NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 370 of 2024
& I.A. No. 1260 of 2024

[Arising out of Order dated 18.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-III in C.P. No. (IB) 132/MB/C-111/2022]

In the matter of:

Shweta Sharma ....Appellant
(Shareholder of Shweta Housing & Hospitality Pvt. Ltd.)
Vs.

SREI Equipment Finance Ltd. & Anr. ...Respondents

For Appellant: **Mr. Amit Singh Chadha, Sr. Advocate with Mr. Nirmal Goenka, Mr. Rahul Sagar Sahay, Advocates.**

For Respondents: **Mr. Krishnendu Datta, Sr. Advocate with Mr. Siddhant Buxy, Ms. Priyanka Vora, Mr. Ativ Patel, Mr. Darshit Dave, Mr. Rajat Sinha, Advocates for R-1.**

JUDGMENT
(2nd April, 2024)

Ashok Bhushan, J.

This Appeal has been filed by a Shareholder of the Corporate Debtor challenging the order dated 18.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No. III admitting Section 7 application filed by the Respondent- Financial Creditor.

2. Brief facts necessary to be noticed for deciding this Appeal are:-

2.1. The Financial Creditor by Loan Agreement dated 13.06.2017 extended facility of Rs. 18,09,00,000/- to the Corporate Debtor- 'Shweta Housing & Hospitality Private Limited'. The facility was to be repaid in the instalments with the interest @14% from 15.08.2017 till 15.05.2022 in 58 instalments. The Corporate Debtor except paying three instalments did not make any further payment to the Financial Creditor. Financial Creditor issued a Demand Notice dated 01.12.2021 recalling the outstanding dues of Rs. 35,90,58,448/-. The Financial Creditor also initiated arbitration proceedings as per the Loan Agreement in which an award dated 04.02.2020 was given. The Corporate Debtor having not made the payment, Section 7 application was filed by the Financial Creditor on 31.01.2022. Reply was filed by the Corporate Debtor to Section 7 application. The Financial Creditor has also for seeking enforcement of *ex parte* arbitral award filed an execution application before the Delhi High Court on 22.07.2021. Corporate Debtor filed his objection in the execution application which is claimed to be pending. The Adjudicating Authority vide impugned order 18.12.2023 admitted Section 7 application. This Appeal has been filed challenging the said order.

3. Learned Counsel for the Appellant challenging the order passed by the Adjudicating Authority submits that the Adjudicating Authority committed error in relying on *ex parte* arbitral award dated 04.02.2020. It is submitted that the arbitral award is a void award which could not be relied by the Financial Creditor. It is submitted that the Corporate Debtor has already filed objection to the execution application filed in the Delhi High Court for

execution of *ex parte* award dated 04.02.2020 which objections are pending. It was submitted that the unilateral appointment of the arbitrator by the financial creditor is *non-est* in the eyes of law. The award consequently is void. It is further submitted that the Section 7 application was barred by time. It is submitted that there is no requirement of getting an award set aside under Section 34 of the Arbitration Act which award is void. Award being *non-est* in eyes of law cannot be basis of initiating CIRP and non-payment of non-executable award cannot be constituted as default. The Adjudicating Authority is not entitled to examine the correctness of the award in summary proceeding challenge to which award is pending consideration before the Hon'ble Delhi High Court.

4. Learned Counsel appearing for the Financial Creditor refuting the submissions of the Counsel for the Appellant submits that the existence of default is established independent of the arbitral award. It is submitted that in the reply to Section 7 application, Corporate Debtor has admitted his default and has pleaded that it has repaid only Rs.40 lakhs. Debt and default being established, Adjudicating Authority has rightly admitted Section 7 application. It is submitted that the application filed by the Financial Creditor was well within time. The Appellant himself has brought on record the loan recall notice dated 24.01.2019 and even if the date 24.01.2019 i.e. the date of issuance of recall notice is treated to be date of default, application filed was well within the period of limitation. Section 7 application having been filed on 31.01.2022, it is submitted that under the order passed by the Hon'ble Supreme Court in Suo Moto Writ Petition No.

