



IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.301

C.P. (IB)/76(AHM)2022

Order under Section 7 IBC

IN THE MATTER OF:

Kotak Mahindra Bank Limited

.....Applicant

V/s

Kunal Structure (India) Private Limited

.....Respondent

Order delivered on: 10/01/2025

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is listed today for pronouncement of order. The members are dissenting on following points:

- (a) Whether the admission of Corporate Debtor into CIRP can be once again kept in abeyance based on the order of Vidarbha Industries Power Ltd?
- (b) Whether corporate debtor can be admitted/rejected into CIRP on merits?

The Registry is directed to place the record before the Hon'ble President under Section 419(5) of the Companies Act, 2013 for constitution of appropriate 3rd Member for his opinion, so that the order in in CP(IB) 76 of 2022 is rendered in accordance with the opinion of majority.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

CP(IB) No. 76 of 2022

[Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016.)]

IN THE MATTER OF:

Kotak Mahindra Bank Limited
Registered Office; 27 BKC, C-27, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai-400051
Branch Office-
Shop No. 401 to 406, 4th Floor,
Siddhi Vinayak Complex,
Shivranjani Cross Roads,
Satellite, Ahmedabad-380015.

....Petitioner/Financial Creditor

Versus

Kunal Structure (India) Private Limited
1205 to 1207, 12th Floor,
Shilp Epitome, B/s.
Infostrecch, Behind Rajpath
Club Road, Bodakdev
Ahmedabad GJ-380054

....Respondent/Corporate Debtor

Order pronounced on 10.01.2025

Coram:

MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)

MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)

**Present:**

For the Applicant : Mr. Harshal Patel, Adv.

Bank officer present physically

For the Respondent : Mr. Devang Nanavati, Sr. Adv.
a.w. Mr. Viswash K Shah, Adv.

JUDGEMENT

1. This application was initially filed before this Tribunal on which certain orders were pronounced on 17.01.2023, keeping the proceedings in the petition pending for 6 months from that date, to enable the CD to settle the dues within the time given or necessary orders will be passed, with further directions to the CD not to sell the assets mortgaged with the applicant or other financial creditors without approval of this authority. The application was observed to have been filed within the period applicable as per the limitation act. It was directed that the registry list this application after 6 months. This matter was relisted after hearing the applicant in IA 1042 of 2023 on 06.10.2023 and the proceedings were again commenced.
2. The brief of the case is given as under: An application filed by the Financial Creditor viz. M/s. Kotak Mahindra Bank Limited under Section 7 of Insolvency and Bankruptcy Code



2016 (hereinafter referred to as "IBC, 2016") against the Corporate Debtor viz. M/s. Kunal Structure (India) Pvt. Ltd. seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. It is submitted that the respondent has a presence in the construction business needed financial assistance to purchase construction equipment for its business and sought loan facilities.

3. In Part II of the application, it is stated that the corporate debtor was incorporated on 05.04.2006 with the Authorised Capital of Rs.5,50,00,000/- (Rupees Five Crores Fifty Lakhs) and the paid-up capital of Rs.5,03,00,000/- (Rupees Five Crores Three Lakhs). In Part III of the Application, the Financial Creditor proposed the name of Mr. Sachin Dinkar Bhattbhatt having Registration No. IBBI/IPA-003/IP-N00138/2017-2018/11514 as Interim Resolution Professional. In Part IV of the application, the default amount is stated to be Rs.18,11,06,790.12/- as on 19.01.2022. The original sanction was for an aggregate amount of Rs.11,80,26,600/- sanctioned as separate Construction Equipment Loans (15) with various drawals on various dates



with separate sanctions on an application starting from 01.09.2017 to 17.03.2021. The respondent executed various documents including guarantees, Demand Promissory Notes etc. It is further submitted that the applicant had lent under the Emergency Credit Line Guarantee Scheme announced by the Ministry of Finance, GOI on 13.05.2020 to aid eligible Business Enterprises/MSME sectors in view of the economic distress caused by the COVID-19 pandemic. The applicant after obtaining necessary clearances from other financial creditors who had lent to the respondent, namely ICICI Bank, Axis Bank, Yes Bank, Tata Capital Financial Services and HDB Financial Credit Services, whereby it is observed that the respondent was complying with the requirements of GOI for sanction of the loan under the scheme and was not a stressed asset (NPA), was granted Working Capital Term Loan by way of Guaranteed Emergency Credit Line (GECL) for an aggregate amount of Rs.14,67,51,600/-. The various sanction letters are dated 24.12.2020, 31.12.2020, 11.01.2021, 27.01.2021, 10.02.2021 & 17.03.2021 being proportionate to approx. 20% of the exposure of the respective loans granted by the aforementioned banks who



