii) Whether the present petition is hit by Article 137 of the Limitation Act, 1963 or section 238A of Limitation Act, 1963?
- (iii) Whether the respondent/ Corporate Debtor is NBFC?

(i) WHETHER DEBT AND DEFAULT ARE PROVED?

While we analyse the documents produced it is revealed that the petitioner/ Financial Creditor has granted a debt or Inter-Corporate Deposit of Rs.5,00,00,000/-, on 04.11.2011, as claimed by the petitioner. Whereas, according to the respondent/ Corporate Debtor, the said amount was Inter-Corporate Deposit for a period of three months deposited towards Performance Bank Guarantee under the impugned contract. The Corporate Debtor also claimed that the said amount of Rs.5 crores provided as security. Hence transaction dated 04.07.2011 even though termed as '**Inter Corporate Deposit**', (**ANNEXURE R5**, page 41 to the Counter) the same is taken as security furnished by the applicant for execution of the contract dated 12.04.2010.

We observe that the respondent/ Corporate Debtor had acknowledged balance confirmation vide the letters dated 01.04.2013, 01.04.2014, 01.04.2015 and 01.04.2016 issued by the petitioner/ Financial Creditor, for the alleged first, second, third and fourth defaults, which are annexed at Annexure I(R) (page 100), Annexure I(m) (page 101), Annexure I(n) (page 102) and Annexure I(o) (page 103) of the petition. Said acknowledgements read that,

"I/ We confirm and certify that the above statement of A/c received from you is true and correct."

Such certification by the respondent/ Corporate Debtor can be considered as an admission of debt.

(ii) WHETHER THE PRESENT PETITION IS HIT BY ARTICLE 137 OF THE LIMITATION ACT, 1963 OR SECTION 238A OF LIMITATION ACT, 1963?



Article 137 of the Limitation Act, 1963 provides for three years. Whereas, section 238A of the I&B Code reads as under:

“238-A. Limitation- The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

As we see there are five defaults occurring on different dates. Since limitation period is three years from the date of cause of action it is for the petitioner/ Financial Creditor to explain the date of default qua particular transaction and satisfy that there is no delay. The petitioner submits that as per section 238A of the I&B Code read with Article 137 of the Limitation Act, 1963, Company Petition can be filed within three years from the date of cause of action. To emphasise this point, the petitioner relied on decision of the Hon'ble Supreme Court in the matter of **JIGNESH SHAH Vs. UNION OF INDIA** in WP (Civil) No.455 of 2019.

The alleged defaults had occurred between 01.04.2013 and 01.04.2016. Whereas the present petition is filed on 07.05.2019. If limitation period is reckoned between the date of latest default and the date of filing the present petition, there cannot be any delay.

(iii) Whether the respondent/ Corporate Debtor is NBFC?

This Adjudicating Authority has noticed in para 20 of order dated 24.10.2019 in CP (IB) No.193/7/ HDB/ 2019 (in the matter between SEW Infrastructures Ltd Vs. Mahendra Investment) that the respondent/ Corporate Debtor is not NBFC. The respondent has failed to provide any proof of registration as NBFC from the regulator, i.e. Reserve Bank of India. As such, we cannot rely on a mere statement made by the respondent in this regard.

21. It is true that in an application filed under section 7 of the I&B Code, the Tribunal has to see whether debt and default exist. It is not in dispute that the Financial Creditor disbursed an amount of Rs.5,00,00,000/- (Rupees five crores), and statements of accounts have been confirmed by the Corporate Debtor. Other contentions raised by the learned counsel for the Corporate Debtor cannot be entertained since the Financial Creditor is able to establish the debt and default. Therefore, the

petition is required to be admitted against the Corporate Debtor. After going through the documents filed by the petitioner we are of the view that the petition is liable to be admitted against the Corporate Debtor. The petition is accordingly admitted.

22. In the light of the fact that the respondent/ Corporate Debtor has acknowledged the debt, confirmed and certified that the Statements of Accounts received by the Corporate Debtor from the petitioner are true and correct as can be seen from the documents at Annexure I(R) (page 100), Annexure I(m) (page 101), Annexure I(n) (page 102) and Annexure I(o) (page 103) of the petition. The present petition, therefore, deserves admission.

ORDER

23. Hence, the Adjudicating Authority admits this Petition under Section 7 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

(A) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(B) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(C) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.



(D) That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

(E) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(F) That this Bench hereby appoints Shri Adinarayana Babji Kota having registration No.001/ IP-P00850/ 2017-2018/ 11433, as Interim Resolution Professional, whose contact details are:

e-mail ID: kotababji@gmail.com

Address: 3-1-211, Upstairs, Somasundram Street
Secunderabad – 500003
Telangana State.

as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

(G) Proposed IRP filed Form-2 issued by the Institute of Insolvency Professionals. Authorisation for Assignment is valid upto 21.12.2021. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

24. Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

25. Accordingly, this Petition is admitted.


VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)


BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)