IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(REFERRAL BENCH)
KOLKATA

TP(IBC)/1(KB)2022
TA (IBC)/1(KB)2022,
TA (IBC)/3(KB)2022,
TA (IBC)/2(KB)2022.

<u>TP(IBC)/1(KB)2022.</u>

Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Power Finance Corporation Limited, CIN: L65910DL1986GOI024862, a Government of India Undertaking Urjanidhi, 1- Barakhamba Lane, Connaught Place , New Delhi- 110001.

...Financial Creditor

Versus

Shree Maheshwar Hydel Power Corporation Limited, CIN U40101MP1993PLC007667, having its registered office at Abhayanchal Parisar Post Mandaleshwar, Madhya Pradesh, 451221

...Corporate Debtor

And

<u>TA (IBC)/1(KB)2022</u>

Entegra Ltd.

… Applicant

And

<u>TA (IBC)/3(KB)2022</u>

Power Infrastructure India

…Proposed Intervenor

<u>TA (IBC)/2(KB)2022.</u>

Entegra Limited

… Applicant

Date of hearing: 01 August 2022
Date of pronouncement of order: 27 September 2022

Coram:
Shri Rohit Kapoor : Member (Judicial).

Appearances (through video conferencing):

Mr. Ramji Srinivasan, Sr. Adv Mr. Deepak Khurana, Adv. Ms. Rajshree Chaudhary, Adv. Mr. Ashwini Kumar Tak, Adv. Ms. Nishtha Wadhwa, Adv.	: Financial Creditor (PFC)
Mr. Arjun R. Sheth, Adv. Mr. Rajiv Chawla, Adv. Ms. Kriti Kothari	: Corporate Debtor
Mr. Abhishek Puri, Adv. Mr. Sachin Shah, Adv. Mr. Umesh ved, PCS	: In IA Entegra Ltd.
Ms. Fereshte Sethna, Adv. Mr. Aniket Nimbalkar, Adv. Ms. Shivani Sanghavi, Adv.	: In IA Power Infrastructure India

ORDER.

1. This Court convened through video conferencing.

2. This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("**Code"**) has been filed by Power Finance Corporation Limited, ("**Financial Creditor**") through its Deputy General Manager namely Mr. Praveen Verma, authorised *vide* Board Resolution dated 19/12/2017 (Annexure-A2 Colly), for initiation of Corporate Insolvency Resolution Process in respect of Shree Maheshwar Hydel Power Corporation Limited (hereinafter referred to as the Corporate Debtor.

3. This petition has a chequered history, noted briefly herein after. This Company Petition was initially filed before the NCLT Ahmedabad Bench on 16th February, 2018.

4. This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 was decided on 08.10.2021, however, there was difference of opinion

amongst two Ld. Hon'ble Members of National Company Law Tribunal and as a result of which this has now been placed before me by Hon'ble President of NCLT.

5. The points referred to under section 419(5) of the Companies Act i.e. the points of difference of opinion are as follows:

    I. Whether Entegra Ltd., the original promoter and Power Infrastructure India as strategic investors, have any locus to intervene in the matter on behalf of the corporate debtor?

    II. Whether, notice dated 17.01.2018 recalling the loan is bad in law?

    III. Whether, present application filed under section 7 of IBC, 2016 is an instance of fraud/malicious initiation of insolvency proceedings under section 65 of the Code?

    IV. If point No. III above is affirmative then whether the application under section 7 of the Code ought to be rejected on that ground?

Contents of application u/s 7 of IBC are summarised as under:

6. Part-I of the application contains the particulars of the applicant. Part II contains particulars of Corporate Debtor, Part-III contains particulars of the Proposed IRP.
7. Part IV contains claims of financial debt for an amount of Rs. 2789,42,00,000/- (Rupees Two Thousand Seven Hundred Eighty-Nine Crore and Forty-Two Lakh only). As is evident from part IV of the application which was filed on 16th of February, 2018 contains the debt up to 15th of January, 2018.
8. Part-V, contains particulars of financial debt along with the documents relied therein.
9. Besides the above, supplementary affidavit which is part of this application contains factual position contended by the Financial Creditor.
10. It is contented that the Financial Creditor is a 'Navaratna' Central Public-Sector Enterprise under the administrative control of Ministry of Power

(MoP), Government of India and is a Non-Banking Financial Company having its registered office at "Urja Nidhi", 1 Barakhamba Lane, Connaught Place, New Delhi-110001.The Financial Creditor is carrying on its business as a Non-Banking Financial Company inter alia for providing financial assistance to the enterprise dedicated to development of power sector in India, in accordance with the rules, regulations and guidelines issued by the Reserve Bank of India from time to time and other applicable guidelines.

11. The background along with the dates and events of the project and the credit facilities extended to the Corporate Debtor are contained in '**Paras b to hh' from page 14 to 30** in the instant application under section 7 of the Code.
12. In view of the factual position stated in the above referred paragraphs, it is contended by the Financial Creditor that the Corporate Debtor was unable to repay the outstanding amount of **Rs.2789,42,00,000/- (Rupees Two Thousand Seven Hundred Eighty-Nine Crore and Forty-Two Lakh only)** and therefore has contended it is just fair and equitable and in the interest of justice the present application be admitted, CIRP initiated in respect of Corporate Debtor and the IRP be appointed to conduct the affairs of the Corporate Debtor till the resolution plan is finalized for the Corporate Debtor or the Corporate Debtor goes into liquidation " as the case may be" in terms of the provisions of the Code.
13. At page 32, it mentions the relief sought in the present application.

Submissions of Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of the Petitioner.

14. Ld. Sr. Advocate Sh. Ramji Srinivasan, while addressing his arguments, has taken this Adjudicating Authority to list of dates, events, pleadings/affidavits and written submissions filed by Financial Creditor before this Adjudicating Authority and which are summarised in tabular form herein after.

Date	Event	Pg/s
Events prior to filing of Section 7 Application		
1993	The Government of Madhya Pradesh entrusted the construction and implementation of 10x40 MW hydroelectric power project at Mandaleshwar, Madhya Pradesh ('**Project**') to Entegra Limited on 'Build Own Operate and Maintain' basis.	
11.5.93	Corporate Debtor was incorporated as a SPV.	
11.11.94	A Power Purchase Agreement was signed between the Corporate Debtor and Madhya Pradesh State Electricity Board (now Madhya Pradesh Power Management Company Ltd – MPPMCL, in short) for purchase of 100% power from the Project. Subsequently, the Corporate Debtor approached various banks and Financial Institutions including the Financial Creditor for grant of various credit facilities for setting up the Project.	
10.10.97	The Financial Creditor sanctioned a Rupee Term Loan of Rs. 100 ('**RTL**	

Date	Event	Pg/s
	1') Crore and Foreign Currency Loan of USD 34 Million ('**FCL 1**') to the Corporate Debtor ('**Corporate Debtor**') for the Project.	
24.11.98	The Financial Creditor sanctioned additional standby loan of USD 18.9 Million to the Corporate Debtor for the Project ('**FCL 2**'). Other lenders also extended financial assistance to the Corporate Debtor for the Project.	
4.12.98	Loan Agreements for the aforesaid loan facilities were executed between the Financial Creditor and the Corporate Debtor.	101/10 CP
1998 to 2000	Non-infusion of requisite equity on the part of the Promoters (Entegra Ltd., Mukul S. Kasliwal and MW Infra Developers Pvt. Ltd.) of the Corporate Debtor led to a huge gap of about Rs. 330 crore of equity funding in the Project.	Pr 2(g) 15/17 CP
March, 2001	The Corporate Debtor approached the GoMP for participation in the Project equity, to bridge the aforesaid gap and in March, 2001, GoMP accorded its approval for a Stand-By Guarantee Facility of Rs 400 crores so as to enable	