had given the clearance. The terms of the sanction were agreed upon by the respondent. The applicant has listed in his application the 6 loans as WCTL aggregating the stated amount. This exposure becomes the composite exposure of the applicant and has enclosed all the relevant sanction letters and term loan agreements. Under the sanction, the rate of interest is at 8.25% per annum which is different from the original sanction as the sanction is now made under the ECLGS facility. The loan is backed by 100% guarantee from the National Credit Guarantee Trustee Company (NCGTC) to the applicant bank. The applicant has stated that *“even if the financial facilities are 100% guarantee backed from the NCGTC, it is still due and recoverable from the CD and is to be compensated to the NCGTC from the amounts to be recovered from the CD”*. The applicant has sanctioned the loan to the respondent after obtaining the necessary NOCs from the mentioned other creditors (banks/FIs).

4. It is stated that the CD was not making payment as per the repayment schedule and became unsatisfactory and failed and neglected to clear the repayment schedule. The applicant issued legal notices on 13.11.2021, 19.01.2022, and



27.01.2022 and called upon the respondent to repay the loan. However the same was not paid. It is stated that the CD had to repay the loans at contractual rates of interest on the Construction Equipment loans and WCTL loans and thereby a total amount of Rs.18,11,06,790.12/- is remaining outstanding due to be recovered from the respondent. The applicant has enclosed the outstanding facility-wise. Since there is no reply to the legal notices and the applicant finds that the respondent has not paid the amount due and payable to the applicant and is not likely to pay other creditors as he is otherwise commercially insolvent has preferred this application for insolvency under Sec 7 of IBC. It is also observed that certain applications filed before the DRT are still pending. There are also other applications filed by other operational creditors.

5. The respondent had initially filed its reply on 02.06.2022. The objection in the matter included that the applicant had various sanction letters along with various contracts and agreements which cannot be merged into one petition. Thereby there were 21 loan agreements, their repayment, duration, default, and rate of interest are all different and



distinct. The respondent relied on the judgment of Hon'ble NCLAT in the case of International Road Dynamics South Asia Pvt Ltd V Reliance Infrastructure Ltd bearing CA No.72 of 2017, wherein it was held that "We are of the view that different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate. For the said reasons, we hold that the joint application preferred by the appellant under Sec 9 is defective, as distinct from incomplete, and, was not maintainable." The above proposition was also held by the Hon'ble NCLT Mumbai in CP (IB) 982 of 2020 in International Road Dynamics South Asia Pvt Ltd which was upheld by Hon'ble NCLAT. It is further stated that the creditor has also filed OA no.71 of 2022 before the Ld DRT I Ahmedabad which is still pending and Sec 7 application cannot be a recovery proceeding and the applicant has suppressed the same before the Tribunal. Further, the applicant has failed to prove the avilment and disbursement of the loan to the CD and no record of default has been placed on record by any information utility. The respondent has



denied that the account is NPA and stated that nothing is placed on record that the account is NPA. Further, it is submitted that the company is a contractor for infrastructure projects of government companies and is holding various arbitral awards aggregating to the tune of Rs. 30 crores. There are arbitral awards against NHAI dated 26.06.2018 for Rs.20,27,39,408/- (3 member award) and 2 awards against Rajkot Municipal Commissioner dated 25.01.2018 and execution of these are pending. Hence submitted that the company is a solvent company and has enclosed copies of the awards mentioned in its reply. The respondent also filed an additional affidavit dated 18.07.2022 wherein the judgment of Hon'ble Supreme Court in Vidarbha Industries Power Ltd V Axis Bank in Civil Appeal No.4633 of 2021 is cited, specifically on the discretion that could be exercised by the Adjudicating Authority in favour of CD with regard to the admission of Sec 7 application especially when such award/decretal amount exceeds the amount of debt. From the statement enclosed an amount of Rs 41,23,68,943/- has been decreed along with interest to be recovered by CD from the Municipal Commissioner Rajkot and NHAI. The



respondent further stated that its case is similar to the Vidarbha Industries judgment and hence the Adjudicating Authority may dismiss the application under Sec 7 of the IBC. During the resumed hearings, the respondent reiterated the points and also stated that it has been paying other creditors including the applicant in the interim period as and when he is realising from the awards, however, the respondent stated that certain preferential payments have been made to other creditors.

