IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. – II (SPECIAL BENCH)

***   ***   ***

IA No. 570 of 2020 in
[CP (IB) No. 264/MB/2020]

Under Section 7 and 60(5) of Insolvency and Bankruptcy Code, 2016

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Between

VIDARBHA INDUSTRIES POWER LIMITED

A company incorporated under the Companies Act, 1956
having its registered office at
H Block, 1st Floor, Dhirubhai Ambani Knowledge City,
Navi Mumbai - 400 710

… **Applicant**

and

AXIS BANK LIMITED
Having its registered office at
"Trishul", 3rd Floor, Opposite Samartheshwar Temple,
Near Law Garden, Ahmedabad - 380 006, Gujarat
and its corporate office at
"Axis House", C-2 Wadia International Centre,
Pandurang Budhkar Marg, Worli, Mumbai - 400 025

… **Respondent**

In the matter of Company Petition CP (IB)/MB/No. 264 of 2020

AXIS BANK LIMITED … **Petitioner**

Vs.

VIDARBHA INDUSTRIES POWER LIMITED … **Respondent**

Date of Order: 29.01.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member Judicial

Mr. Ravikumar Duraisamy, Hon'ble Member Technical

Appearance:

For the Applicant:	Mr. Chetan Kapadia, Advocate i/b Manini Bharati, Advocate for Trilegal.
For the Respondent:	Mr. Sarosh Bharucha and Associates, Advocates i/b Mulla & Mulla & Craigie Blunt and Caroe.

<u>Per: Janab Mohammed Ajmal, Member Judicial</u>

ORDER

This is an Application filed by Corporate Debtor seeking stay of the further proceeding of the Company Petition.

2. Brief facts leading to the Application may be stated as follows. The Applicant is a coal based thermal power plant with its unit in the Butibori Industrial Area in Nagpur District, Maharashtra State. The Applicant was awarded the implementation of the Group Captive Power Project (GCPP) in a competitive bidding process conducted by the Maharashtra Industrial Development Corporation (MIDC). Subsequently after expansion of its capacity it offered its output of 600 Megawatt of electricity to the Reliance Infrastructure Limited (RIL). The RIL approached the Maharashtra Electricity Regulatory Commission (MERC) for approval of the procurement of power from the Corporate Debtor.

3. The MERC granted the approval by order dated 20th February 2013 subject to the Corporate Debtor's obtaining a No Objection Certificate (NOC) from MIDC. The MIDC after satisfying itself granted the NOC on 28th May 2013. The MERC thereupon granted its approval on 19th July 2013 for procurement of power by RIL from one of the units of the Corporate Debtor. Pursuant thereto a consolidated Power Purchase Agreement (PPA) was executed on 14th August 2013 between the Corporate Debtor and RIL.

4. The Corporate Debtor commenced supply of power to RIL with effect from 1st April 2014. The MERC under the Electricity Act 2003 was authorized to determine the tariff for supply of electricity from a Generating Company to the Supplying Company, in the present case, from the Corporate Debtor to RIL. The tariff can be periodically revised on an Application by the Corporate Debtor. Such Application is required to disclose the factors necessitating the revision.

5. The MERC accordingly had approved final tariff for the power plant by order dated 9th March 2015 passed in Case No. 115 of 2014. The Corporate

Debtor then filed Case No. 91 of 2015 for the revision of the tariff for the Financial Years 2016-2017 to 2019-20 setting out there in the factors for such revision.

6. The MERC disposed of Case No. 91 of 2015 by an order dated 20th June 2016 disallowing the tariff revision. The Corporate Debtor carried the matter in Appeal before the Appellate Tribunal for Electricity (APTEL). The APTEL by its order dated 3rd November 2016 *inter alia* directed the MERC to allow the Corporate Debtor the actual cost of Coal purchased during the relevant period. The Corporate Debtor filed an Application on 8th December 2016 for implementation of the order of APTEL dated 3rd November 2016. MERC however, challenged the order before the Hon'ble Supreme Court in Civil Appeal No. 372 of 2017. The Hon'ble Court have stayed the order dated 3rd November 2016. The matter is still pending for the consideration before the Hon'ble Court.

