

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 1324/(KB)/2022

In

Company Petition (IB) No. 94/KB/2021

***An application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016, read with Rule 11 of the National
Company Law Tribunal Rules, 2016.***

IN THE MATTER OF:

CANARA BANK

... Financial Creditor.

Versus

SIMPLEX INFRASTRUCTURES LIMITED

... Corporate Debtor.

And

IN THE MATTER OF:

SIMPLEX INFRASTRUCTURES LIMITED

(CIN: L45209WB1924PLC004969)

... Applicant.

Versus

**CANARA BANK, Stressed Asset Management Branch, Bells House,
5th Floor, 21 Camac Street, Kolkata – 700 016**

... Respondent.

Date of Pronouncement: April 02, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

**For the Corporate Debtor/ Applicant for I.A. (IB) No.
1324/KB/2022:**

1. Mr. Joy Saha, Sr. Adv.

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- 2. Mr. Pankaj Agarwal, Adv.**
- 3. Ms. Muskan Agarwal, Adv.**

For the Canara Bank/ Respondent for I.A. (IB) No. 1324/KB/2022:

- 1. Mr. Mainak Bose, Adv.**
- 2. Ms. Aparajita Ghosh, Adv.**
- 3. Ms. Sumita Chatterjee, Adv.**
- 4. Mr. Souvik Ghosh, Adv.**

ORDER

Per D. Arvind, Member (Technical):

- 1.** This Court is congregated through hybrid mode.
- 2.** Heard the Learned Senior Counsel and Learned Counsel for the parties.
- 3.** This application has been preferred by **Simplex Infrastructures Limited** (Corporate Debtor/ CD) hereinafter referred to as “Applicant”, seeking dismissal of C.P. (IB) No. 94/KB/2021 filed by Canara Bank (Financial Creditor/ FC), hereinafter referred to as “Respondent” to initiate Corporate Insolvency Resolution Process (hereinafter referred as “CIRP”) of the Corporate Debtor.
- 4.** This application has been preferred to seek the following reliefs, *inter alia*:
 - (a)** *The company petition being C.P. (IB) No. 94/KB/2021 be dismissed;*
 - (b)** *In the alternative, the hearing of the company petition being C.P. (IB) No. 94/KB/2021 be deferred for a period of six months or any other period as this Tribunal deems fit and proper;*

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(c) *The proceedings instituted under the said company petition, be stayed till the disposal of this instant application;*

Factual Matrix:

- 5.** The Applicant is a company engaged in infrastructure projects for the past several years. The Financial Creditor has preferred an application under Section 7 of Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code” to initiate CIRP of Corporate Debtor and the said Company Petition is numbered as C.P. (IB) No: 94/KB/2021 and pending for disposal before this Adjudicating Authority.
- 6.** Meanwhile, the Hon’ble Supreme Court pronounced a Judgement on 12th July, 2022 in the case of ***Vidarbha Industries Power Limited vs. Axis Bank Limited*** reported in **MANU/SC/0874/2022: (2022) 8 SCC 352.**
- 7.** In this judgment the Hon’ble Supreme Court of India held that the powers of Adjudicating Authority mentioned under Section 7(5)(a) of the I&B Code, 2016 is discretionary in nature and such discretion cannot be exercised arbitrarily. The Hon’ble Apex Court further held that in the event the circumstances warrant exercise of discretion in a particular manner, then in that case, the discretion would have to be exercised in that manner.
- 8.** In that case the Corporate Debtor therein had several awards in its favour which were pending to be executed and the total amount of such awards were in excess of the total debts of the said Corporate Debtor.

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9. The question that was before the Hon'ble Apex Court was whether an award of Appellate Tribunal for Electricity (APTEL) in favour of the Corporate Debtor can completely be discarded by the Adjudicating Authority for deciding on admitting a company under Corporate Insolvency Resolution Process (CIRP) in terms of the IBC 2016, when in terms of the award, a sum of Rs. 1730 Crore which is an amount far exceeding the claim of the Financial Creditor, is realizable by the Corporate Debtor in that case. To this question the Hon'ble Supreme Court held that the Adjudicating Authority cannot ignore this important fact while considering an application for commencement of CIRP
10. Considering the facts and circumstances of that case, the Hon'ble Supreme Court of India held that Adjudicating Authority ought not to have admitted the applicant under Section 7 of the I&B Code and should have used its discretionary power provided under Section 7(5)(a) of the I&B Code in terms the word "**may**" used in said sub section and dismissed the application.