6. It is also observed that a Special Civil Application No.20325 of 2023 (Converted from SCA/35521/2023 dated 01.12.2023) has been filed before the Hon'ble High Court of Gujarat praying to quash and set aside this impugned CP (IB) 76 of 2022 pending before this Tribunal which was withdrawn without pressing by the applicant (respondent/CD). In that petition, the respondent had included the applicant, Rajkot Municipal Corporation, NHAI and the NCLT Ahmedabad.
7. The applicant filed a further additional affidavit in compliance with an order dated 22.11.2023 stating that no settlement has been reached between the parties and on voluntary



surrendering of a few hypothecated vehicles/construction equipment the bank had auctioned the properties and realised an amount of Rs.1,55,67,274/- after filing the application and certain loan accounts (5) were closed and as on 04.12.2023 an amount of Rs.24,93,60,863.03/- is outstanding in all the accounts of the CD. No viable proposal for settlement was received and hence submitted to proceed with this application.

(PER MRS. CHITRA HANKARE HON'BLE MEMBER (JUDICIAL))

8. Perused written submissions filed by both the parties.
9. From the application, it appears that loan facilities were granted to the Corporate Debtor and there was default in repayment from May 2021 to July 2021. As on 19.01.2022, there were total claim of Rs. 181106790.12. Demand notices were issued on 13.11.2021, 19.01.2022 and 21.01.2022 and application was filed on 11.03.2022. Thus, application is within limitation.
10. Main defence of the Corporate Debtor is to keep the proceedings in abeyance. Corporate Debtor relied upon judgment of Vidarbha Industries Power Limited V. Axis Bank



Limited. As mentioned above, this defence was considered in the order dated 17.01.2023. Para 19 of the said order states as under:

“19. From the facts of this case it is apparent that there is a debt of Rs. 18.11 crore, which is within limitation, and the corporate debtor has defaulted in its payment. Thus, all ingredients for admission into CIRP under Section 7 of IBC are present in this case. However, as guided by Hon’ble Supreme Court in the case of Vidarbha Industries Power Limited, and on consideration of the decision of Indore Bench in the case of Krishidhan Seeds Private Limited cited supra, we find it proper to keep this proceeding for admission under Section 7 of IBC, 2016 in abeyance for six months from today. We make it clear that if the corporate debtor fails to settle the due debts within the time given, we will be constrained to pass further orders. We further direct the corporate debtor not to sell the assets mortgaged with the applicant or other financial creditors without approval of this Adjudicating Authority.”

11. Accordingly, matter was kept in abeyance for six months from the date of this order i.e. 17.01.2023. Since then, till date i.e., in January 2025, two years have already passed. During this



two years, Corporate Debtor has failed to repay the debt amount though admitted. Still Corporate Debtor relied upon Vidarbha Industries Power Limited V. Axis Bank Limited and insisting to keep the proceedings in abeyance on the same ground i.e., he has to receive an amount of Rs.41 crores through arbitration award. The Corporate Debtor stated in written submissions that though warrant of attachment was issued by the District Court, same was stayed by the Hon'ble Gujarat High Court. While it has paid Rs.2.99 crores to the applicant. He has also mentioned that he is intending to sale some of the assets. However, since last two years, no assets were sold by the Corporate Debtor so as to repay the debt amount to the applicant.

12. The Hon'ble Supreme Court in *M. Suresh Kumar Reddy v. Canara Bank & Ors.* (Civil Appeal No. 7121 of 2022) vide Judgement dated 11.05.2023, has held that once the NCLT is satisfied that the default as occurred, there is hardly any discretion left with the NCLT to refuse admission of the application under Section 7 of the IBC. Moreover, same facility cannot be granted again and again.