Date	Event	Pg/s
	the Corporate Debtor to raise optionally fully convertible debentures (‘**OFCDs”**) to the extent of Rs 400 crores. In order to improve the marketability of the bond issue, the Corporate Debtor further approached the Financial Creditor to provide a Default Payment Guarantee to the extent of Rs 400 crores (‘**DPG**’). In the interest of the Project the Financial Creditor agreed to provide the aforesaid Default Payment Guarantee. **Note:** That despite the support provided by the GoMP and the Financial Creditor for the above bond issue, the financial closure could not be achieved by the Corporate Debtor. The Project cost had escalated from Rs 1565 crores to Rs 1818 crores (till 1998) with corresponding equity of Rs 582 crores. That till 2005, the Promoter along with foreign investors had infused equity of Rs 144 crores.	
1.10.01 to 31.10.05	The Project was completely stalled due to non tie-up of equity impacting the financial tie up of the Project. The promoter and the Corporate Debtor failed to infuse requisite equity in the Project and thereby the Project	

Date	Event	Pg/s
	suffered a setback. It was solely due to financial indiscipline of the Promoter and the Corporate Debtor that the Project work was stalled. That in order to explore the possibility of reviving the Project, a task force was constituted in September, 2005 by the Ministry of Power (‘**MoP**’), of which Financial Creditor was also a part. Simultaneously, the Corporate Debtor appointed IL&FS as financial advisors to work out a Financial Realignment Plan (‘**FRP**’) for the Project. The FRP was approved by each of the lenders including the Financial Creditor on various dates. The Corporate Debtor approached the Financial Creditor to take over as the Lead Institution from FCI Ltd. and also to revalidate its financial assistance for the Project.	
2.3.05	On further discussion with the Corporate Debtor, the Financial Creditor revalidated its support of Rupee Term Loan of Rs. 325 Crore (which included amount disbursed under RTL1, FCL1 & FCL2) and the DPG for the said OFCD. Accordingly, sanction letter was issued by the Financial Creditor to the Corporate Debtor. Thereafter the Financial	166/168 CP

Date	Event	Pg/s
	Creditor also provided the DPG in favour of the trustee of the OFCD issue on 09.03.2006 which was secured by the **Counter Guarantee of GoMP** dated 09.03.2006. That in terms of the sanction letter dated 02.03.2005 for revalidation of loan, it was stipulated that the Financial Creditor in consultation with other lenders will approve the appointments of Chairman, Managing Director and Director (Finance) on the Board of the Corporate Debtor. Accordingly, Articles of Association of the Corporate Debtor were amended with the consent and approval of its members. **Note**: Both Corporate Debtor & Entegra's contention is that by amendment of AoA, the composition of Board of the Corporate Debtor was tilted in favour of Lenders thereby meaning that the management control of the Corporate Debtor was transferred to the Lenders. However, notably, the amendments were done (i) with the consent and approval of the shareholders including the Promoter; and (ii) in view of the	

Date	Event	Pg/s
	revalidation of the financial facility, the COD of the Project having been delayed as brought out above, (iii) All Lenders including GoMP were involved in the said process, with GoMP having a nominee director on the Board. Reliance was also placed on the letter dated 02.03.2005 by Entegra (207/210 of the 3rd Reply filed by Corporate Debtor) & more specifically Para 11 to contend that Lenders were to exercise full management and control. It was argued that Para 12 of the said letter which provided that in case of increase in project cost the promoters shall contribute the entire amount (Point No. 12), was deleted vide letter dated 30.06.2006 *(211/214 @ 213/216)*, thereby indicating that the Promoter were not required to contribute. The above contentions are misleading & incorrect. The fact that the Condition (Point) No. 12 does not mean that the Promoter, who had already defaulted in bringing in the requisite equity, were not required to make good the said default. The condition in Point No. 12 was w.r.t. further increase in the Project Cost. Promoter had already	

Date	Event	Pg/s
	defaulted in bringing in equity in terms of the Original Project Cost. It is further to be noted that if the Promoter or any other party was aggrieved by Lenders' collective decisions as reflected in para 12 of the letter dated 02.03.2005 & if the Promoter itself was not in default, then the Promoter was not precluded from taking recourse to their remedy to protect their rights & interests. The fact that the Promoter did nothing, not even a word of protest, shows that they were in default, and the Lenders were only trying to ensure completion of the Project, which was allotted by the GoMP and was being supervised by the MoP, GoI. Further, the Corporate Debtor requested the Lenders to disburse further amounts on the ground of completing the construction of the Project. The then existing Lenders of the Corporate Debtor agreed to convert defaulted portion of interest in their respective accounts into Zero Coupon Bonds ('**ZCB**') redeemable over a period of 20 years after a moratorium of 1 (one) year from the	

Date	Event	Pg/s
	commercial operation date of the Project. Pertinently, in terms of the Master Restructuring and Loan Agreement which was executed subsequently on 22.06.2010, the COD was 31.12.2010. ***[Para 2(k) at 17/19 CP]***	
16.9.05	An Amendatory and Restated Agreement was signed amongst the GoMP, MPSEB, the Financial Creditor, the Corporate Debtor and Entegra Ltd. (Promoter). As per Clause 3.3 of the A&RA, it was the responsibility of the Promoter to achieve financial closure within 180 days of the signing of the A&RA i.e. by 15.3.06. Further, as per the A&RA, Commercial Operation Date (‘**COD**’) as defined in the PPA or 4 years from the effective date of GoMP’s Counter Guarantee for the OFCD.	147/149 CP
24.10.05	That in a review meeting presided over by the **Secretary (Power)**, it was noted that while the restructuring was based on the starting point of the Promoter brining in Rs 310 crores as Project equity and that the Promoter failed	471/473 CP

Date	Event	Pg/s
	miserably in the same. It was decided that the Corporate Debtor, its Promoter and the lenders should make all t efforts to restart the Project by 01.11.2005. Thus keeping in view the urgency, the Financial Creditor further disbursed Rs 70 crores till August, 2006. However, the Corporate Debtor failed to achieve the financial closure due to failure to infuse equity. As a result of non-achievement of financial closure, the Financial Creditor on the request of Corporate Debtor had to sanction additional funding to the tune of Rs 375 crores in the nature of subordinate loan to facilitate financial closure and to ensure implementation of the Project.	
29.9.06	Pursuant to above, Financial Creditor and Corporate Debtor executed a Subordinate Loan Agreement for disbursement of subordinate loan of Rs. 375 Cr. A Common Loan Agreement was also executed between Financial Creditor, Rural Electrification Ltd., Housing & Urban Development Corporation Ltd. and the Corporate Debtor for a loan	363/365 CP 172/174 CP

