

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD**

COURT - II

CP (IB) 76/NCLT/AHM/2022

[Application for initiation of Corporate Insolvency Resolution Process under Section 7 of the Insolvency & Bankruptcy Code, 2016]

In the Matter of:

Kotak Mahindra Bank Limited

**Applicant/
Financial Creditor**

Versus

Kunal Structure (India) Private Limited

**Respondent/
Corporate Debtor**

Order Pronounced on: 17/01/2023

Coram:

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

MEMO OF PARTIES

Kotak Mahindra Bank Limited

Registered office at:
27, BKC, C-27, G Block,
Bandra Kurla Complex
Bandra (East)
Mumbai 400 051

Branch Office at:
Shop No. 401 to 406
4th Floor, Siddhi Vinayak Complex
Shivranjani Cross Roads
Satellite,
Ahmedabad 380 015

... **Applicant/Financial Creditor**

Versus

Kunal Structure (India) Private Limited

Registered Office at
1205 to 1207, 12th Floor,
Shilp Epitome, B/s. Infostrech,
Behind Rajpath Club Road
Bodakdev
Ahmedabad 380 054
Gujarat State

... **Respondent/Corporate Debtor**

Appearance:

For Applicant : Mr. Harshil Patel, Advocate
For the Respondent : Mr. Masoom Shah, Advocate

ORDER

1. The Present Application is filed on 11.03.2022 under section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') through Mr. Ravi Doshi, Manager of **Kotak Mahindra Bank Limited** (for brevity 'Applicant') authorised vide resolution dated 13.07.2021, with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP) against **Kunal Structure (India) Private Limited** (for brevity 'Corporate Debtor').
2. The Applicant is a banking company within the meaning of the Banking Regulation Act, 1949 having CIN 165110MH1985PLC038137 and having registered office at 27, BKC, C-27, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051.

3. The corporate debtor is a private limited company, incorporated under the provisions of Companies Act, 1956 on 05.04.2006 duly registered with Registrar of Companies, Ahmedabad, Gujarat State with CIN: U45200GJ2006PTC048080, having registered office at 1205 to 1207, 12th Floor, Shilp Epitome, B/s. Infostrech, Behind Rajpath Club Road, Bodakdev, Ahmedabad 380 054, Gujarat State. The authorised share capital of the corporate debtor is Rs.5,50,00,000/- and paid up share capital is Rs.5,03,00,000/-. The corporate debtor is engaged in the business of undertaking various contracts with the Government of Gujarat for construction of roads, buildings, bridges, irrigation and pipelines.

4. It is submitted by the applicant that for purchase of construction equipment, loan facilities of an aggregate amount of Rs. 11,80,26,600/- was sanctioned to the corporate debtor during the period between September, 2017 and 17.03.2021, on the terms and conditions agreed upon by and between the parties. As per the terms of agreement and other documents executed, more particularly described in the respective loan cum guarantee agreements and promissory notes, the loan along with interest was to be repaid in monthly instalments. Copies of loan agreements, guarantee

agreements are annexed. An Emergency Credit Line Guarantee Scheme (ECLGS) was announced as a part of the comprehensive package by the Ministry of Finance, Government of India on 13.05.2020 to aid eligible business enterprises in view of the economic distress caused by the Covid-19 pandemic. Subsequent to the same upon receiving No Objection Certificates from ICICI Bank, Axis Bank, Yes Bank, Tata Capital Financial Services and HDB Financial Services to grant credit facility under the aforesaid ECLGS Scheme and at the request of the defendants, the applicant bank had lent and advanced working capital term loan by way of Guaranteed Emergency Credit Line (GECL) aggregate amount of Rs. 14,67,51,600/- to the corporate debtor under sanction letters dated 24.12.2020, 31.12.2020, 11.01.2021, 27.01.2021, 10.02.2021 & 17.03.2021; being proportionate to approximately 20% of the exposure of the respective loans granted by aforesaid various banks. The terms of the said sanction letters have been agreed and acknowledged by the corporate debtor/s who have appended their signature on the said sanction letters.