13. The Corporate Debtor has relied upon various judgements. However, it is pertinent to note that his request was accepted by the Tribunal and time was granted to it for repayment. In spite of expiry period of 6 months, the Corporate Debtor has not repaid the debt amount. He is not able to make payment since lapse of two years from the date of earlier order keeping this application in abeyance. In such circumstances, no further time can be granted to the Corporate Debtor to pay amount by keeping application in abeyance. The amount of debt is huge and matter is also pending since long. Though the opportunity was given to the Corporate Debtor to repay the amount for more than two years, he failed to repay the debt amount. Thus default is admitted.
14. According to the Corporate Debtor, all the loan agreement cannot be clubbed together. However, those are part of one and the same facility i.e., Construction Equipment Loan.
15. Though three demand notices were issued by the applicant, Corporate Debtor has not replied to any of them.
16. All the requirements of Section 7 application are fulfilled. Though earlier, applicant has suggested name of IRP, in the written submissions, they have mentioned that the Tribunal



may appoint any local IRP from the panel of Insolvency Professional.

17. In view of the above, we pass the following order:

ORDER

- I. The corporate debtor – Kunal Structure (India) Private Limited, is admitted in CIRP under Section 7 of the IBC, 2016.
- II. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14 (1) shall follow in relation to the Corporate Debtor, prohibiting actions as per clauses (a) to (d) of Section 14 (1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall remain in force.
- III. We appoint Mr. Sushil Vishwakant Tewary, having Reg. No.IBBI/IPA-001/IP-P01288/2018-2019/12049, email – sushilt@hotmail.com under Sec.13(1)(c) of the Code to act as Interim Resolution Professional ("IRP") of Corporate Debtor, subject to the condition that no disciplinary proceedings are pending against him. He shall conduct the CIRP as per the IBC, 2016 r.w. Regulations made thereunder.



- IV. The IRP shall perform all his functions contemplated, inter-alia, by sections 17, 18, 20 & 21 of the IBC, 2016. It is further made clear that all personnel connected with the Corporate Debtor, its Promoter or any other person associated with the management of the Corporate Debtor are under legal obligation under section 19 of the IBC, 2016 for extending assistance and co-operation to the IRP. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or co-operate the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
- V. This Adjudicating Authority directs the IRP to make a public announcement of the initiation of CIRP and call for the submission of claims under section 15 as required by section 13(1)(b) of the IBC, 2016.
- VI. The IRP is expected to take full charge of the Corporate Debtor assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities



to render all assistance as may be required by the IRP in this regard.

- VII. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- VIII. The IRP shall be under duty to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern as a part of obligation imposed by Sec.20 of the IBC, 2016.
- IX. The Financial Creditor is directed to pay an advance of Rs.2,00,000/- (Rupees Two Lakh Only) to the IRP within a period of 7 days from the date of this order to meet the cost of CIRP arising out of issuing public notice and inviting claims etc. till the CoC decides about his fees/expenses.
- X. The Registry is directed to communicate a copy of this order to the Financial Creditor, Corporate Debtor and to the IRP and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after the pronouncement of the order. The Registrar of Companies shall update its website by updating the Master Data of the



Corporate Debtor in MCA portal specific mention regarding admission of this Application and shall forward the compliance report to the Registrar, NCLT.

- XI. The IRP shall also serve a copy of this order to the various departments such as Income Tax, GST (centre), State Trade Tax, Provident Fund etc. who are likely to have their claim against Corporate Debtor as well as to the trade unions/employees associations so that they are informed timely of the initiation of CIRP against the Corporate Debtor timely.
- XII. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

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CHITRA HANKARE
MEMBER (JUDICIAL)



**(PER DR. V. G. VENKATA CHALAPATHY HON'BLE MEMBER
(TECHNICAL))**

8. The respondent filed a written submission by affidavit on 05.12.2022 reiterating the same points including defects in the application filed, quoting the judgments of Hon'ble Supreme Court in Vidarbha Industries and Honble NCLAT ND in Company Appeal (AT) (Ins) 1342 of 2022 wherein it is stated that "Be that as it may, the fact that there is already an award to pay Cash Security of Rs.3,64,58,785 with interest, which award has already been put in execution by the FC, this was reason good enough to refuse admission of Sec 7 application. It has now been laid down by the Hon'ble Supreme Court in Vidarbha Industries Power Ltd V Axis Bank limited that admission of Sec 7 application is not obligatory merely on proof of debt and default". Further, the respondent had also relied upon the CA certificate issued for the solvency of the CD filed as Annex C on page 8 of the affidavit dated 22.10.2022. A further affidavit from the respondent dated 29.06.2024 placing on record certain subsequent developments including payment of Rs.2.99 crores to the respondent bank and also intending to sell some machinery



