

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
29-03-2023 AT 10:30 AM

IA (IBC) 1131/2022 & Rst. A (IBC) 6/2023 in Company Petition IB/12/2021
u/s. 7 of IBC, 2016

IN THE MATTER OF:

Srei Equipment Finance Ltd

...Financial Creditor

VS

Madhucon Projects Ltd

...Corporate Debtor

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

ORDER

CP(IB) No. **IB/12/2021**: Orders pronounced. Recorded vide separate sheets. In the result CIRP is kept in *abeyance for three months* from the date of this order, however by giving liberty to the applicant/financial creditor to *approach this Tribunal if its dues continue to remain unpaid within three months from the date of this order.* The Company Petition is allowed to the extent indicated above and disposed of. No Costs.

IA (IBC) 1131/2022 & Rst. A (IBC) 6/2023

In view of orders passed in main CP, IA 1131/2022 no separate order is required. Since IA No. 1131/2022 is disposed of, Rst.A (IBC) 6/2023 becomes infructuous.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH -I**

C.P. (IB) No.12/7/HDB/2021

(Under **Section 7** of the IBC, 2016 read with Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

BETWEEN:

M/s. SREI EQUIPMENT FINANCE LIMITED

Head Office situated at Plot No.Y-10, Block EP
Sector – V, Salt Lake City, KOLKATA – 700 091
Registered office at “Vishwakarma”, 86C,
TopsiaRoad,Kolkata - 700046
West Bengal
Represented by its Authorized Representative
Shri Prashant Mustii

... Financial Creditor

versus

M/s. MADHUCON PROJECTS LIMITED

Represented by its Managing Director
Plot No.1129/A, Road No.36
Jubilee Hills, HYDERABAD – 500 034
TELANGANA STATE
Corporate office
and also at
H.No. 1-7-70, Jubilee Pura , Khammam
Telangana-507003
Registered office

... Corporate Debtor

Date of order: 29.03.2023

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Hon’ble Member Judicial
Shri Charan Singh, Hon’ble Member Technical

Appearance:

For Petitioner: Shri Deepak Bhattacharjee, Senior Advocate, assisted by Shri Prasoon Das

For Respondent: Shri Hemendranath Reddy, Senior Advocate assisted by Shri Prateek Reddy

PER BENCH

ORDER

1. This Petition is filed by M/s SREI Equipment Finance Limited under Section 7 of *Insolvency and Bankruptcy Code (hereinafter to be referred as "Code")*, read with Rule 4 of *Insolvency and Bankruptcy* seeking initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon, contending that the Respondent defaulted in the payment of alleged debt of Rs. 100,05,77,347/- (Rupees One Hundred Crores, Five Lakhs, Seventy-Seven Thousand, Three Hundred and Forty-Seven Only).
- 2.1 The gist apropos to the Petition in brief is that the Financial Creditor i.e. M/s SREI Equipment Finance Limited, is a Company incorporated under the Companies Act, 1956 and a Non-Banking Financial Company authorized by the Reserve Bank of India.
- 2.2. The Corporate Debtor had availed the following loan facilities for their business and that the credit facility was sanctioned to the Corporate Debtor to the tune of Rs. 40 crores vide contract no. 149204 on 12.11.2017. The details of amount sanctioned and disbursed by M/s.

SREI EQUIPMENT FINANCE LIMITED to the Corporate Debtor is tabulated below:-

Sl.No	Nature of Facility	Amount Sanctioned	Amount Disbursed
01.	Term Loan-Contract No.149204	Rs.4000,00,000/-	Rs. 4000,00,000/-
02.	Bank Guarantee 162083 (4044IPEBG180047)	Rs. 940,50,000/-	Rs. 940,50,000/-
03.	Bank Guarantee 173578 (0002IGPER022618)	Rs. 800,50,000/-	Rs. 800,50,000/-
04.	Bank Guarantee 173580 (0002IGPER022918)	Rs. 963,00,000/-	Rs. 963,00,000/-
05.	Bank Guarantee 173579 (0002IGPER022818)	Rs. 970,50,000/-	Rs. 970,50,000/-
06.	Bank Guarantee 173577 (0002IGPER022518)	Rs. 61,58,000/-	Rs. 61,58,000/-

2.3. It is stated that the Corporate Debtor had entered into a loan agreement with the financial creditor on 26.12.2017. Thereafter, the Corporate Debtor had defaulted in timely servicing of the principal repayments and interest payments for the facilities in relation to the loan accounts since 15th October, 2018.