7. The Corporate Debtor despite being eligible to procure Coal under a Fuel Supply Agreement (FSA) in respect of one of its units was not able to make any headway on account of Government apathy. The Corporate Debtor moved an Application under Article 226 of the Constitution of India in WPC no. 10614 of 2017 before the Hon'ble Delhi High Court seeking a direction to the Coal India Limited (CIL) for entering in to a FSA and supply Coal to its units. The learned Single Bench by order dated 31st January 2018 directed the CIL to supply Coal to the Corporate Debtor's unit. The CIL and the Government of India respectively moved Miscellaneous Applications (CM No. 7039 of 2018 and RA No. 102 of 2018) seeking revision of the order. These Applications were dismissed by order dated 7th March 2018. The CIL and the Union of India filed Appeal against the orders. The Division Bench of the same High Court by order dated 21st August 2019 set aside the orders dated 31st January 2018 and 7th March 2018 passed by the Leaned Single Judge.

8. Meanwhile the Hon'ble Supreme Court on 11th April 2017, in the matter of *Energy Watchdog vs. Central Electricity Regulatory Commission: (2017) 14 SCC 80* granted substantive reliefs to similarly placed Generating

Companies. The MERC by order dated 7th March 2018 in compliance of such order granted relief to the tune of Rupees Eight Thousand Crores to other similarly placed Generating Companies in Maharashtra. The Corporate Debtor thereafter made a Consolidated Application for revision of the tariff in Case No. 199 of 2017. The MERC heard the matter on 8th January 2019 and is yet to pronounce order thereof.

9. The RIL also committed various defaults in respect of its obligation to make payment to the Corporate Debtor against supply of electricity. Correspondence exchanged between them in this regard bore no fruit. MERC by order dated 28th June 2018 in Case Nos. 139 & 140 of 2017 approved the transfer of Mumbai Distribution Business of RIL to Reliance Electric Generation and Supply Limited (REGSL). Adani Electricity Mumbai Limited (AEML) acquired REGSL on 29th August 2018. The amount payable by RIL, however, remained outstanding. The RIL by its letter dated 22nd August 2018 *inter alia* confirmed that it would remain liable to make good the outstanding payment. In a Memorandum of Understanding (MOU) dated 29th August 2018 between the Corporate Debtor and the REGSL, the latter agreed to support the Corporate Debtor in its litigation and would not do any act detrimental to its interest. The RIL by letter dated 3rd September 2018 informed the Corporate Debtor that the PPA executed between them stood assigned to AEML with effect from 29th August 2018. It would however be liable for any payment up to 28th August 2018.

10. The Corporate Debtor on 15th December 2018 executed an undertaking *inter alia* confirming AEML's right to set off any amount remaining unpaid by RIL to AEML. AEML thereafter proceeded to set off three months' invoices of the Corporate Debtor in violation of the undertaking and terms of the PPA. As a consequence of under recovery of fuel costs over an extended period, owing to the long pending legal proceedings and set offs effected by the AEML the cash flow into the Corporate Debtor was severely impaired.

11. The Corporate Debtor was thus forced to shut down its plant of 17th January 2019. AEML by its letter dated 20th April 2019 terminated the PPA. The situation did not improve despite various correspondence between them. The

Corporate Debtor then filed Case No. 247 of 2019 on 30th August 2019 before the MERC *inter alia* seeking to set aside the termination of the PPA. The Financial Creditor (Respondent) herein was also made a party in the said proceeding and it supported the Applicant's plea. The MERC by order dated 16th December 2016 held that the termination letter was valid and granted liberty to the lenders to exercise their right of substitution under the PPA.

12. The Corporate Debtor challenged the order dated 16th December 2019 before the Appellate Tribunal in Appeal No. 446 of 2019. The Financial Creditor filed Case No. 44 of 2020 before MERC *inter alia* seeking permission to exercise its right of substitution under the PPA essentially for selecting a substitute through the process of CIRP under the Insolvency and Bankruptcy Code (IBC) of 2016.

13. Subsequently the Corporate Debtor took part in a linkage auction conducted by the CIL after due procedure. The Western Coal Fields Limited issued a Letter of Intent (LoI) on 11th July 2019 in favour of the Corporate Debtor. The Corporate Debtor in its letter dated 15th July 2019 informed AEML of the provisional allocation of Coal through the linkage auction and requested the AEML to execute an amendment agreement. Despite various correspondence the AEML did not execute any such agreement.