Date	Event	Pg/s
	aggregating to Rs 834 crores (‘**CLA**’). Thus, financial closure was achieved with the execution of the CLA and the Subordinate Loan Agreement. As per the terms of the Subordinate Loan Agreement, the Financial Creditor had the right to convert a part or full of the subordinate loan into fully paid up equity shares of the Corporate Debtor at par.	
30.11.06	That, in accordance with the requirements of the CLA, a Deed of Pledge **(Pledge Deed),** was also executed in favour of Financial Creditor acting as the Security Agent and further addendums were done thereto in the year 2010 and 2011, whereby the Promoter pledged its 29,17,20,330 Fully Paid up Equity Shares of aggregate face value of Rs.291,72,03,300/- held in the Corporate Debtor, for the benefit of the lenders (including the Financial Creditor), with a second charge on the said shares in, favour of GoMP.	
22.6.10	As a number of lenders were involved in the Project since 1997 till date and their standalone financing and security	516/518 @

Date	Event	Pg/s
	documents led to a requirement of bringing all the lenders on a common platform. That in order to achieve uniformity of terms and conditions amongst all the lenders in relation to the administration and disbursement of the Credit. Facilities and creation of additional Security and its enforcement, the Corporate Debtor and the lenders (Financial Creditor, HUDCO, REC, Central Bank of India, State Bank of India, Life Insurance Corporation Ltd., IFCI, Dena Bank, GIC, NIC, IDBI, UIICL, OIC & NIA (14 lenders) entered into Master Restructuring and Loan Agreement **('MRLA')**	574/576 CP
2011 to 2016	That, the Corporate Debtor also failed to maintain the financial discipline in terms of the financing agreements and defaulted in repayment of dues, interest and outstanding amounts to the lenders. It is pertinent to mention that till 2010, whereas the lenders (including the Financial Creditor) had disbursed their total debt commitment to a tune of approximately Rs. 1817 crores, the Promoter of the Corporate Debtor and foreign investors had brought in only approximately Rs. 499	

Date	Event	Pg/s
	crores against the equity requirement of Rs. 749 crores (which was only 66% as per the stipulations of FRP) which was required to be arranged by the Promoter. The Project completion was incessantly getting delayed. If the Promoter had timely infused funds and taken proper steps for the implementation of the Project, there would not have been an inordinate delay of more than 20 years in implementation of the Project. That from the year 2011 to 2016 the Project was completely stalled again owing to non-infusion of funds by the Corporate Debtor and its Promoter and their nonchalant approach towards the Project. Accordingly, the loan accounts of the Corporate Debtor were classified as Non-Performing Assets ('**NPA**') by the lenders including the Financial Creditor classifying the loan account as NPA on 31.3.12 in accordance with guidelines as applicable to each of the lenders.	
30.9.14	The **Union Minister of State** (Independent Charge) for Power, Coal and Renewable Energy, took a review of the Madhya Pradesh power sector, where the **Chief Minister** of Madhya	

Date	Event	Pg/s
	Pradesh, **Energy Minister** of Madhya Pradesh, other **senior officials** of the **State**, and **senior officials** of the **Central Public-Sector Undertakings** were also present. During the review meeting, a High-Level Committee headed by **Additional Chief Secretary (Finance), GoMP,** was constituted to suggest the way forward for the Project. The other members of the said Committee were **Principal Secretary (Energy), GoMP, Joint Secretary (Hydro), Union Ministry of Power, Director (Finance) of the Financial Creditor, Managing Director of MP Power Management Company Limited, a nominee from State Bank of India, and Mr. Mukul Kasliwal** (representative of the Promoter).	
17.11.14 **(Ack. 1 Balance Sheet 2014)**	Debt was acknowledged in the **Annual Report/Balance Sheet** of the Corporate Debtor for the FY 2013-14 signed by Sh. Mukul Kasliwal (Promoter) as one of Directors of the Corporate Debtor on 17.11.2014. This Annual Report was filed with the ROC & is part of public record. This Annual Report is also filed by Entegra Ltd. as *Annexure-QQ* with CP No. 175/2017.	15/16 @ 54/55 PFC WS 4.8.21

Date	Event	Pg/s
2.5.15	*Vide* letter dated 02.05.2005, the Report of the aforesaid High Level Committee was circulated, wherein the following three Scenarios were proposed:- **Scenario-I**: Implementation by the present promoter – 90 days' time allowed till 02.08.2015. *Existing promoter will have to arrange additional equity of Rs. 600 Crore as well as debt of Rs. 1100 Crore at concessional rates* to achieve the MPPMCL stipulated tariff of Rs. 5.32 per unit shall be applicable. **Scenario-II**: Government companies acquiring/ having majority equity in project with management control. Project could be taken over by NHPC Limited/ NHDC Limited and that Financial Creditor would be amenable to infusing equity or additional debt as well as lowering of interest rate for existing debt and with commensurate support from lenders, tariff could be reduced to Rs. 5.32 per unit which is acceptable to MPPMCL. **Scenario-III**: Cancellation of PPA. If scenario I & II above do not fructify, the last option will be that MPPMCL	

Date	**Event**	**Pg/s**
	cancels the existing Power Purchase Agreement. GoMP and MPPMCL would be burdened on account of GoMP's counter guarantee of Rs. 400 Crore issued to the Financial Creditor.	
29.9.15 **Ack 2**	The Corporate Debtor again acknowledged its liability/debt in the meeting of the Board of Directors of the Corporate Debtor held on 29.09.2015 duly attended by the Promoter Sh. Mukul Kasliwal.	821/843 CP
18.12.15	That, as per the Scenario-I, the Promoter was given 90 days' time to submit a firm and binding proposal regarding arrangement as stated above. However, the Promoter failed to infuse necessary equity and/or arrange the debt. Consequently Scenario-II was initiated in compliance of the recommendations of the High-Level Committee.	
5.1.16	Following the non-compliance of Scenario-I by the Promoter, the Financial Creditor, on behalf of itself and other Lenders, issued a Loan Recall Notice to the Corporate Debtor and demanded payment of the	838/860 CP

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	outstanding dues. However, no repayment of the outstanding amounts was received by the Financial Creditor or other lenders.	
22.3.16 **(Attempt to implement Scenario II)**	A review meeting held at Ministry of Power to discuss the issues relating to revival of the project. Following was *inter-alia* discussed. i. Endorsement of NHPC/NHDC as new Promoter as suggested by Committee. However, NHPC declined the suggestion. ii. As an interim measure, the Financial Creditor along with other lenders proposed to take majority equity of the Corporate Debtor to sustain the revival measures. Implementation of Scenario II was envisaged by way of (a), invocation of pledge in favour of various consortium lenders, and (b) exercise of the conversion right by the Financial Creditor, as entailed under the Subordinate Loan Agreement, for partially converting Financial Creditor's subordinate loan into equity, in order to acquire majority	

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	equity as per the mandate of the High-Level Committee under Scenario-II.	
19.5.16	A notice/intimation for **Invocation of Pledge** was issued by the Financial Creditor to the Corporate Debtor and its Promoter/pledgor.	
27.5.16	The Financial Creditor issued a Notice to the Corporate Debtor for partial conversion of subordinate loan outstanding from Corporate Debtor into equity. By virtue of the transfer of 6,57,46,779 number of equity shares of Rs. 10/- each and conversion of subordinate loan of Rs. 66,10,00,000/- into 6,61,00,000 equity shares of Rs. 10/- each, the Financial Creditor became a shareholder of the Corporate Debtor w.e.f from 01.06.2016, holding 13,18,46,779 equity shares of Rs. 10/- each, constituting 23.32% of the entire shareholding of the Corporate Debtor. It is also pertinent to mention that **7 of the Lenders namely Financial Creditor, REC, HUDCO, Central bank of India, Dena Bank, NICL** had cumulatively acquired 51% shareholding of the Corporate Debtor,	