03 of 2020, the period from 15.03.2020 till 28.02.2022 has to be excluded and Section 7 application was filed well within time. In the loan recall and termination notice dated 24.01.2019 debt shown as Rs.27,03,77,188/-. Section 7 application thus can be sustained even if the arbitral award is not to be looked into. It is further submitted that the arbitral award cannot be disregarded in the proceeding under Section 7 which is the summary proceeding. The arbitral award till date has not been set aside under Section 34 of the Arbitration & Conciliation Act. It is further submitted that in the balance sheet of the Corporate Debtor, the financial debt has been very well acknowledged the balance sheets are of the Corporate Debtor himself.

5. We have considered the submissions of the Counsel for the parties and perused the record.

6. From the submissions of the Counsel for the parties, following questions arise for consideration in this Appeal are:-

(i) Whether the application under Section 7 filed by the Appellant on 31.01.2022 was barred by time?

(ii) Whether the arbitral award dated 04.02.2020 needs to be ignored in proceedings under Section 7, the objection of the Corporate Debtor being pending before the Delhi High Court in the proceeding for execution of the arbitral award?

(iii) Whether debt and default was proved in the proceedings under Section 7?

(iv) Whether the Adjudicating Authority committed error in admitting Section 7 application?

QUSESTION NO.1

7. Now coming to the question of limitation. Section 7 application was filed by the Financial Creditor on 31.01.2022. Part-IV of the application is as follows:-

"PART-IV

PARTICULARS OF FINANCIAL DEBT

<table>
<tr><td rowspan="3">1.</td><td rowspan="3">TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT</td><td>Contract No.</td><td>Debt Granted (Amount in Rs.)</td><td>Date of Contract</td></tr>
<tr><td>128922</td><td>18,09,00,000</td><td>13-06-20.17</td></tr>
<tr><td>Total</td><td>18,09,00,000</td><td></td></tr>
<tr><td></td><td></td><td colspan="3">Offer Letter dated 9th June 2017 addressed by SREI Equipment Finance Limited to the Corporate Debtor for proposal of Financial Assistance and copy of loan. Agreement dated 13th June 2017 is annexed and marked as "Exhibjt G" and "Exhibit G-1"</td></tr>
<tr><td rowspan="8">2.</td><td rowspan="8">AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED. (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</td><td colspan="3">Total Claim Amount as on 01-12-2021: Rs. 35,90,58,448/ (Thirty-Five Crore Ninety Lakhs Fifty-Eight Thousand Four Hundred Forty-Eight Only)

Hereto annexed and marked as "Exhibit H" is the copy of Statement of claim as on 1st December 2021.

Amount claimed to be in default as on 01-12-2021: Rs.27,02,74,828/- (Twenty-Seven Crore Two Lakhs Seventy-Four Thousand Eight Hundred Twenty-Eight Only)</td></tr>
<tr><td>Particulars</td><td>Amount</td><td rowspan="6"></td></tr>
<tr><td>Award Amount (Rs)</td><td>270,274,828</td></tr>
<tr><td>Interest on Award (Rs)</td><td>88,768,620</td></tr>
<tr><td>Cost of Reference (Rs)</td><td>15,000</td></tr>
<tr><td>Total</td><td>35,90,58,448</td></tr>
<tr><td colspan="3">Date of Default: 4th February 2020 (date of award)</td></tr>
</table>

8. Under Part-V of Section 7 application, loan agreement, deed of guarantee, deed of mortgage have been brought on record dated 13.06.2017.

CIBIL Report dated 03.12.2021 has also been brought on the record. Demand notice dated 01.12.2021 was also referred to in the Section 7 application. In paragraph 19 of the impugned order, Adjudicating Authority noticed the date of 58 instalments under which the loan was required to be repaid by the Corporate Debtor. 1st instalment was to be paid on 15.08.2017. The Corporate Debtor has filed its reply. In paragraph 9 of the reply, following has been stated:-

> *"9. It is submitted that the term of the loan granted under the Loan Agreement dated 13th June 2017 was 60 months i.e. till 12th June 2022. Despite payment of certain instalments by the Corporate Debtor, the Financial Creditor prematurely and illegally terminated the Loan Agreement on 24th January 2019. In any event, it is the case of the Financial Creditor that no instalments have been paid by the Corporate Debtor. It is submitted that the Corporate Debtor made the payment of instalments amounting Rs. 40 lacs. I crave leave to produce a detailed payment schedule at a later stage, if so required."*