for which negotiations are with the buyer and that it has given proposal in the context of 2 awards passed against Rajkot Municipal Corporation, it proposes to issue a garnishee order in favour of the applicant. Further, in the light of the order dated 05.12.2023 by the Hon'ble High Court of Gujarat, the submission is that IA requires to be heard first and dealt with independently prior to hearing the captioned CP(IB) No.76 of 2022. However, it is also observed that the respondent has filed an affidavit to withdraw the surviving prayers in SCA No.20325 of 2024 and on 28.02.2024 the Hon'ble High Court permitted the withdrawal. The respondent also filed a written submission dated 11.09.2024, listing the Sundry Debtors, list of deposits held, list of properties and further stating that he had offered a settlement proposal to the applicant on 02.09.2024 which is in response to the email dated 30.08.2024 from the applicant. As per the statements enclosed, it is observed that the respondent has a recoverable amount due for the last 6 months amounting to Rs. 29,76,38,609/- (Group summary from 1 April 2024 to 9 Sept 2024), Customer Deposits on contracts amounting to Rs.109,61,41,492/- and various




properties both residential and commercial valued at Rs.180,10,25,235/-. These assets far exceed the liability of the applicant apart from the arbitral awards due for realisation stated to be around 32 crores (total amount with interest as per affidavit dated 16.02.2024 at Rs.71.83 crores) in the letter dated 02.11.2024. Further, the same letter dated 02.09.2024 also states that apart from paying Rs.2.99 crores and engaging in discussions with the applicant to sell further machineries hypothecated, they had offered to pay Rs. 10 crores received by them in the award passed against NHAI amounting to Rs.10 crores to the applicant which was rejected outright by the applicant, for which they also filed an affidavit before this Tribunal. Apart from this, there is also mention of further recoveries by the sale of machineries proposed which was discussed in the meeting dated 25.07.2024.

9. During the discussions, the respondent offered to escrow the amount of due entirely through the realisation of these awards, further to what is stated in this letter which was not agreed by the applicant.




10. From the documents submitted, and various arguments with repeated affidavits we observe the following:

- a) The respondent is an MSME who is into the construction business and raised loans from other creditors including the applicant. This application is preferred only by Kotak Mahindra Bank Ltd. which is also a secured financial creditor (apart from other petitions by operational creditors) who has also been realising from the machinery hypothecated. Other financial creditors have not preferred any application under Sec 7 or intervened in the matter. The matter was heard and a pass was given for arranging repayments failing which the proceedings will be further heard.
- b) The applicant has bunched the various loan facilities as default without providing proper documents including the NeSL certificate of default and date of NPA. Further, it is a serious concern to be noted that for an MSME Unit, the applicant had extended the Credit facility under the Government of India's Scheme to assist MSME units during the COVID-19 pandemic (scheme dated 13.05.2020) which was sanctioned on various dates



between 24.12.2020 to 17.03.2021, but the applicant has treated them also as default even though as per the term of sanction letter issued these had a 1-year moratorium and the loans were fully guaranteed 100% on default by the Government of India. Even without exercising the option and blatantly stating in the application as stated in Para 1 of this order (in italics) the applicant stated that the option was not exercised as the credit guarantee fund if availed will anyhow have to be repaid through recovery. Thereby the applicant did not invoke the guarantee facility given specifically during the pandemic to the aid and revival of such MSME units, but without any sincerity of having sanctioned the scheme after obtaining the consent of all creditors who have certified and permitted the facility has clubbed the entire facilities from 2017 to 2021 and immediately issued a legal notice stating that there was default. The objection raised in this regard of clubbing the application is thus sustainable and it is highly improper of the applicant to have let off the guarantee facility under which the loan was sanctioned by the Government of India which is a sovereign body and



putting the borrower before insolvency by filing this application. It is also noted from the reply affidavit filed and the additional documents submitted that there have been more than 5 such loans that have been closed after sanction and after the application was filed, thereby proving that the respondent has been sincere, with all efforts inspite of pending arbitral awards which are struck in the business of construction with Government authorities, the applicant argued and wanted to pursue the application, rejecting the proposal given on 02.09.2024.