Date	Event	Pg/s
	pursuant to the invocation of the pledged shares and conversion of sub-ordinate loan into equity. That subsequent to acquisition of **51% stake in the Corporate Debtor by the lenders, the Financial Creditor formed a corpus fund of Rs. 20 crores** to meet immediate critical fund requirements and started making disbursement to address the difficulties faced by the Project as mentioned above. Importantly, following works were taken up by the Corporate Debtor i.e. restoration of Electricity and water supply at site, Appointment against key vacant positions in the Board as well as at working level, dewatering of Power House and Dam gallery, maintenance of radial gates to avoid any mishap during monsoon, outstanding salary of the staff and workers of the Corporate Debtor at the Project site w.e.f. 01.06.2016 was paid, salary of R&R executing committee staff members, deployment of security agency at site, Maintenance of switchyard and Power House, assessment of revised cost and timelines for completion of project, process initiated for renewal of	

Date	Event	Pg/s
	insurance that had lapsed in February 2014.	
13.1.17	In the meanwhile, the efforts to revive the Project by the Financial Creditor were hindered by the Promoter and other investors. On account of various complaints filed with Registrar of Companies, Gwalior against the Financial Creditor and other lenders and several non-compliances under Companies Act, 2013 by the Corporate Debtor, the Corporate Debtor was eventually marked as "Management disputed" company by the RoC. Under such circumstances, the Corporate Debtor was unable to tie-up requisite amount required for completion of the Project and to run the day-to-day affairs of the Corporate Debtor. On account of acts of omission & commissions of the Promoters of the Corporate Debtor, the Financial Creditor was constrained to file a Petition under Section 241, 242 & 244 of the Companies Act, 2013 bearing C.P. No. 15/241-242/NCLT/AHM of 2017 before the Hon'ble NCLT seeking appropriate reliefs *inter-alia*, for handing over of records of the Corporate Debtor from	

Date	Event	Pg/s
	the erstwhile management, removal of *'Management Disputed'* status of the Corporate Debtor by the RoC.	
27.4.17 **(Addl.** **Loan 2017)**	That in order to meet the immediate fund requirements as part of revival measure of the Project, the Financial Creditor in principle agreed to the increase in the Project cost from Rs. 2760,00,00,000/- to Rs. 8121,00,00,000/- and requirement of additional debt of Rs. 3022,00,00,000/- **('Additional Debt")** for the Project. Subsequently, at the request. of the Corporate Debtor, a Loan Agreement dated 27.04.2017 was executed between the Financial Creditor and the Corporate Debtor **('Additional Loan Agreement')** for an additional term loan of Rs. 600 crores in order to meet the immediate fund requirements as a part of revival measure of the Project. Pursuant to the said Additional Loan Agreement, the Financial Creditor had disbursed an amount of Rs. 384,59,00,000. The said Additional Loan Agreement was entered into by Financial Creditor in the capacity of Lender's Agent, Security Agent and Lender.	683/705 CP 39/40Rep IA 53

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Ack. 3	**Note:** **(i)** Pertinently, the aforesaid loan was supported by the Promoter Sh. Mukul Kasliwal in the board meeting dated 2.3.17, as recorded in the minutes of meeting as under, wherein it is recorded that "*Shri Mukul Kasliwal specifically requested the Board to record that, the sanctioning of additional loan to complete the project is a welcome step apart from all the issues and concerns going on between the Lenders and Promoters and Lenders will receive support from the promoters as well in view to complete the project.*" Entegra is thus estopped from questioning the said Loan Agreement & any argument to the contrary is hit by doctrine of approbate and reprobate. **(ii)** Schedule II of the Additional Loan Agreement dated 27.04.2017 acknowledges the already existing debt of Rs. 1750.93 crore including the aforesaid amount due to the Financial Creditor *(Pg. No. 736/758).* Further, the Recitals to the Loan Agreement *(Pg. Nos. 685/707)* also	

Date	Event	Pg/s
	acknowledge the previous liabilities of the Corporate Debtor. **(iii)** Article 2.3(a) of the said Loan Agreement states *“The Drawdown under this Agreement shall be subject to the satisfaction of each condition precedent set forth in Article IV hereof. Further, the obligation of the Additional Lender to make disbursement under this Agreement shall be subject to the Borrower performing its obligation and undertakings under this Agreement and the Borrower’s compliance with the disbursement procedure stipulated hereunder, including, the submissions by the Borrower of all necessary information, documents, etc. to the satisfaction of the Additional Lender.”* Article 4.1(ii)(a) provides that *“validity of the Additional Facility as well as its terms and conditions shall be subject to Government Companies/Lenders holding majority equity in the Project…………..”* It was argued by Entegra that the Recitals of this Loan Agreement are contrary to the Order dated 12.3.18 of	

Date	Event	Pg/s
	the Hon'ble NCLAT [Recitals (L),(O),(R), (S)]. It is submitted that the Loan Agreement was executed much prior to the Hon'ble NCLAT Order dated 12.3.18, in fact **prior to** NCLT Order's dated 15.6.17. On account of acquisition of the shareholding of Corporate Debtor by the Lenders having been declared invalid vide the said Orders, further disbursals under the Loan Agreement could not be made, as the condition precedents for such disbursal could not be fulfilled. The interest amount of Rs 10 crores was due to be payable by the Corporate Debtor on 15.07.2017, i.e. after the NCLT's Order. This amount could not be disbursed to the Corporate Debtor on account of the NCLT Order as aforesaid. At the time of disbursal of Rs 384 crore, the amount of Rs 10 crore had not become due for payment by Corporate Debtor, and therefore, it was not disbursed along with Rs 384 crore. (Please see Para 14 of the Loan Recall Notice dated 17.01.2018 at Pg 86). Thus, the allegation of default having been 'created' or engineered' is wholly incorrect and baseless. Accordingly,	

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	the position remains that the Corporate Debtor received the amount (debt) and defaulted in payment of interest on the amounts already disbursed.	
15.6.17	NCLT dismissed the said Petition holding, *inter-alia* that the aforesaid invocation of pledge of shares and conversion of debt into equity shares in the Corporate Debtor by the Lenders was not as per law.	578/589 3rd Rep
6.7.17- 5.1.18	The Corporate Debtor could not comply with the terms, conditions and covenants of the Additional Loan Agreement, based on which the Financial Creditor had sanctioned the Additional Debt, *inter alia* including conditions provided under Article 2.3 (a) ***[Pg 696/718]*** read with Article IV of the Additional Loan Agreement, occurrence of events adversely impacting the ownership of Government companies/ lenders (including Financial Creditor) etc. provided under Article 4.1 (ii) (a) ***[Pg 706/728]*** and accordingly the Financial Creditor could not have and did not disburse any further money out of the Additional Facility to the	