2.4. According to the Financial Creditor, despite sending various reminders for the default and demand notice dated 09.07.2020 demanding payment

for the outstanding of **Rs.60,93,35,049/-** as on 30.06.2020, with interest pertaining to Term Loan-Contract No.149204, the Corporate Debtor failed to repay the amount.

- 2.5. The Petitioner further states that the Corporate Debtor has shown an outstanding amount of Rs. 13,15,56,295/- in the Balance Sheet for the FY 2019-20 as due and payable to the applicant and moreover in the FY 2021-22 the corporate debtor again admitted default as well as debt is by showing a sum of Rs. 45,08,69,000/- as due and payable to the applicant.
- 2.6. It is further stated by the Financial Creditor that the Corporate Debtor had in its OTS proposal dated 05.12.2020 acknowledged the total outstanding debt as Rs. 40 crores as on 01.08.2020 followed by another OTS proposal wherein, the Corporate Debtor had acknowledged the total outstanding debt amounting to Rs. 49.32 crores as on 31.05.2022, which shows that the Corporate Debtor had time and again admitted to the debt and default. Thus submitting, failure to service the debt by the Corporate Debtor, the Financial Creditor preferred the instant petition seeking initiation of Corporate Insolvency resolution process against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016.
- 3.1. The Corporate Debtor filed counter, *inter alia*, contending that the Financial Creditor cannot initiate CIRP against the Corporate Debtor on

the ground that the date of default is after 25.03.2020 by relying on Insolvency & Bankruptcy Code (Amendment) Ordinance, 2020 that inserted Section 10-A of IBC, 2016 for suspension of the CIRP for any default arising on or after 25.03.2020 to 24.03.2021. The Corporate Debtor further submits that the petition is not maintainable as the date of default mentioned in the application and legal notice issued by the Financial Creditor is beyond 25.03.2020 and that the default is continuing default till 18.08.2020.

- 3.2. The Corporate Debtor further alleges that the financial creditor is inconsistent in mentioning the date of default. According to the Corporate Debtor, the actual date of default is 18.08.2020.
- 3.3. The next plea taken by the Corporate Debtor is that Arbitration proceedings has been initiated by the Financial Creditor in respect of the same claim and is pending before the Arbitrator.
- 3.4. It is contended that the claim of the Financial Creditor against the Corporate Debtor is against the terms and conditions of the loan documents and the amount claimed to be in default is not in accordance with Contract No. 14924. Thus submitting, prayed the Tribunal to dismiss the petition.

4. When the Petition was pending adjudication, the Financial Creditor filed IA No. 376/2022 seeking amendment to the cause title of the Petition in view of appointment of an Administrator, Shri Rajneesh Sharma. This Tribunal vide order dated 03.06.2022 allowed the Application directing the Financial Creditor to amend the cause tile and to file additional counter if any, only to the extent of representation of the Financial Creditor through the Administrator, can be filed within 7 days. Accordingly, the Corporate Debtor has filed Additional Counter dated 18.06.2022, contending that the Administrator appointed by RBI ceases to be functus officio with the appointment of Administrator/IRP by the National Company Law Tribunal, Kolkata Bench in CP (IB) No. 294/2021 in the matter of SREI Equipment Finance Limited in view of Rule 5 of I&B (Insolvency & Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 and Section 11 of IBC.
5. Aggrieved by this Tribunal order passed in IA No. 376/2022 dated 03.06.2022, the Corporate Debtor preferred Writ Petition (SRP No. 34118/2022) before the Hon'ble High Court of Telangana and Hon'ble High Court vide order dated 18.07.2022 allowed the Corporate Debtor to file additional counter and to raise any ground of objection to the

Petitioner filed under Section 7 of IBC. Accordingly, the Corporate Debtor filed 2nd Additional Counter dated 23.11.2022, *inter-alia*, contending as under: -