5. The applicant has further submitted that the financial facilities granted to the corporate debtor under the special scheme of ECLGS as announced by the Ministry of Finance, Government of India with the 100% guarantee backed from the National Credit Guarantee Trustee Company (NCGTC) to the applicant bank, however, even if the financial facilities is 100% guarantee backed from the NCGTC, it is still due and recoverable from the corporate debtor and is to be compensated to the NCGTC from the amounts to be recovered from the corporate debtor. After availing finance from the applicant, the corporate debtor has failed to pay the regular monthly instalments and the outstanding amount due as per the terms and conditions agreed upon by the corporate debtor. Therefore, the applicant is compelled to file the present application. As per the statement of accounts being maintained by the applicant, an aggregate amount of Rs. 18,11,06,790.12 is outstanding and to be recovered from the corporate debtor.
6. The corporate debtor filed affidavit in reply inter alia stating that:
- The application is barred by limitation.
 - The authorisation annexed with the application is neither proper nor legal.

- Various sanction letters/contracts and loan agreements cannot be merged in one application.
 - The applicant has also filed Original Application No. 71 of 2022 before DRT-1, Ahmedabad which is pending for adjudication. The said fact has been suppressed by the applicant.
 - Arbitral awards against NHAI dated 26.06.2018 and Rajkot Municipal Commissioner (Ld. Arbitrator – Retired Gujarat High Court Judge, Mr. Justice C.K. Buch) dated 25.01.2018 are pending for execution. Copy of such arbitral awards are annexed with the reply.
 - The corporate debtor is functioning as contractor for infrastructure projects of Governments and Government entities and is a running company with 728 employees and 15 current projects. The corporate debtor is a solvent company
7. Along with the reply the applicant has submitted copies of arbitral awards passed in favour of the corporate debtor in different arbitration matters.
8. The applicant filed written submissions stating that:
- The claim made by the applicant is within limitation as the date of default in 21 loan accounts are from May, 2021 to July 2021.

- The applicant had sanctioned 15 (fifteen) construction equipment loans aggregating to Rs. 11,80,26,600/- and 6 (six) working capital term loans under Guaranteed Emergency Credit Line Scheme aggregating to Rs. 14,67,51,600/- to the corporate debtor to be repaid with contractual rate of interest based upon execution of various facility agreements.
- Despite repeated requests and reminders to clear up the outstanding instalments and interest due, the corporate debtor failed to repay its overdues and thereby committed default.
- Consequent to default the applicant had issued demand notices dated 13.11.2021, 19.01.2022 and 21.01.2022 calling upon the corporate debtor to pay an amount of Rs. 18,11,06,790.12 as on 19.01.2022 which squarely falls within the definition of financial debt.
- As per Vidarbha Industries' judgement dated 12.07.2022 passed by Hon'ble Apex Court, the Adjudicating Authority may examine all relevant facts and circumstances.
- Against the corporate debtor and its directors, in addition to the present application, several applications have been filed by various financial creditors/operational creditors before authorities like DRT-1, Ahmedabad, CMM, Ahmedabad and Civil Court, Ahmedabad

- Corporate debtor has neither filed latest financial statements for FY 2021-22 before RoC nor before this bench despite order dated 31.10.2022, however, as per balance sheet annexed with Additional Affidavit filed by the corporate debtor, as on 31.03.2021, the corporate debtor had following outstanding liabilities:

Sl. No.	Particulars	Outstanding as on 31.03.2021
1	Long term borrowing (26 creditors)	132,34,99,000/-
2	Short term borrowings (18 creditors)	215,83,14,000/-
	Total	348,18,13,000/-

- Arbitral awards obtained by the corporate debtor for Rs. 41.23 crores against Municipal Commissioner, Rajkot and National Highway Authority, respectively dated 25.01.2018 and 26.06.2018 wherein the corporate debtor has not served summons upon the aforesaid authorities till date.