Date	Event	Pg/s
	Corporate Debtor. Pertinently, the additional loan was sanctioned as part of the revival measures in accordance to the recommendation of **High Level Committee Constituted by GoMP** and was *inter alia* on the premise that Government Companies/ Lenders shall hold majority equity in the project. The first interest payment was due on 15.07.2017 in terms of Article 7.1(b) *(Pg. No. 719/741)* read with definition of *'Interest Payment Dates'* at *Pg 692/714*. (After the NCLT's Order dated 15.06.2017) The Corporate Debtor failed to pay the same & subsequent instalments. Demand Letters dated 06.07.2017, 01.10.2017 & 05.01.2018 were issued by the Financial Creditor to the Corporate Debtor for non-payment of dues under the Loan Agreement dated 24.04.2017. ***[Page 853/875 of the Application]***. **Note**: It has been argued by the Corporate Debtor & the Promoter that the default under the Additional Loan Agreement was not that of principal amount but that of Interest, as Principal amount repayment was to	

Date	Event	Pg/s
	begin from 15.07.2020. It was further argued that this default in repayment of interest was *'created'* by the Applicant for taking the Corporate Debtor to IBC. Reference was made to the Draw Down Notice dated 02.05.2017 ('**DDN**') to contend that an amount of Rs 435 crore was sought under the DDN including interest payment of Rs 10 crore (IDC), however, the Applicant chose to not make the disbursal of the said amount of Rs 10 crore towards interest with malicious intent. The contention is misconceived inasmuch as Corporate Debtor & Promoter cannot seek to rely upon the Loan Agreement to the extent it provides for disbursal of amounts, however in the same breath ignore the conditions attached to such disbursal. It is clear case of approbation & reprobation. As brought out above, the amount could not be disbursed as the condition for disbursement could not be fulfilled because of the Order dated 15.06.2017 passed by the NCLT. It is further pertinent to note that on the one hand the Promoter, Corporate Debtor & PII are objecting	

Date	Event	Pg/s
	vehemently to the Lenders having previously received IDC from Corporate Debtor and on the other hand non-disbursal of the said amount of Rs 10 crore by the Lenders to Corporate Debtor, which would then have come back to Lenders as IDC as aforesaid, is being objected to by the same parties. Now, the central Argument in defense of default is that the Lenders (Financial Creditor) were not paying themselves. This is again approbation & reprobation. It may also be noted at this stage, although counsel appearing for PII (holding 17.70% equity in the Corporate Debtor) made a statement in the course of the hearing that it is representing other foreign investors holding shareholding aggregating to 41% (i.e. India Hydro Investments Ltd.- 17.70%, SMH Power Investment Ltd.-4.67% and Pacific General Development Company-1.67%) is wrong & misleading. The other foreign investors have not sought to intervene in the present proceeding, therefore, the question of their representation does not arise at all.	

Date	Event	Pg/s
	PII had sought to argue that the sanction of the additional loan was without any proper shareholders' resolution. This is incorrect as the loan terms and conditions including security creation were approved in the EGM of the Corporate Debtor held on 31.3.2017.	
8.8.17	The Promoters of the Respondent Company i.e. Entegra Ltd., Mukul S. Kasliwal and MW Infra Developers Pvt. Ltd. filed a Petition under Section 241-242 of the Companies Act, 2013 being CP No. 175/2017 before the Ld. NCLT, wherein the Lenders including the Financial Creditor herein are arrayed as Respondents. In the said Petition, Entegra Ltd., Mukul S. Kasliwal and MW Infra Developers Pvt. Ltd. sought reliefs in relation to the Respondent Company and the Lenders. The said Petition is pending. The Financial Creditor has filed an Application (IA No. 281/2018) seeking dismissal of the said Petition, which is pending.	
28.8.17 **Ack. 4**	Debt is again acknowledged in the Balance Sheet of the Corporate Debtor	828/850 @ 831/853 CP

Date	Event	Pg/s
	for FY 2016-17 signed on 28.08.2017.	
17.01.2018 Recall Notice	In view of the above, the Financial Creditor issued a recall notice demanding the Corporate Debtor to make payment of the total outstanding amount of Rs. 2139.20 crores including outstanding interest amounts payable as on 16.01.2018 (excluding costs/delayed charges/other charges etc.), within 15 (fifteen) days of the receipt of the said notice **Note:** It is alleged by Entegra that in the draft reply to loan recall notice that was prepared & circulated, certain changes were made by Entegra's representative (in track mode) and the same were not considered. In this regard, it is submitted that even if the changes made by Entegra in the draft reply to loan recall notice are to be accepted, the existence of debt and default is not disputed, thereby not making any *iota* of difference. The draft reply is at Pg. No. 302 & 303 of the IA. In any event of the matter, the Corporate Debtor has filed replies to the present Application u/s 7 of the	86/88 CP

Date	Event	Pg/s
	IBC & even in the third reply filed through CMD appointed by Entegra, both debt & default are admitted (discussed in the latter part of the present LOD).	
16.2.18 **Sec 7 Filed** **Debt & Default** **Part IV** **5/7**	Pursuant to the above, the Financial Creditor filed the present Application for initiation of CIRP against the Corporate Debtor. **Note:** (i). The Corporate Debtor is also in default of its liability of **Rs. 318.49 crore** towards Default Payment Guarantee due & payable to Financial Creditor *(S. No. 3 at Pg. No. 808/830)*. Break-up is at *Pg. No. 813/835***.** Table in the middle shows the liability/debt towards DPG accruing on monthly basis. Total amount as on 15.01.2018 is Rs. 318.49 crore. DPG was issued by Financial Creditor for securing the Optionally Fully Convertible Bonds (OFCB) issued by the Corporate Debtor to the Trustee of the Bondholders (Recital D & F of the Amendatory & Restated Agreement executed on 16.09.2005 at *Pg. No. 147/149 @ Pg. No. 155/157)*. On account of Corporate Debtor's failure	

Date	Event	Pg/s
	to discharge its liability to the Bond holders, the said Guarantee issued by Financial Creditor is being invoked on monthly basis by the Bondholders and said amount is being paid by Financial Creditor to Bondholders. Financial Creditor is making corresponding demand on Corporate Debtor, which the Corporate Debtor has failed to discharge. Corporate Debtor has also defaulted in discharging it's liability towards Guarantee Fee, Facility Agent Fee, Security Agent Fee etc. mentioned at S. No. 5 at *Pg. No. 808/830* read with *Pg. Nos. 813/835 & 814/836*. **(ii).** In addition to the above, Corporate Debtor has also defaulted in discharging its liability/debt of **Rs. 103.87 crore** towards Zero Coupon Bonds issued by the Corporate Debtor *(S. No. 3 at Pg. No. 808/830)* for conversion of interest liability on the outstanding loan in terms of the sanction letter dated 02.03.2005 ***(Pg. No. 166/168 @ Pg. No. 167/169****, S. No. 4 & 5)*. The said liability on account of Zero-Coupon Bonds is accruing on quarterly basis as detailed	

Date	Event	Pg/s
	in the Table at *Pg. No. 812/834*, which Corporate Debtor has defaulted.	
Events after filing of Section 7 Application		
19.2.18	Entegra Ltd. filed an Application being I.A. No. 68/2018 in CP No. 175/2017 seeking certain interim reliefs including an order to restrain the Financial Creditor and other Lenders from acting upon the Recall Notice dated 17.01.2018 and to further restrain the Financial Creditor and other Lenders from instituting insolvency proceedings *qua* the Respondent Company under the provisions of the IBC, 2016. Another Application being IA No. 67/2018 was filed for amendment of the Company Petition including addition of the aforesaid interim prayers. **Note**: During the course of hearing, certain minutes of Board of Directors' meeting of the Corporate Debtor were relied upon (from Pg 70/73 of the 3rd Reply filed by the Corporate Debtor) w.r.t. discussion on Section 7 Application having been filed by the Financial Creditor before the NCLT. It was argued that in the Minutes dated 04.04.2018 (at Pg 88/90), consent of	