9. The Corporate Debtor itself pleaded that he has paid Rs.40 lakhs. It has been submitted during the submissions of the parties that only three instalments could be paid by the Appellant. The date of default as given in Part-IV is 04.02.2020 i.e. the date of arbitral award. The Adjudicating Authority has noticed the date of default in Section 7 and came to the conclusion that the application is well within the time filed on 31.01.2022. The submission which has been much pressed by the Counsel for the

Appellant is that the arbitral award is void and need not be looked into, hence, date of default cannot be taken as 04.02.2020. Section 3 of the Limitation Act casts an obligation on a Court to consider as to whether application filed is within limitation as prescribed by the Limitation Act, 1963. It is also well settled that even if no defence is raised by the Defendant regarding plea of limitation, the question of limitation has to be looked into and decided by the Court. We, thus, for the time being even if 04.02.2020 is not taken as date of default, proceed to examine as to whether application is filed within the limitation. As noted above, the amount was to be paid in 58 instalments. 1st instalment is to be paid in 15.08.2017 and last on 15.05.2022. It is pleaded by the Corporate Debtor itself that it has paid only Rs.40 Lakhs which at best will cover first three instalments. Thus, even if we take the default committed on 15.11.2017, the application filed on 31.01.2022 is well within time. By the order of the Hon'ble Supreme Court passed in Suo Moto Writ Petition No. 03 of 2020, the period of limitation from 15.03.2020 till 28.02.2022 has to be excluded. The Appellant himself has filed the loan recall notice dated 24.01.2019. After loan recall notice, the amount as mentioned in the loan recall notice become due i.e. Rs.27,03,77,188/- as on 30.11.2018. When the entire loan was recalled, the cause of action arose to initiate proceeding and application filed on 31.01.2022 from loan recall notice is also well within time. Thus, from any view of the matter, the application filed by the Financial Creditor on 31.01.2022 was well within time and the Adjudicating Authority did not commit any error in rejecting the submission of the Appellant that the Application is barred by time.

QUSESTION NO.2

10. The arbitral award in favour of the Corporate Debtor is dated 04.02.2020 which arbitral award has been said to be void by Learned Counsel appearing for the Appellant. It is submitted that the award dated 04.02.2020 was on the basis of unilateral appointment of the arbitrator by the Corporate Debtor which cannot be held to be valid. Counsel for the Appellant in support of his submission that award does not require setting aside under section 34 of the Arbitration & Conciliation Act relied on judgment of the Calcutta High Court in ***"Cholamandalam Investment and Finance Company Ltd. vs. Amrapali Enterprises and Anr- 2023 SCC OnLine Cal 605"*** and judgment of the Delhi High Court in ***"Sanjay Kaushish vs. D.C. Kaushish and Ors.- 1991 SCC OnLine Del 497"***.

11. Learned Counsel for the Appellant further submitted that the Corporate Debtor has put the award dated 04.02.2020 for execution before the Delhi High Court in which objections have been filed by the Appellant on 22.11.2021 which objections are pending consideration. The Adjudicating Authority in the impugned order although has noted the submissions with regard to award dated 04.02.2020 but observed that the contention regarding appointment of arbitrator cannot be looked into and adjudicated by the Tribunal.

12. The challenge to the arbitral award dated is 04.02.2020 pending before the Delhi High Court with regard to which objections have already been filed by the Corporate Debtor. We are of the view that it is not

necessary to express any opinion with regard to rival contentions of the parties in relation to award dated 04.02.2020.

13. Learned Counsel for the Respondent has submitted before us that even if the award dated 04.02.2020 is disregarded the debt and default is proved, hence, there was no illegality in admitting Section 7 application. The contention of the parties regarding debt and default shall be examined hereinafter.