- c) It is observed that the respondent has various assets but due to the nature of the transactions, there is delay. These arbitral awards have been pending since 2017-18 much before these loans were sanctioned and the applicant should have been well aware when these exposures were created. The last balance sheet filed was of 2021-22 of the CD respondent, who stated that due to certain reasons of not getting details from creditors, they are not able to update further financial statements, however, the outstanding assets as per books have been certified.




d) Further during the hearing, it was observed that the applicant is also in the process of recovering the amounts through the sale of assets and he has also pursued by filing a OA before Hon'ble DRT. Thereby it is clear that the applicant financial creditor has violated a major responsibility in financing an MSME borrower, being the respondent to whom he has sanctioned a Government sponsored scheme and even within a short time when the instalment dues, if any, falls during the Sec 10A period, has without proper listing of the date of NPAs has bunched all his exposure into this application, pursuing recoveries, resisting any settlement or awards for which the respondent is prepared to issue a Grantishee Order. The applicant has not only deviated but also not acted as a responsible banker who has advanced to an important unit involved in contracts for the State Government and NHAI in building highways whose payments are struck in arbitral awards, and there are sufficient securities available to realise his loans with the respondent cooperating in all manner, deliberately and irresponsibly pressing this application under Sec 7 of IBC 2016.




- e) We believe that based on all documents submitted, without going further into the solvency of the respondent, this application is filed by a financial creditor who chose not to invoke a sovereign guarantee if his dues were to be realised, did not account and show the disbursements and date of NPA, did not file the NeSL certificate of default and application deserves to be dismissed as filed with a cause of such action deliberately and stubbornly forced on the respondent to realise the amounts gaining upper hand based on the documents executed at the time of sanction of loan. Both the Vidarbha Industries Judgment and the other Hon'ble NCLAT judgments cited by the respondent apply in this matter and the applicant.
- f) As per the affidavit submitted by the Petitioner in terms of order dated 23 Oct 2024 (clarifications), it is stated that an advance under the Emergency Credit Line Guarantee Scheme (ECLGS) was granted (backed by the guarantee of Government of India) vide sanction letters dated 24.12.2020, 31.12.2020, 11.1.2021, 27.1.2021, 10.2.2021 & 17.3.2021 for an aggregate amount of Rs.14,67,51,600 after obtaining consent from various



other creditors in terms of the scheme. As per clause 18 (xi) and Clause 18(xc) of the Operational guidelines of the stated ECLGS scheme, even if financial facilities is 100% guarantee backed from NCGTC(GOI), it is still due and recoverable from the borrower and is to be compensated to the NCGTC from the amounts to be recovered from the Borrower. Hence applicant did not invoke this guarantee even though the amount due became a default on classification of NPA, which cannot be justified as the Lender opted and granted the scheme based on eligibility. Keeping in view of the Vidarbha Judgment cited, this was a facility or line of credit available to the borrower on soft term basis from the Guarantor which was Government of India and it would be similar to a “Unsecured Borrowing” which should have helped the respondent pay off its liability. This guarantee facility was not invoked by the applicant which was available up to 90 days of the account turning NPA. Further, the coverage available was 100% and Clause 16 of the terms and conditions provide for appropriation of amount realised by the applicant in respect of a credit facility after guarantee has been




invoked, if any recoveries are made in the account, the applicant shall first adjust such recoveries towards the default amount relating to the first charge and the legal cost incurred by them for recovery of the amount and shall thereafter remit to NCGTC the balance recoveries. Hence the ground stated by the applicant, let going the guarantee provided by the NCGTC after granting as per its terms and conditions to respondent, is unwarranted and in case the respondent is admitted to CIRP the same cannot be recovered separately either by the RP or the corporate debtor. This almost gives a secured creditor status on account of the guarantee provided by the Government of India to sustain the corporate debtor in the business due to COVID-19 situation. The applicant had vide affidavit dated 22 March 2022 corrected the default amount from Rs 16,67,51,600 to Rs 26,47,78,200 stating that to be an arithmetical error mentioned in Sl No.1 of Part 4 of Form 1 filed in this petition. Further, the applicant stated vide affidavit 6 Dec 2023 that the corporate debtor had offered various securities for sale, but did not come up a viable settlement proposal, but the affidavit statement, ignores




the guarantee provided through the scheme, which was not invoked by the applicant.