Submissions of the Applicant:

11. The Ld. Senior Counsel appearing for the Applicant claims that in this case similar facts and circumstances that existed in **Vidarbha** case (Supra) exist.
12. The Ld. Senior Counsel states that there are 36 awards pronounced in favour of the applicant and the applicant is in the process of realizing a sum of Rs. 7330.60 crores and out of such sum, a sum of Rs. 554.17 Crore inclusive of interest has already

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been awarded in applicant's favour and another 1212.58 crores shall be realized at the earliest.

- 13.** Therefore, he submitted that the principles laid down in ***Vidarbha*** Judgment of Hon'ble Supreme Court will squarely apply in this case and, consequently, either the Company Petition filed by the Financial Creditor may be dismissed or deferred for 6 months or more to enable the Corporate Debtor to realize the awards and pay off all the debts.
- 14.** The Ld. Senior Counsel has also brought to our notice the minutes of the consortium meeting held on 19th October 2023 wherein all the Financial Creditors, including representatives of the Canara Bank have attended and it was decided to take lender-wise views on the National Asset Reconstruction Company Limited (hereinafter referred to as "NARCL") offer and to take vote on initiation of Swiss Challenge Process for the purpose of restructuring of the loans advanced to Corporate Debtor
- 15.** He further brought to our attention, the several settlements and the payments made by the Corporate Debtor to several creditors during the past one year and relied on the list of such payments / settlements which are part of the application.
- 16.** In view of above, he submits that the Corporate Debtor is confident of achieving restructuring of its debts and settlement / payments to several creditors which would be beneficial to the Creditors, then what they will get if the Corporate Debtor is put in to CIRP.

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Respondent's submissions per contra:

- 17.** The Ld. Counsel for the respondent submits that the dues of the Corporate Debtor to several Financial Creditors and operational creditors including the Applicant in Company Petition mentioned above, is in far excess of the amounts claimed in awards. Even several awards claimed to have been received are disputed and the matter is pending before various legal fora. Therefore, ***Vidarbha*** judgment of the Hon'ble Supreme Court of India which applies only in that particular facts of the case cannot be applied in the case in hand as the facts and circumstances are completely different.
- 18.** The Ld. Counsel for the respondent further submits that the Corporate Debtor's ability to pay off or settle with several creditors does not take away the fact that the Corporate Debtor is insolvent, committed default in making payment to the Applicant and has not been able to fulfil major claims of other Financial and operational creditors.
- 19.** The Ld. Counsel for the respondent further submits that the entire application is based on assumption that all the awards would materialise and would be credited into the accounts of Corporate Debtor without any dispute or delay. These assumptions and presumptions are not supported by any document. On the other hand, most of the awards are disputed by the parties against whom such awards have been granted. Even otherwise, the amount claimed in all such awards are far less than the total debts of the CD. Therefore, he submits that this application will have to be dismissed.

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Analysis and Findings:

- 20.** The Applicant claims that there are several awards in its favour for a sum of Rs. 7330.60 crores.
- 21.** We find that only a sum of Rs. 554 inclusive interests have been awarded in applicants favour and all other awards claimed are still pending at various stages some of which are admittedly disputed.
- 22.** We find that two-Judge Bench of the Hon'ble Supreme Court in ***M. Suresh Kumar Reddy v. Canara Bank*** reported in **MANU/SC/0561/2023: (2023) 8 SCC 387** distinguished ***Vidarbha*** case on facts and noted that when the existence of debt and default had been proved, the NCLT is bound to admit the petition under Section 7 of the Code. In the ***M. Suresh Kumar Reddy (Supra)***, the Hon'ble Apex Court was of the view that in light of the dismissal of the **review petition** against ***Vidarbha*** case, it was made clear that the same had only been passed in the factual conspectus of the matter before the Court. The relevant part of the judgment in ***M. Suresh Kumar Reddy (Supra)*** is reproduced verbatim:

“12. A Review Petition was filed by the Axis Bank Limited seeking a review of the decision of Vidarbha Industries MANU/SC/0874/2022 : 2022 (8) SCC 352 on the ground that the attention of the Court was not invited to the case of E.S. Krishnamurthy MANU/SC/1249/2021 : (2022) 3 SCC 161. While disposing of Review Petition by Order dated 22nd September 2022, this Court held thus:

The elucidation in paragraph 90 and other paragraphs 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

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pronouncements are in the setting of the facts of a particular case.

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.

13. Thus, it was clarified by the order in review that the decision in the case of Vidarbha Industries MANU/SC/0874/2022 : 2022 (8) SCC 352 was in the setting of facts of the case before this Court. Hence, the decision in the case of Vidarbha Industries MANU/SC/0874/2022 : 2022 (8) SCC 352 cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries MANU/SC/1063/2017 : (2018) 1 SCC 407 and E.S. Krishnamurthy MANU/SC/1249/2021 : (2022) 3 SCC 161. The view taken in the case of Innoventive Industries MANU/SC/1063/2017 : (2018) 1 SCC 407 still holds good."

(Emphasis Added)

- 23.** We would further rely upon the order passed by the Coordinate Bench, New Delhi, **IndusInd Bank Limited v. M/s Feedback Energy Distribution Co. Ltd.** in **Company Petition No. (IB)-477(ND)/2023**, where the Learned NCLT New Delhi Bench has discussed the ratio of **"Review Petition of Vidarbha Industries Power Limited (Supra) (2023) 7 Supreme Court Cases 321"** as:

"15. To the reliance placed by the Respondent on the Judgement of the Hon'ble Supreme Court in the matter of "Vidarbha Industries Power Limited V. Axis Bank Limited" [CIVIL APPEAL NO. 4633 OF 2021], we are aware of the judgment passed by the Hon'ble Supreme Court in the "Review Petition of Vidarbha Industries Power Limited (Supra) (2023) 7 Supreme Court Cases 321" dated 22.09.2022, wherein the following was observed:

"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

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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.” Since the factual position in the instant case is not the same, therefore, in our considered view, the observations in the “Vidarbha Industries Power Limited” do not apply to the present case.

16. In view of the abovementioned discussion, the debt and default of the Respondent have been established by the Applicant Bank beyond doubt.

17. In the sequel to the above and the given facts and circumstances, the present Application being complete and the Applicant having established the default on the part of the Respondent in payment of the Financial Debt for an amount being above the minimum threshold limit, the present Application is admitted in terms of Section 7(5) of the IBC and accordingly, the Moratorium is declared in terms of Section 14 of the Code....”

(Emphasis Added)

- 24.** Hence, **Vidarbha** case could not be understood as taking a contrary position in law as opposed to **Innovative Industries (Supra)** case and also the case law rendered in **E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P) Ltd** reported in **MANU/SC/1249/2021: (2022) 3 SCC 161** by the Hon’ble Apex Court.
- 25.** Therefore, we find that the **Vidarbha** Judgement of the Hon’ble Apex Court will not come to the rescue of the Applicant, herein.
- 26.** In terms of the foregoing discussions, we find no merit in the application being **I.A. (IB) No. 1324/(KB)/2022** preferred by the Applicant herein and accordingly, we **dismiss** the same.
- 27.** We find that this application has been filed with an intent to derail this Tribunal from considering the Application filed by the Respondent under Section 7 of IBC This is in our view is an

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attempt to abuse the process of Tribunal and therefore **levy a cost of Rs. 1 Lac (Rs. One Lac only)** in terms of Rule 149 read with Rule 11 of the NCLT Rules 2016. The amount may be paid to **National Defence Fund (NDF)** within 30 days from the date of pronouncement of the Order.

- 28.** This order is issued in terms of Section 60(5) of the I&B Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.
- 29.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Order signed on the 2nd Day of April, 2024.

Bose, R.K. [LRA]/ AR [Steno]