QUSESTION NO.3 & 4

14. The question to be answered is as to whether even if arbitral award dated 04.02.2020 is not considered for the purposes of debt and default whether there are sufficient materials on the record to prove that debt and default was proved. As noticed above, Section 7 application was filed relying on Loan Agreement between the parties dated 13.06.2017. In the impugned order, the Adjudicating Authority has noticed the repayment schedule of the loan in paragraph 19 as per which the loan granted to the Corporate Debtor was to be repaid in 58 instalments beginning from 15.08.2017 till 15.05.2022. We have already noticed paragraph 9 of the reply filed by the Corporate Debtor in Section 7 application under which Corporate Debtor has pleaded that it has paid only Rs.40 lacs. The reply was filed by the Corporate Debtor by its affidavit sworn on 27.04.2022. Thus, on 27.04.2022 only amount of Rs.40 lacs was paid, during submission of the parties it has been submitted that at best only three instalments have been paid by the Corporate Debtor. In the Appeal, Appellant has brought on the record the

copy of the loan recall notice dated 24.01.2019. The loan recall notice was given by the Financial Creditor on account of occurrence of events of default and the amount claimed in the loan recall notice was Rs.27,03,77,188/-. The recall notice dated 24.01.2019 in the end stated:-

> *"We have been instructed by our client to call upon you jointly or severally and demand from you payment of the aforesaid sum of Rs.27,03,77,188/- (Rupees- Twenty Seven Crores Three Lakhs Seventy. Seven Thousand One Hundred. Eighty Eight Only) which we hereby do, together with further accrued interest from December 1, 2019 until payment at the agreed rate provided under the said Agreement.*
>
> *On further instructions from our clients we in terms of Clause 8.7 of the said. Agreement also terminate the said agreement with immediate effect.*
>
> *In case of failure on your part to make payment of the aforesaid amount within 7 (seven) days from the date of this notice, we have received instruction from our client to initiate appropriate legal proceedings against you including referring the matter to arbitration, in terms of the relevant arbitration clause. contained in the said Agreement without further reference to you.*
>
> *Needless to mention here that you will be held liable for all costs and consequence thereof.*
>
> *Please acknowledge receipt of this notice.*
>
> *Yours faithfully,*
> *For ANS Associates*
>
> *Neelina Chatterjee*
> *Partner*
>
> *C.C.: Client"*

15. We may further notice that the Adjudicating Authority in the impugned order has referred to Certificate dated 09.03.2022 issued by the National E-Governance Service Limited evidencing the default. In paragraph 20 of the order, Adjudicating Authority has noticed following:-

> *"20. It is clear that repayment of only 3(three) out of 58(Fifty-eight) instalments have been made as acknowledged by the Corporate Debtor in its Reply. Therefore, it is not incorrect to hold that the Corporate Debtor has defaulted on the repayment of the outstanding loan amount. Moreover, apart from all the above documents, the Financial Creditor has also submitted the Certificate dated 09.03.2022 issued by the National E- Governance Service Limited (NESL) evidencing the default. In view thereof, we are satisfied that there is debt and default as mandated under the Code."*

16. From the above facts, it is clear that debt and default is fully established and even if the arbitral award dated 04.02.2020 is not taken into consideration the debt and default is proved on the part of the Corporate Debtor. We may refer to the judgment of the Hon'ble Supreme Court in ***"M. Suresh Kumar Reddy vs. Canara Bank and Ors.- (2023) 8 SCC 387"*** where the Hon'ble Supreme Court after noticing the earlier judgments had held that when debt and default is proved, the Adjudicating Authority has to admit the application unless it is incomplete. In paragraphs 9 to 14, Hon'ble Supreme Court has laid down following:-

"9. *We have given careful consideration to the submissions. This Court in Innoventive Industries Ltd. v. ICICI Bank has explained the scope of Section 7. Paras 28 to 30 of the said decision read thus: (SCC pp. 438-39)*

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. 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.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational

creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, 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 supplied)

10. *The view taken in Innoventive Industries has been followed by this Court in E.S. Krishnamurthy. Paras 32 to 34 of the said decision read thus : (E.S. Krishnamurthy case, SCC pp. 177-79)*

"32. In Innoventive Industries, paras 28 and 30, a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine whether a "default" has occurred i.e. whether the "debt" (which may still be disputed) was due and remained unpaid. If the adjudicating authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete. Speaking through Rohinton F. Nariman, J., the Court has observed : (SCC pp. 438-39, paras 28 & 30)

'28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the

corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. 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.