Date	Event	Pg/s
	Sh. G.S. Patra, nominee director of Financial Creditor was taken as granted, which shows that he had not consented. Therefore, the recording that 3 out of 7 directors (2 being absent) supported the Section 7 Application, 2 opposed and 2 silent is not correct. In this regard it is submitted that all such discussion in the Board of the Corporate Debtor to oppose or support Section 7 Application is immaterial. What is to be seen is debt and default. In case there is a debt and default, the deliberations in Board of Directors meeting of the Corporate Debtor are wholly irrelevant.	
12.3.18	Hon'ble NCLAT dismissed the Appeal filed by the Financial Creditor against the aforesaid the Order dated 15.06.2017 passed by the NCLT. The Hon'ble NCLAT while dismissing the Appeal, *inter alia* directed that the *Government of Madhya Pradesh (GoMP) and Central Government both need to urgently consider the way forward in public interest to get the Project completed.* It is pertinent to note that the Hon'ble NCLAT in the Order dated	

Date	Event	Pg/s
	12.03.2018 has held that the Promoter i.e. Entegra had a responsibility and a duty to manage the Corporate Debtor as per the Companies Act in which they have failed. The Hon'ble NCLAT further held that "***the Promoter do not appear to be enthusiastic to get status quo ante restored in the Articles not inspire confidence that if we strike down these amendments made on 25.11.2005 (and subsequently) they can take charge and complete the project which attracts public interest. Promoters have not brought to our attention that at any time they opposed, or stood up to the gradual takeover***." *(Para 44 of the Order).* ***(Pg. No. 759/770 of the 3rd Reply)*** **Note**: Corporate Debtor & Promoter has relied upon the judgment to argue that the Hon'ble NCLAT has held that acquisition of shareholding by the Lenders in the Corporate Debtor by invocation of pledge & by conversion of debt was not as per law. Pertinently, the reasoning of the Hon'ble NCLAT for the same, as can be seen from the Order is that primarily compliances w.r.t. the provisions of the Companies Act, 2013 for conferring right to	

Date	Event	Pg/s
	convert debt into equity, the compliance of the Rules framed thereunder for effecting transfer of shares, requirement of notice for invocation of pledge etc. under the Contract Act, were not made by the Lenders. The attempt of the Corporate Debtor & Promoter to argue that in view of the Hon'ble NCLAT Order dated 12.3.18, the present Application is malicious & fraudulent is totally misconceived & untenable.	
24.3.18	In terms of the aforesaid Order of NCLAT, the Secretary (Power), GoI on 24.3.18 convened a meeting, which was attended by Promoters, Lenders, GoMP, PFinancial Creditor & other Lenders i.e. SBI, HUDCO, Dena Bank, IFCI, CBoI, Edelweiss, United Insurance as well as strategic investor PII (Para 17 of the Minutes). **Note:** All concerned **including PII** favored resolution of Corporate Debtor under IBC, as recorded in the aforesaid MoM. *See Pg 52/53* Emphasis was placed by the Corporate Debtor on the last sentence in the	47/48 @ 52/53 Rep IA 53

Date	Event	Pg/s
	MoM i.e. *"GoI is requested to guide further"*. In this regard, it is submitted that the GoI through MCA has also filed an affidavit before this Hon'ble Tribunal no resolution could be reached (see below against 20.11.18 date)	
18.5.18	Civil Appeal No. 5028/2018 filed by the Financial Creditor against the aforesaid Order of Hon'ble NCLAT was dismissed by the Hon'ble Supreme Court at the stage of admission.	
29.5.18	NCLT issued notice to the Central Government and GoMP, observing that it would be expedient for the Tribunal to ascertain the view/stand of the Central Government and GoMP in IBC proceeding.	
3.8.18 **GoMP** **IBC**	GoMP filed its Comments in the present proceeding. A perusal of the Comments would show, *inter alia*, that GoMP supported admission of the present Application *(Para 8)*.	
27.9.18	NCLT *suo moto* granted time to the Corporate Debtor to file a better affidavit of its key managerial personal	

Date	Event	Pg/s
	competent to clarify the categorical stand of the company on admission or otherwise of the Petition.	
20.11.18 **MCA doesn't object to IBC** **IBC is also statutory resolution**	Ministry of Corporate Affairs, Government of India filed an Affidavit in the present proceeding stating, *inter alia*, that *"After due discussion, meeting [between promoters, PFC and Corporate Debtor] was concluded without any result as no resolution from the parties reached to any finality."* **Note:** Thus, the resolution being sought *via* present proceeding is wholly in consonance with the Hon'ble NCLAT's directions. In Para 51 of the Order dated 12.03.2018, the Hon'ble NCLAT has observed that "*The Project has been delayed endlessly.*" Notably, more than three more years have elapsed from the date of the said Order. Thus, the only way forward is resolution of Corporate Debtor under the framework of IBC.	
11.4.19	The Corporate Debtor, through its Managing Director, filed an Affidavit in Reply to the Application under Section 7 pending before the NCLT emphasizing that resolution needs to be	4/6 2nd Rep

Date	Event	Pg/s
	found for the Corporate Debtor. The said Reply was duly supported by the Board Resolution dated 22.2.19 passed by the Corporate Debtor	
18.4.19 **STF**	During pendency of the present Application, the GoMP decided to constitute a Task Force on 18.4.19 for, *inter alia*, examining the difficulties being faced by the Project. Meeting of the Task Force was held on 25.5.19, wherein, it was, *inter alia*, concluded that "*It was agreed that promoter and lenders in particular would engage in discussions to reach an understanding for the purpose. The way forward proposed must be agreed to by the concerned parties, <u>have the support of the GoMP</u> and relevant departments of the Government of India, and be feasible to implement.*"	Para 12 @ 40/41 43/44 Financial Creditor Affidavit 31.8.20
25.5.19	A meeting of STF was held on 25.5.19, which was concluded with by *"It was agreed that promoter and lenders in particular would engage in discussions to reach an understanding for the purpose. The way forward proposed must be agreed to by the concerned parties, have the support of the GoMP and relevant departments*	39/40 Financial Creditor Affidavit 31.8.20

Date	Event	Pg/s
	of Government of India, and be feasible to implement. ......"	
22.07.2019 **MOU** **(See Ebix pr 249)**	Accordingly, an MoU was executed amongst Financial Creditor, the Corporate Debtor and Entegra on 22.7.19, in order to explore a settlement plan by the Corporate Debtor/Entegra, for OTS /Restructuring Scheme for dues of the creditors *(**Pg. No. 44/45** of the Additional Affidavit dated 31.08.2020 filed by the Petitioner)*. Management of Corporate Debtor was taken over by Entegra Ltd. & CMD Sh. M.L. Gupta of Corporate Debtor was appointed by Entegra on **06.08.2019**. Invoked shares were returned by Financial Creditor to Entegra. The same is recorded in the letter dated 05.03.2020 issued by the Sh. M.L. Gupta, who also requested Entegra to create pledge on the said shares in favour of Financial Creditor. *(**Pg. No. 58/59** of the Additional Affidavit dated 31.08.2020 filed by the Petitioner)*. Further, conversion of debt into equity done by Financial Creditor, was also reversed & accepted by the Board of the Corporate Debtor.	