9. The corporate debtor filed written submissions stating that:

- Corporate debtor has obtained arbitral awards to the tune of Rs. 41.23 crores along with interest pending to be recovered from State functionaries. Thus, the amount to be recovered from such agencies and local authorities exceeds the amount that financial creditor is claiming under Section 7 petition. Therefore, the case is squarely

covered by decision of the Hon'ble Supreme Court in Vidarbha Industries Power Limited vs. Axis Bank Limited

- Corporate debtor has relied on the decision taken by Hon'ble NCLAT, New Delhi in *Shaikh Mohammed Tariq vs. Aegis Forging Ltd.* [Company Appeal (AT) (Ins) 1342 of 2022] wherein it is held as under:

“Be that as it may, the fact that there is already an award to pay cash security of Rs. 3,64,58,785/- with interest, which award has already been put in execution by the financial creditor, this was reason good enough to refuse admission of section 7 application. It has now been laid down by the Hon'ble Supreme Court in Vidarbha Industries Power Ltd. vs. Axis Bank Limited that admission of section 7 application is not obligatory merely on proof of debt and default”

- Claims for several loan agreements cannot be merged into one.
- Corporate debtor has relied on the decision taken by Hon'ble NCLAT, New Delhi in *International Road Dynamics South Asia Pvt. Ltd. vs. Reliance Infrastructure Ltd.* [Company Appeal (AT) (Ins) 72 of 2027]

wherein it is held as under:

“10. We are of the view that different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate. For the said reasons, we hold that the joint application preferred by appellant under Section 9 is defective, as distinct from incomplete and, was not maintainable.”

- Outstanding amount claimed is incorrect.
 - Financial creditor has failed to prove the availment and disbursement of loan to the corporate debtor.
 - OA No. 71 of 2022 filed before DRT - 1, Ahmedabad is pending.
10. The corporate debtor filed additional affidavit enclosing therewith copy of arbitral award dated 08.07.2022 and a copy of judgement of Hon'ble Supreme Court of India dated 12.07.2022 in the matter of *Vidarbha Industries Power Limited vs. Axis Bank Limited* wherein it is held as under:

“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 for 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) of 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.

NCLT shall reconsider the application of the appellant for stay of further proceedings on merits in accordance with law.

11. In pursuance of order dated 12.09.2022 the corporate debtor filed additional affidavit enclosing therewith copies of latest case status of execution petitions pending against two authorities and latest audited balance sheet and certificate from statutory auditor in respect of net worth of corporate debtor. The following execution petitions are filed by the corporate debtor in respect to some award (s) passed in its favour.

No.	Particulars	Next Date
1	Commercial Execution Petition No. 27 of 2021 before District Court, Rajkot “Kunal Strucure India Ltd. v. The Municipal Commissioner, Rajkot”	06.12.2022
2	Commercial Execution Petition No. 27 of 2021 before District Court, Rajkot “Kunal Strucure India Ltd. v. The Municipal Commissioner, Rajkot”	10.11.2022
3	Execution petition (regular) No. 648 of 2022 before Civil Court, Ahmedabad “Kunal Strucure India Ltd. v. Chief Engineer (NH) and Add. Secretary and Anr.	02.11.2022

12. As per Form 1, part IV, the corporate debtor is in default of total Rs. 18,11,06,790.12 (Rupees eighteen crores eleven lakhs six thousand seven hundred ninety and twelve paise only) as on 19.01.2022.

13. The registered office of the corporate debtor is situated in Ahmedabad, Gujarat State and, therefore, this Tribunal has jurisdiction to entertain and try this application.
14. Heard the submissions and perused the documents on record. The arguments of both sides are dealt with as under:
15. In the case of an application by a financial creditor, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all the relevant facts and circumstances, including the overall financial health and viability of the corporate debtor. In the instant case, the adjudicating authority cannot brush aside the case of the corporate debtor that against the claim of 18.11 crore, an amount of Rs. 41.23 crore is receivable by the corporate debtor in terms of the arbitral awards obtained by it.
16. In view of the decision of Hon'ble Supreme Court in *Vidarbha Industries Power Limited vs. Axis Bank Limited* and the observations made therein it is apparent that admission of application under Section 7 of IBC, 2016 is not obligatory merely on proof of debt and default.