- 5.1 If the petition is admitted, it will adversely impact the national wide business of the Corporate Debtor but thousands of employees will be at risk.
- 5.2 The Agreement dated 26.12.2017 executed between the parties provides for a Dispute Resolution Mechanism as per Clause 9.11 and in case of any dispute an Arbitrator shall be appointed at the instance of the Financial Creditor and the jurisdiction and applicable law would be that of forums at Kolkata.
- 5.3 That the disruption was caused owing to COVID-19 pandemic and the Corporate Debtor made efforts to settle its obligations with most banks and obtained no dues certificate from them.
- 5.4 That the Financial Creditor failed to consider OTS proposal as well as implementation of Clause 9.11 of the Agreement dated 26.12.2017. It is further contended that the matter is pending before the Arbitrator Mr. Samrat Mukherji since 27.10.2020 much prior to initiation of CIRP proceedings to resolve the matter amicably. The Sole Arbitrator had passed an interim order dated 14.08.2020 and even before allowing the

Corporate Debtor to act upon the directions of the Ld. Arbitrator, the Financial Creditor approached this Tribunal with Section 7 IBC Application.

- 5.5 That the RBI vide notification dated 04.10.2021 superseded the Board of Directors of the Financial Creditor upon initiation of CIRP against the Financial Creditor under Section 227 of IBC, 2016 and co-ordinate Bench, Kolkata admitted the petition and appointed Shri Rajneesh Sharma to act as Administrator as well as IRP vide order dated 08.10.2021. Hence, the petition is hit by Section 11 of IBC.
- 5.6 That the Financial Creditor has approached this Tribunal with unclean hands by suppressing the material facts about pendency of Arbitration Proceedings as well as taking into custody the assets/movables of the Corporate Debtor in pursuance of interim Arbitral order dated 14.08.2020. It is further contended that no decision was taken with respect to the OTS proposal and in the absence of any cogent decision, continuance of CIRP is prejudicial to the interest of the Corporate Debtor.
- 5.7 The Corporate Debtor by placing reliance on the judgement of the Hon'ble Apex Court in Civil Appeal No. 4633 of 2021 in ***Vidarbha Industries Power Limited Vs Axis Bank Limited*** states that the Adjudicating Authority has powers to reject an application, even if there

is existence of debt and to achieve the overall objective of the IBC, which is the revival of the Company and value maximization.

5.8 That the issue of maintainability be decided at the first instance before the matter is heard and decided on merits. It is contended that NCLT cannot proceed with CIRP when the properties are attached by the Enforcement Directorate under Sections 5(1) and 8 of Prevention of Money Laundering Act, 2022. Thus submitting, prayed the Tribunal to dismiss the application.

6. The Financial Creditor filed *rejoinder* to the counter filed by the Corporate Debtor stating as under:-

6.1 The Petitioner deny the contention of the Corporate Debtor that the date of default in the present case is after 25.03.2020. According to the Petitioner, the date of default in the instant case is 15.10.2018, which has been provided in the application filed under Section 7, IBC by the Financial Creditor as such the Corporate Debtor cannot avail the benefit under Section 10A, IBC, inserted by the aforementioned amendment.

6.2. The Financial Creditor further reiterated that “the debt has become due” as defined in the matter between Krishna Kilaru and Another v. Maytas Properties Limited Rep., by its Managing Director, Hyderabad,

MANU/AP/0745/2012 and that the defaulted debt in the present matter is payable since 15.10.2018. To buttress their case, the Financial Creditor further relied Co-ordinate Bench, Kochi in M/s. Al Sadiq Sweets v. M/s. Krisenter Impex Pvt. Ltd., IBA/35/KOB/2020 as-

“ 33. In view of the above discussions, this Tribunal is of the view that the Executive in the Promulgation of the Ordinance to meet an extraordinary situation and to avoid causing further stress to the already beleaguered businesses due to COVID pandemic throughout the world and also in addition affected by the lock down enforced by the State of the Union, all beyond their control have chosen to suspend the filing of any application in relation to defaults arising on or after 25.03.2020 and not prior to it. In this application, the Corporate Debtor on 31.12.2019 assured the Operational Creditor that the shipment of goods would be made within one week, but the same was not shipped on 14.01.2020. The date of refusal to deliver the goods and return the money is not to be treated as the date of default, as the date of default occurred on the date of shipment which was not fulfilled and complied by the Corporate Debtor and the acknowledgement made thereafter. The date of default is the date on which the Corporate Debtor failed to fulfil the obligation. Therefore, it seems that the Corporate Debtor is trying to take undue benefits of the lockdown and Section 10A inserted into the IBC.”