Date	Event	Pg/s
	Note: **(i)**. At the outset it is submitted that MoU is not relevant for the present proceeding as the scope of the present proceeding is narrow & the NCLT is not a civil court where disputes relating to MoU can be agitated or specific performance thereof can be sought. **(ii).** Without prejudice, it is submitted that MoU was executed in order to give an opportunity to Entegra /Corporate Debtor to settle the dues of the creditors (debt and default having been admitted). However, Entegra/Corporate Debtor failed even to come up with a concrete proposal for settlement of the dues of the lenders, much less paying/settling the same. Pertinently, the MoU stipulated that Entegra would bring in an upfront amount of Rs. 10 crore within three weeks from appointment of CMD i.e. by **27.08.2019** (the appointment having been made on 06.08.2019). Admittedly, only Rs. 1 crore that too in tranches was brought by Entegra. The balance amount of Rs. 9 crore was never brought, admittedly. <u>Thus, the first default under the MoU was</u>	

Date	Event	Pg/s
	committed by Entegra on 27.08.2019 itself. Copy of correspondence exchanged between the parties in relation to the aforesaid is already on record along with Additional Affidavit filed by Financial Creditor on 31.08.2020 (55/56 Financial Creditor Affidavit 31.08.2020**).** **(iii)**. Clause 11 of the MoU records *that* "*While submitting the Settlement Plan, the Settlement Plan would make provision with respect to the various Loans as are mentioned in the Loan Recall notice dtd. 17.01.2018 and Schedule B (includes loans given subsequent to the loan recall notice to meet critical requirements of the SMHPCL and amount disbursed pursuant to DPG including future liability under DPG, if any) …………….*". Thus, the MoU clearly stipulated repayment of loan granted under the Additional Loan Agreement dated 27.04.2017 as well as the DPG liability, apart from the previous loans.	

Date	Event	Pg/s
10.8.19	Pursuant to the MoU, Entegra Ltd. appointed its Chairman and Managing Director on the board of the Corporate Debtor.	
19.9.19	In terms of the MoU, the Financial Creditor vide its letters dated 19.09.2019, sought to return the original share certificates to Entegra Ltd. and the Corporate Debtor, which were transferred and allotted upon invocation of pledge and conversion of part of subordinate debt into equity respectively.	
23.9.19	Original Share certificates held by Financial Creditor on account of invocation of pledge, as referred to above, were returned by the Financial Creditor.	
24.10.2019	1. As brought out above, Clause 22 of the MoU provided "*In the event of failure to implement the contents of this MoU in 12 (twelve) months from the Execution Date, this MoU shall stand <u>automatically</u> terminated.*" Admittedly, the MoU was not implemented by Entegra/Corporate Debtor as it failed to bring in Rs. 9 crore and further failed to give a	44/46 IA 9/19

Date	Event	Pg/s
	concrete settlement proposal/restructuring plan of the dues to the Lenders, much less acceptance thereof by the Lenders. Even as on **24.10.2019**, the said amount had not been infused. The same is recorded in the Lenders' meet held on the said date wherein Entegra was also a participant. The said meeting also records that the Corporate Debtor/Entegra needs to give a concrete & comprehensive proposal for settlement of dues of lenders. Relevant extract of the minutes of meeting held on 24.10.2019 are reproduced below (**Pg. No. 44 of IA No. 9/2019 filed by Entegra**): *"The lenders noted that **<u>the Company/ Promoter were yet to comply with the terms of MoU e</u>**xecuted with PFC viz. **infusion of atleast Rs. 10 crore in SMHPCL by Entegra Ltd. (Rs. 1 crore infused till date)**. Restoration of the pledge of shares returned by PFC to Entegra Ltd. and cancellation of new shares issued in lieu of conversion of PFC's sub-debt into equity alongwith restoration of the sub-debt. **The lenders apprised SMHPCL representatives about the pending actions on the part of Entegra/SMHPCL under MoU and***	

Date	Event	Pg/s
	expressed their concern on non-adherence to the terms of MoU which raise apprehension over the implementation of MoU*. MD, SMHPCL assured that though there is delay, all the actions envisaged under MoU shall be implemented……………………………..* *Subsequently, the SMHPCL and Consultant joined the meeting and views of the lenders were conveyed to them. Lenders also enquired about the timeline for submission of detailed proposal alongwith terms & conditions, to which consultant informed that it may take 2-2.5 months, keeping in view the ongoing holidays break abroad.* *The meeting concluded with the following decisions:* *1. SMHPCL was requested to submit the detailed proposal alongwith viability aspects of the project, including safety of machines running below MDDL, for consideration of lenders at the earliest, considering servicing of lenders dues. The proposal should also include suitable equity infusion in*	

Date	Event	Pg/s
	SMHPCL by promoters/their affiliates. *2. Lenders also agreed that signing of inter-creditors Agreements (ICA) alongwith vesting of rights by all lenders to PFC or any other single lender alongwith priority for the interim financing and ring fencing of the cash flows is subject to lenders reviewing the detailed proposal submitted by SMHPCL.* *3. Lenders in-principally agreed to consider keeping on hold the litigations filed by them subject to signing and adherence of MoU terms by Entegra /SMHCPL. Also, lenders desired that Company needs to ensure that other legal proceedings initiated by operational creditors/ others be also put on hold.* *4.* ***SMHPCL/Entegra Ltd. to take immediate actions for compliance of milestone identified under Memorandum of Understanding (MoU) with PFC****………………………”*	

Date	Event	Pg/s
3.12.19	The nominee director of the Financial Creditor on the board of the Corporate Debtor resigned.	
11.12.19	*Vide* letter dated 11.12.2019 addressed to the Corporate Debtor and Entegra Ltd., the Financial Creditor highlighted non-compliance of the provisions of the MoU by the parties.	55/56 Financial Creditor Affidavit 31.8.20
16.12.19 **All Lenders**	The subsequent meeting of lenders (Financial Creditor, HUDCO, SBI, IFCI, REC, OICL, NICL, GICL, CBoI, IDBI, Dena Bank,) was held on **16.12.2019** (i.e. almost after two months after the meeting of 24.10.2019) also records the same. In the said meeting, Entegra assured that it shall infuse the said amount of Rs. 9 crore by end of December, 2020, which was also not done. The said Lenders' meet also records that the proposal for settlement of dues of the lenders presented by the Corporate Debtor & Entegra was **not at all comprehensive** enough to be considered *(Pg. No. 70 of the written submissions dated 10.02.2020 filed by PFC in IA No. 9/2019).*	

Date	Event	Pg/s
	Relevant extract of the minutes (containing Entegra's commitment & proposal of Corporate Debtor) is reproduced hereunder: *"Representative of SMHPCL informed that for implementation of issues pertaining to SMHPCL, a Board meeting of SMHPCL has been scheduled on 17.11.2019. SMHPCL explained that for transfer/cancellation of shares, legal opinion had been obtained and the matter had been put up to the Board for consideration and approval in the ensuing Board meeting.* ***<u>It was further informed by SMHPCL that remaining fund of Rs 9 crore shall be transferred by Entegra Ltd. by end of December, 2019.</u>*** *Lenders expressed dis-satisfaction over continued non-compliance of MoU signed in July 2019 by SMHPCL/Entegra which indicates non-seriousness towards adherence to the mutually agreed terms of the MoU, signed amongst PFinancial Creditor, SMHPCL & Entegra formulated under the guidance of task force*	