The relevant extracts of head note and judgement are reproduced below for reference:

“C. Insolvency and Bankruptcy Code, 2016 – Ss. 7 and 9 – Scheme under with respect to admission of applications by financial and operational creditors – distinguished – held, it is apparent from the use of “shall” and “may”, respectively, that legislature intended S. 9 (5) (a) to be mandatory and S. 7 (5) (a) to be discretionary.

The fact that legislature used “may” in S. 7 (5) (a) but a different word, that is, “shall” in the otherwise almost identical provision of S. 9 (5) (a) shows that “may” and “shall” in the two provisions are intended to convey a different meaning – Further, the legislature has consciously differentiated between financial creditors and operational creditors, as there is an innate difference between financial creditors, in the business of investment and financing, and operational creditors in the business of supply of goods and services – Interpretation of statutes – subsidiary Rules – Mandatory or directory – Use of “may” and use of “shall”.

D. Interpretation of Statutes – Basic Rules – Literal construction/interpretation/A verbis Legis Non Est Recedendum – The first and foremost principle of interpretation of a statute is the rule of literal interpretation – Held, if S. 7 (5) (a) IBC is construed literally the provision must be held to confer a discretion on the adjudicating authority (NCLT) – Further, purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result – In this case, held, there is no cogent reason to depart from the rule of literal construction - Hence, power and under S. 7 (5) (a) IBC held to be discretionary in nature (see in detail short note A) – Insolvency and Bankruptcy Code, 2016 S. 7 (Paras 65 to 69)”

“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 for 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) of 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.

NCLT shall reconsider the application of the appellant for stay of further proceedings on merits in accordance with law.”

17. There is no denial that loan facilities are availed by corporate debtor. Proceedings before DRT, and various other parties approaching other judicial fora are also pointing towards incapacity of the corporate debtor to pay its debts. The applicant is financial creditor and an amount of Rs. 18.11 crore is due from the corporate debtor. The debt and default is established. The debt is also within limitation. Thus, all ingredients for admission of the application under Section 7 are present in this case. However, we note that an amount of Rs. 41.23 crore is receivable by the corporate debtor in terms of the arbitral awards decided in its favour. Corporate debtor has taken steps for execution of the said award. We have also noted that as per the latest

standalone audited report of financial year 2020-21 submitted by the corporate debtor, it has positive net worth of Rs. 284.87 crores, as per the additional affidavit dated 22.10.2022 submitted by the corporate debtor. Corporate debtor has further submitted that it is a going concern with 728 employees and currently work in 15 projects is going on.

18. We have gone through the order of NCLT, Indore Bench in the case of *Krishidhan Seeds Private Limited in TP 82 of 2019 [CP(IB) 500 of 2018]* wherein in similar circumstances the application for admission in CIRP was kept in abeyance for six months.

19. From the facts of this case it is apparent that there is a debt of Rs. 18.11 crore, which is within limitation, and the corporate debtor has defaulted in its payment. Thus, all ingredients for admission into CIRP under Section 7 of IBC are present in this case. However, as guided by Hon'ble Supreme Court in the case of *Vidarbha Industries Power Limited*, and on consideration of the decision of Indore Bench in the case of *Krishidhan Seeds Private Limited* cited supra, we find it proper to keep this proceeding for admission under Section 7 of IBC

in abeyance for six months from today. We make it clear that if the corporate debtor fails to settle the due debts within the time given, we will be constrained to pass further orders. We further direct the corporate debtor not to sell the assets mortgaged with the applicant or other financial creditors without approval of this Adjudicating Authority.

20. We direct the Registry to put the proceedings of this case in the cause list after six months from today.

Sd/-

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

Sd/-

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)**