6.3. The Financial Creditor reiterates that they could establish that the Corporate Debtor committed the default in repayment of the sanctioned loan on 15.10.2018 and continued to do so even thereafter, hence, irrespective of the fact as to whether this application to initiate CIRP of the Corporate Debtor was filed after 25.03.2020, the same is maintainable since Section 10A shall not be applicable herein.

- 6.4. In response to the contention of the Corporate Debtor that One Time Settlement was initiated, the Financial Creditor vehemently oppose the contention of the Corporate Debtor that the one-time settlement scheme dated 05.12.2020 as relied upon by the Corporate Debtor in its affidavit in reply as the same has been rejected, since it was not commercially viable to the Financial Creditor and the same has been verbally communicated by the officer of the Financial Creditor on numerous occasions.
- 6.5. In response to the contention of the Corporate Debtor that the Arbitration Proceedings are pending, as such the instant petition is not maintainable, the Financial Creditor submitted that pending arbitration proceedings is not a bar to initiate proceedings under Section 7, IBC. The Financial Creditor placed reliance on the Hon'ble Delhi High Court in Power Grid Corporation OF India Ltd. V. Jyoti Structures Limited, O.M.P. (Comm.) 397/2016 .
- 6.6. The Financial Creditor further submitted that the Corporate Debtor has never denied the existence of debt arising out of the financial facilities availed by it and hence, the present application deserves to be admitted by the Tribunal.

6.7. The admission of debt due and payable by the corporate debtor to the financial creditor can be corroborated from the OTS submitted by the Corporate Debtor, which stands declined being commercially unviable and not feasible. The financial creditor placed reliance on the Hon'ble Supreme Court of India in M/s.Innovative Industries Limited Vs. ICICI Bank reported in (2018) 1 SCC 407, wherein the Hon'ble Supreme Court of India, in its judgment held that once there is a default, the application should be admitted. The relevant portion is reproduced below:-

It is at the stage of [Section 7\(5\)](#), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

6.8 The financial creditor by placing reliance on the judgment of this Tribunal in *Canara Bank Vs. Deccan Chronicle* in CP IB/41/7/2017 and in *Canara Bank Vs. Transstroy (India) Ltd* in CP IB/47/2018, wherein

the same ratio is laid down by this Tribunal, submitted that it has fulfilled all the requirements of Section 7(1) to (5) of the Insolvency and Bankruptcy Code 2016, hence the application is ought to be admitted.

6.9 The Financial Creditor by placing reliance on the Hon'ble Supreme Court order in the case of Innovative Industries (Supra), reiterated that the criteria for this Tribunal to examine is whether the Corporate debtor has committed any "default" or not. Hence, urged the Tribunal to allow the application with costs.

7. In the light of the contest as aforesaid the following **point** emerges for the due consideration by this Adjudicating Authority:

- Whether a financial debt of a sum over rupees one crore is *due and payable* by the respondent to the applicant? If so, whether the respondent has *defaulted* in repayment of the same?

8. We have heard the learned Sr. Counsel Shri Deepak Bhattacharjee assisted by Ld. Counsel Shri Prasoon Das for the Petitioner/Financial Creditor; and, Learned Counsel, assisted by, Learned Counsel, for the Respondent/Corporate Debtor, perused the record, case law and the written submissions.

POINT:

Whether a financial debt of a sum over rupees one crore is *due and payable* by the respondent to the applicant? If so, whether the respondent has *defaulted* in repayment of the same?

9. At the outset it may be stated that the present application being one under section 7 of the I&B Code, 2016, upon establishing existence of a *financial debt* of a sum of over rupees one crore *due and payable* by the respondent/corporate debtor to the applicant/financial creditor, and its *default by the* respondent/corporate debtor, the Adjudicating Authority can *trigger* Corporate Insolvency Resolution Process, herein after referred to as ‘CIRP’, against the respondent herein.
10. This legal position can be traced from the ruling of the Hon’ble Supreme Court of India, in *re, Innoventive Industries Ltd Vs. ICICI Bank*, 2017 SCC OnLine SC 1025, wherein it was held by the Hon’ble Apex Court that,

“30. in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”(Emphasis is ours).

11. Subsequently, Hon'ble Supreme Court of India, in re, Vidarbha Industries Power Limited Vs. Axis Bank Limited in (2022)(8)SCC P352

held that:

“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.”

79.” 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.”

12. Therefore, in light of the above legal *frame* coupled with the *factual matrix* of this case, we proceed to decide the above point.