14. The Corporate Debtor then approached the MERC in Case No. 225 of 2019 seeking approval of the amendment agreement between the Corporate Debtor and AEML. The MERC by order dated 3rd September 2019 approved the draft agreement and instructed AEML to sign the amended PPA by 5th September 2019.

15. The Corporate Debtor has six (6) institutional lenders including the present Financial Creditor with an aggregated exposure of approximately ₹ 2987 Cr (Two Thousand Nine Hundred Eighty Seven Crores) as on 3rd January 2020. The other Financial Creditors have refrained from approaching this Authority under the Code. The admission of the present Company Petition would not only prejudicially affect the Corporate Debtor but also its other lenders and various other stakeholders. The power plant which is the most valuable asset of the Corporate Debtor would fetch maximum possible value through

Resolution outside the Insolvency Resolution Process. It accordingly sought the following prayers:

a) That this Hon'ble Tribunal be pleased to stay the present Company Petition pending the final hearing and disposal of,
    i) Civil Appeal No. 372 of 2017 by the Hon'ble Supreme Court;
    ii) Case No. 199 of 2017 by MERC;
    iii) Case No. 44 of 2020 by the MERC; and
    iv) Appeal No. 446 of 2019 by APTEL.

b) For such further and other Orders as this Hon'ble Tribunal deems necessary in the facts and circumstances of the case;

c) For the costs of this Application.

16. The Respondent objecting to the Application submitted that it is the Lead Bank of the Consortium of Banks which extended various facilities to the Corporate Debtor. The Respondent had extended foreign currency term loan, working capital facility and Rupee term loan respectively aggregating to One Hundred Fifty Million US Dollars and INR Nine Hundred Thirty Four Crores. The Corporate Debtor has been in default in respect of each of the facilities since 31st March 2019 which prompted the Financial Creditor to approach this Authority through the Company Petition under Section 7 of the Code. The stay Application essentially focuses on events and proceedings as well as disputes between the Corporate Debtor and other entities. Causes of default are completely irrelevant for admission of a Petition of under Section 7 of the Code. The Adjudicating authority under the Code is required to assess the existence of the debt and default. It need not consider other factors in a Petition for admission. The issues raised by the Corporate Debtor before various other forms relating to disputes with other entities have no bearing on the issues relevant to the Company Petition.

17. The Application is intended to deflect the attention of the Tribunal from the blatant default in repayment of its debts. The Code is an independent legislation that provides effective resolution of debts. The Tribunal has exclusive jurisdiction in such matters. The objective of the CIRP under the Code is to ensure maximization of the value of the Corporate Debtor.

18. The plea that the admission of the Company Petition would be prejudicial to the Corporate Debtor cannot a ground to stay the further proceeding of the Company Petition. The present Application is intended to delay the disposal of the Company Petition, which from the averments made in the Application deserves to be admitted. The Application therefore does not merit consideration and is liable to be rejected.

19. The Code is a special legislation. The chief object of which is to decide the Petition in a time bound manner and take adequate steps to see that the Corporate Debtor remains a going concern even during the process of CIRP.

20. The Hon'ble Apex Court in *Swiss Ribbons v. Union of India: (2019) 4 SCC 17* have set the tone for the proceeding before the Adjudicating Authority in order to make all endeavour to dispose of the matter in a time bound manner. The observation of the Hon'ble Court may profitably be quoted as under.

> "As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete.
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> Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets.
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> xxx xxx xxx
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> The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

21. The observation would indicate that no other extraneous matter should come in the way of expeditiously deciding a Petition either under Section 7 or under Section 9 of the Code. The inability of the Corporate Debtor in servicing the debts or the reason for committing a default is alien to the scheme of the Code. The averments made in the instant Application would indicate that various factors apparently hindered the Corporate Debtor from

carrying on its business. There were disputes between the Corporate Debtor and the recipient of energy as well as the change in supply chain management of the recipient of the energy may also have contributed to the lack of confidence between the entities. Be that as it may, the dispute of the Corporate Debtor with the Regulator or the recipient would be extraneous to the matters involved in the Company Petition. The decision in the matters pending before the Hon'ble Apex Court and other authorities would hardly have any bearing and impact on the issues involved in the present Company Petition under Section 7 of the Code.

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

O R D E R

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

Sd/-	**Sd/-**
RAVIKUMAR DURAISAMY	**JANAB MOHAMMED AJMAL**
MEMBER TECHNICAL	**MEMBER JUDICIAL**

Ankit