- g) The Respondent had by affidavit dated 29 June 2024 listed various litigations in the matter of his recoveries including arbitral awards pending in courts, being a contractor in various road, infrastructure projects and certain Special Leave Applications pending before Honble High Court of Gujarat. It has stated that an amount of Rs.32.17 crores (Rs.71.83 crores) is to be recovered from the Union and State functionaries being NHAI and Rajkot Municipal Corporation. From the above awards, in context of two awards passed against Rajkot Municipal Corporation, the respondent undertook to provide as Garnishee to the petitioner to repay the loan. The main reason he has not been able to make the payment to the applicant is inspite of arbitral awards and non-release of money from the authorities, the respondent is not able to satisfy the payments. The respondent heavily relies on the Vidarbha Industries Power Judgment vs Axis Bank. The respondent as directed provided his cash flow statements by affidavit dated 11 November 2024. As per the statement his cash




flow during last 6 months was Rs 1269.88 lakhs and net projected cash flow for next month is around Rs. 853.19 lakhs. The respondent has not provided any statement of financial position including audited balance sheet for the last 3 years.

- h) The applicant had issued a demand notice dated 13 Nov 2021 segregating the two loan components respectively as Loan 1 (WC and TL as per earlier facility) and Loan 2(ECLGS). The amount due is mentioned as 3,27,53,642.46 and Rs.15,02,48,058.72 respectively. Keeping aside the issue whether the applicant can prefer this application when the guarantee provided by the NCGTC has not been invoked could be above the threshold limit of Rs 1 crores.
- i) The other creditors have not filed any application under Sec 7 of IBC 2016 and the exposure of financial creditors appear to be of multiple lending, while due to non-submission of balance sheet the total exposure of the financial creditors and whether they are at default is not ascertainable. As per the applicant there are large dues outstanding to the banking system. There are few




applications pending of Sec 9 to be adjudicated. Even though the respondent has shown certain receivables by way of arbitration orders, also pleaded and in affidavit that he could get a garnishee in favour of this lender, this Adjudicating Authority cannot issue any such order as the execution of the awards is before the other court of law which has been pending execution for a long time and the applicant and respondent are aware of the litigations and time period of their realisation.

- j) Further, it would be unjustified if we allow the entire debt of default claimed to be passed on to the corporate debtor for payment immediately without the applicant invoking the ECLGS facility which is a 100% guarantee provided by the Government of India to address the concerns of the industry to which respondent belongs to.
- k) However, debt due for the remaining amount to be claimed has to be satisfied only after the other part of the loan is invoked and claimed failing which there would be mounting debt on the corporate debtor and also becomes ineligible and cannot be claimed by the Financial Creditor after preferring this application. The Scheme does not



envisage a full and conditional payment and is always a clause in such guarantees given to facilitate dispensation of credit lines supported by a GOI scheme. The applicant has also not given further time period by restructuring the facility in consultation with other creditors who also have similar or larger exposure or deciding on offer of such garnishee order from appropriate court/s where the execution petition is pending and has insisted on the insolvency petition, if agreed to the proposal, the recovery and interest to be earned may be higher and will not prejudice the interests of other creditors (around 7) and the corporate debtor. The respondent is not a wilful defaulter whose loans have become NPA during short period and stands covered by protection in major part of credit facility through a guarantee which has not been invoked and realised by the applicant. The projected cash flows during next 6 months seems to be adequate to pay the outstanding if clearly by appropriate arrangement used to repay the first term loan granted by the applicant along with interest with the offer proposed garnishee order in favour of the applicant by the corporate debtor. Further,



as per respondent after issue of Demand Notice, it is stated to have made certain payments to the applicant. While taking in to consideration of the judgment of Honble High Court in Vidarbha Industries Limited, we cannot ignore the non-invocation of guarantee by the applicant and the fresh order of getting a garnishee order in favor of the applicant by the respondent and the cash flows for the next 6 months to be verified by the applicant financial creditor.

11. In view of the above, we pass the following order:

ORDER

The present petition CP(IB) 76 is rejected with liberty to file after invoking the Guarantee facility under ECLGS of the second term loan, if the respondent is not able to repay the remaining debt due outstanding subject to the applicable provisions of IBC 2016.

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**DR.V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)**