13. As the corporate debtor contends that it had repaid the entire Term loan availed under the contract No. 149204, availing of Term loan by the corporate debtor vide contract No. 149204 to the tune of Rs. 40 Crores

from the Financial Creditor stands admitted. The corporate also placed the details of the receipt of the above Term loan amount as well as its repayment. Therefore, there is no necessity for us to find existence of financial debt of a sum of over rupees one crore.

14. Ld. Sr. Counsel for the Financial Creditor while accepting receipt of the amounts as mentioned by the Corporate Debtor, contends that the corporate debtor's 'Group' 'Madhucon' had availed various financial facilities from the Financial Creditor herein, even prior availing the Term loan under the contract No. 149204, and defaulted in repayment of the said loans to the tune of Rs.44.42 Crores, and the same is evident from the balance sheet of the Corporate Debtor of FY 2019-2020. Therefore, the repayment that the Corporate Debtor referred to relates to the previous outstanding loans availed by the Corporate Debtor and its group companies and not in respect of the loan availed under the contract No.149204, hence it is untrue to state that the entire Debt amount of Rs.40 Crores vide contract No.149204 has been repaid in full to the Financial Creditor. According to the Ld. Sr. Counsel in an event wherein Rs.40 Crores vide contract No.149204 was repaid by the year 2017 itself, there is no reason whatsoever, for the Corporate Debtor to make OTS proposals dated 05.12.2020 and 18.06.2022 towards the

discharge its liability vide contract no.149204 for an amount of Rs.49.32 Crores Therefore according to the Ld. Sr. Counsel the theory of repayment of the subject debt is false and baseless.

15. Since existence of multiple debts between the applicant and the respondent besides its 'Group', is evident from the entries in the balance sheets of the corporate debtor for the FY 2019-2020 it is necessary to determine to which debt the payment was required to be credited as per facts of this case and law, we profitably rely on Section 59 of Indian Contract Act, 1872, which is as below.

Section 59. Application of payment where debt to be discharged is indicated.

—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly." Illustrations

(a) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes B no other debt of that amount. On the first June, A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note. (a) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes B no other debt of that amount. On the first June, A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note."

(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment. (b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and

demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment."

16. Needless to say, that sections 59 to 61 of the Contract Act gets attracted only when more than one debt is due from a debtor to the creditor. The onus of getting a particular payment appropriated towards a particular debt is on the debtor.
17. The leading English case on the question of appropriation of payment is known as 'Clayton's' case. In that case it was held that where money is due on a current account the debtor has the first right to direct which item any sum paid by him shall discharge. If he does not so direct the creditor may appropriate the payment to any item he chooses.
18. The Indian law is based on Clayton's case. In India it has been repeatedly laid down that if a series of separate debts exists between a creditor and a debtor, the debtor may make payment towards any one of them as he may deem fit and if he specifically appropriates the payment to a particular debt the creditor is not entitled to accept the payment otherwise than in respect of the debt to which it is so appropriated by the debtor. Where, however, the debtor has not taken any advantage of the power conferred upon him by the present section, the creditor is at liberty to apply the payments in liquidation of the lawful debt actually due and payable to him by the debtor. The creditor may apply payment up to the very last moment even up to the time of the trial.
19. Admittedly it is not the case of the corporate debtor herein that it had specifically instructed the Creditor to appropriate the payments to the Term loan under contract No.149204. So much so we do not find

anything wrong on the part of the financial creditor in appropriating the payments towards the earlier debt.

20. Moreover as rightly pointed out by the Ld. Sr. Counsel Shri Deepak Bhattacharjee, in an event wherein the loan of Rs.40 Crores under the contract No 149204 was repaid to the Financial Creditor by 2017 itself as contended, the Corporate Debtor herein had no reason whatsoever to make OTS proposals dated 05.12.2020 and 18.06.2022 towards the discharge its liability due vide contract no.149204 for an amount of Rs.49.32 Crores as admitted in OTS proposals besides, to disclose the said liability in its Annual Financial Statement for the year post 2017. That apart the plea of discharge has emanated only in the additional counter/affidavit filed by the corporate debtor. Admittedly before institution of this application, multiple reminders and also a demand notice on 09.07.2020 has been sent to the Corporate Debtor, and the corporate debtor never raised the plea of discharge of the debt under the loan under contract No149204. Only when the present application for initiation of CIRP has been filed the corporate debtor has come forward with the theory of discharge.
21. We, are therefore of the firm view that the OTS proposals dated 05.12.2020 and 18.06.2022 for the discharge its liability due vide contract no.149204 for an amount of Rs.49.32 Crores besides disclosure of the subject liability in its Annual Financial Statement for the year post 2017 by the corporate debtor estops the corporate debtor from pleading discharge of the very same liability by the year 2017. Thus, the theory of discharge shall fail. Needless to say, that once the theory of

discharge fails, the debt claimed as discharged stares at the Corporate Debtor.