***

30. On the other hand, as we have seen, 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.'

33. In the present case, the adjudicating authority noted that it had listed the petition for admission on diverse dates and had adjourned it, inter alia, to allow the parties to explore the possibility of a settlement. Evidently, no settlement was arrived at by all the original petitioners who had instituted the proceedings. The adjudicating authority noticed that joint consent terms dated 12-2-2020 had been filed before it. But it is common ground that these consent terms did not cover all the original petitioners who were before the adjudicating authority. The adjudicating authority was apprised of the fact that the claims of 140 investors had been fully settled by the respondent. The respondent also noted that of the claims of the original petitioners who have moved the adjudicating authority, only 13 have been settled while, according to it '40 are in the process of settlement and 39 are pending settlements'. Eventually, the adjudicating authority did not entertain the petition on the ground that the procedure under IBC is summary, and it cannot manage or decide upon each and every claim of the individual homebuyers. The adjudicating authority also held that since the process of settlement was progressing "in all seriousness", instead of examining all the individual claims, it would dispose of the petition by directing the respondent to settle all the remaining claims "seriously" within a definite time-frame. The petition was accordingly disposed of by directing the respondent to settle the remaining claims no later than within three months, and that if any of the remaining original petitioners were aggrieved by the settlement process, they would be at liberty to approach the adjudicating authority again in accordance with law. The adjudicating authority's decision was also upheld by the appellate authority, who supported its conclusions.

34. The adjudicating authority has clearly acted outside the terms of its jurisdiction under Section 7(5) IBC. The adjudicating authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the adjudicating authority must then either admit or reject an application, respectively. These are the only two courses of action which are open to the adjudicating authority in accordance with Section 7(5). The adjudicating authority cannot compel a party to the proceedings before it to settle a dispute."

(emphasis in original and supplied)

11. *Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. "Default" is defined under sub-section (12) of Section 3 IBC which reads thus:*

*"**3. Definitions**.—In this Code, unless the context otherwise requires—*

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(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;"

Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a corporate debtor. In such a case, an order of admission under Section 7 IBC must follow. If NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.

12. *Reliance is placed on the decision of this Court in Vidarbha Industries and in particular, what is held therein in paras 86 to 89 which reads thus : (SCC p. 377)*

"86. Even though Section 7(5)(a) IBC may confer discretionary power on the adjudicating authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 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. For example, when admission is opposed on the ground of existence of an award or a decree in favour of the corporate debtor, and the awarded/decretal amount exceeds the

amount of the debt, the adjudicating authority would have to exercise its discretion under Section 7(5)(a) IBC to keep the admission of the application of the financial creditor in abeyance, unless there is good reason not to do so. The adjudicating authority may, for example, admit the application of the financial creditor, notwithstanding any award or decree, if the award/decretal amount is incapable of realisation. The example is only illustrative.

89. In this case, the adjudicating authority (NCLT) has simply brushed aside the case of the appellant that an amount of Rs 1730 crores was realisable by the appellant in terms of the order passed by APTEL in favour of the appellant, with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential."

(emphasis supplied)

13. *A review petition was filed by Axis Bank Ltd. seeking a review of the decision of Vidarbha Industries on the ground that the attention of the Court was not invited to the case of E.S. Krishnamurthy. While disposing of review petition by order dated 22-9-2022, this Court held thus : (Vidarbha Industries Power case, SCC p. 323, paras 6-7)*

"6. The elucidation in para 90 and other paragraphs [of the judgment under review] were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.

7. To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."

14. *Thus, it was clarified by the order in review that the decision in Vidarbha Industries was in the setting of facts of the case before this Court. Hence, the decision in Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in Innoventive Industries and E.S. Krishnamurthy. The view taken in Innoventive Industries still holds good."*

17. We, thus, find that there was sufficient materials brought by the financial creditor on the record to prove the debt and default, even if the arbitral award is disregarded.

18. In view of the foregoing discussions, we are of the view that the Adjudicating Authority did not commit any error in admitting Section 7 application. Debt and default having been proved on the part of the Corporate Debtor, we, thus, do not find any error in the order passed by the Adjudicating Authority admitting Section 7 application. There is no merit in the appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
Anjali