22. In so far as the liability under the bank guarantees to the tune of Rs. 1,76,34,298/- claimed as due and defaulted by the corporate debtor is concerned, even if the submission of the Ld. Sr. Counsel for the corporate debtor Shri Hemendranath Reddy, that the bank guarantees are not even invoked and all the guarantees remain valid till 2023 as such the sum claimed as due under these bank guarantees is unsustainable, is accepted, yet the undisputable fact being nonpayment of Rs. 1.76 Cr towards the commission in respect of the Bank Guarantees by the corporate debtor, which itself is sufficient to hold that the corporate debtor committed default in repayment of financial debt of a sum over Rupees One Crore.
23. Therefore, we unhesitatingly hold that, the applicant financial creditor has successfully established existence of financial debt of a sum over Rupees One Crore, which is due and payable by the respondent/corporate debtor bides its default on the part of the corporate debtor.

The point is answered accordingly.

24. Having held that the financial creditor has successfully established existence of financial debt of a sum over Rupees One Crore, due and payable by the respondent/corporate debtor bides its default on the part of the corporate debtor, we now proceed to decide whether the corporate

debtor is entitled for keeping *the admission in abeyance*, in view of the ruling of Hon'ble Supreme Court of India, in re, Vidarbha, supra, wherein it was held that:.

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.”

79.” 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.”(Emphasis is ours)

25. Hon'ble Supreme Court of India, in re, Vidarbha, supra, in paras 59, 60 & 61 of the Judgement observed that:

“ 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 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, 22 an amount far exceeding the claim of the Financial Creditor, is realizable 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.

(Emphasis is ours)

26. Therefore, in the light of the ruling, *supra*, the Adjudicating Authority must necessarily apply its mind to relevant factors including the feasibility of initiation of CIRP against the corporate debtor and shall not confine the enquiry merely 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, trigger the CIRP, as existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP.

27. According to the Ld. Sr. Counsel for the Corporate Debtor, even if it is assumed without accepting that the corporate debtor has defaulted an amount of Rs. 100,05,77,347/-, there is a Decree dt. 09.08.2019 issued in favor of corporate debtor by District Judge – XIV, Cum Presiding Officer, Commercial Court, Dhanbad for an amount of Rs. 163,55,52,895/- and an Arbitral Award dt. 17.01.2021 for a sum of Rs. 52,62,76,413/- and together the total amount of receivables vide the above said decree and award is much greater than the alleged defaulted debt claimed by financial creditor. Relying on the ruling of Hon'ble Supreme Court in the case of Vidarbha Industries Power Limited supra, Ld. Sr. Counsel for the Corporate Debtor contended that, the alleged debt in default by CD is much lesser than the amounts that it is entitled no justice would be served to admit the Section 7 application and to proceed with CIRP.
28. We have carefully considered the Decree dt. 09.08.2019 issued in favor of corporate debtor by District Judge – XIV, Cum Presiding Officer, Commercial Court, Dhanbad for an amount of Rs. 163,55,52,895/- and an Arbitral Award dt. 17.01.2021 for a sum of Rs. 52,62,76,413/- which together make the total amount of receivables much greater than the

defaulted debt, besides the unrebutted plea that the corporate debtor is a running concern having more than 5000 employees, and are of the firm view that the facts and circumstances of this case warrant keeping the admission of the corporate debtor into Corporate Insolvency Resolution Process (CIRP) in ***abeyance for three months*** from the date of this order, however by giving liberty to the applicant/financial creditor to ***approach this Tribunal if its dues continue to remain unpaid within three months from the date of this order.***

29. This Company Petition is allowed to the extent indicated above and disposed of. No Costs.

Sd/-

(Charan Singh)
Member (Technical)

Sd/-

(Dr. N.Venkata Ramakrishna Badarinath Nandula)
Member (Judicial)

Binnu