Date	Event	Pg/s
	constituted by GoMP. ………………………………. ***The lenders generally observed that there is no proposal from the existing promoters regarding infusion of equity*** *under the interim finance which was also deliberated in the last lenders' meet and the same remains a critical aspect for considering the proposal for interim finance.* *Based on the deliberations, following was concluded:* *1.* ***Lenders noted that the current proposal of settlement by SMHPCL does not address project viability, equity infusion by the Promoters*** */ its affiliates and safe operation of the project as suggested by the lenders in the previous lenders' meet. In place, it proposes final settlement on the basis of an interim financing proposal for completion of 3 units. However, lenders agreed to consider proposal of interim funding of Rs. 250 crore, provided SMHPCL submits terms sheet from proposed lender of interim funding at the earliest and subject to the points detailed below. SMHPCL was also*	

Date	Event	Pg/s
	requested to consider servicing of dues of existing lenders along with new lenders and make provision for adequate equity infusion alongwith interim finance, which is proposed to be entirely in the nature of debt, to commission the three units. *2. Further, entering into an ICA and vesting of all rights and decision making on behalf of a single lender is impractical and is likely to give rise to disputes, issues and complications, especially when the proposal demanding upfront approvals from the lenders is without detailed terms & due-diligence.…………………………….* *5.* ***Lenders further noted that <u>the terms of MOU remain yet to be complied by SMHPCL & Promoter and they are in breach of the MoU.</u>*** *In addition,* ***the lenders namely REC, HUDCO & Dena Bank opined that they are not agreeing for holding/ keeping their respective litigations at abeyance or withdrawal.*** *Also, lenders' suggestions raised in the last lenders' meet while seeking detailed proposal have also not been incorporated in the same.*	

Date	Event	Pg/s
	6. Lenders raised concern over the safety and preservation of project assets in the absence of committed fund infusion by Promoter as per MoU and requested SMHPCL to take adequate steps to ensure safety of the same, so that the security interest of lenders are not in jeopardy. **Note:-** Relying upon the MoU, it was argued on behalf of the Corporate Debtor & Entegra that the fact that MoU was executed shows that insolvency is not the answer and therefore the present Application should be dismissed. As brought out above, MoU was entered into pursuant to the Hon'ble NCLAT Order and the Task Force recommendation. However, inasmuch as the MoU was not implemented by the Promoter itself, the Applicant had no option but to take recourse to its already filed Section 7 Application.	
24.1.20	Arguments on behalf of the Financial Creditor were heard by the NCLT in Application under Section 7 of the IBC and the matter was adjourned at the request of the Corporate Debtor,	

Date	Event	Pg/s
	which was duly represented by a counsel.	
20.2.20	*Vide* letter dated 20.2.20 addressed to the Corporate Debtor and Entegra Ltd., the Financial Creditor highlighted non-compliance of the provisions of the MoU by said parties.	57/58 Financial Creditor Affidavit 31.8.20
20.2.20	The proceeding in the Application under Section 7 of the IBC filed by the Financial Creditor herein was adjourned at the request of the Corporate Debtor, duly represented by the counsel. It is further pertinent to note that pursuant to the hearing dated 20.02.2020, one of the members of the NCLT made observations qua the long pendency of the present Application.	
27.2.20	The proceeding under Section 7, IBC was adjourned at the request of the Corporate Debtor.	
28.2.20	After hearing arguments of both the sides i.e. the Financial Creditor and the Corporate Debtor, Orders on Application under Section 7 of the IBC were reserved by the NCLT. It was argued by the Corporate Debtor that the Applicant had not complied	

Date	Event	Pg/s
	with the terms of the MoU inasmuch as the Applicant continued to pursue the Application u/s 7 of the Code although in terms of the MoU the Application was to be adjourned, and if not adjourned then withdrawn with liberty. In this regard, it is submitted that Clause 19 of the MoU provided that the Applicant shall request the Hon'ble Tribunal to defer the IBC Application. However, in view of the position that Entegra Ltd. & the Corporate Debtor failed to comply with their obligations under the MoU & committed first breach, the Applicant had no option but to proceed with the Application. Furthermore, in the hearing held on 05.12.2019 itself, this Hon'ble Tribunal had recorded in the Order as follows: *"Learned Counsels appeared for both sides have submitted that "Special Task Force Committee" has been constituted by the State Government (Madhya Pradesh) which is still under consideration.* ***However, we are of the view that, the matter pertains to the year 2018 and the time is essence of***	

Date	Event	Pg/s
	the Code no further time can be granted on this aspect, the parties are hereby advised to come prepare with the final argument on the main CP(IB) 111 of 2018 *as well as CP(IB) 389 of 2018 along with all pending Interlocutory Application(s).”* (Emphasis supplied) That in the hearing held on 27.2.20 (i.e., **seven months** after the execution of the MoU), this Hon’ble Tribunal passed the following Order: “*The proxy Advocate, appearing on behalf of the counsel for the Corporate Debtor, submits that Adv. Mr. Arjun Sheth* ***is not able to come today due to some personal difficulties****, hence, she prayed that matter may be adjourned for tomorrow for hearing, as last chance.* *However, the counsel appearing for the Petitioner vehemently opposed and submitted that earlier sufficient opportunities were granted to the Corporate Debtor. He further contented that on previous hearing*	

Date	Event	Pg/s
	also last opportunity was granted to the Corporate Debtor. *Having heard the counsel for both the parties, we feel that, in the interest of justice, one more opportunity may be granted to the Corporate Debtor* ***for final hearing****. Hence, a final opportunity is granted for final hearing, either through the advocate on record or an alternative advocate, failing which the matter shall be proceeded further on its merits.*" Admittedly as on this date, Entegra had neither brought in the balance amount of Rs. 9 crore nor did it/Corporate Debtor submit the concrete plan for settlement of dues of the lenders as decided in the Lenders' meet held on 24.10.2019 & 16.12.2019 *(supra)*. Accordingly, on 28.2.20, counsel for Corporate Debtor appeared. Arguments were heard at length from both the sides and Orders were reserved. The Order passed on 28.02.2020 records as follows: "*The Parties are represented through their respective Learned Counsel.*	

Date	Event	Pg/s
	The arguments of the counsel from both side are heard and concluded. *However, the learned counsel appearing for the State Govt. of M.P submits that he is not a party to the MoU in question entered between the Petitioner and Corporate Debtor. Hence, he does not propose to offer any comment on the same* ***as the stand of the M.P Govt. has been conveyed in pending I.A No. 9 of 2019****.* *Hence, the order is reserved.* *The Parties are at liberty to file their written submission, if any, within one week.*"	
28.2.20 **3rd REPLY of Corporate Debtor filed** **through Promoter's Authorised MD Sh. M.L. Gupta**	After conclusion of hearing on the Application under Section 7 as aforesaid, the Corporate Debtor sought to file a reply (signed by an officer authorized by the CMD appointed by the Promoter) to the Application, copy whereof was served on the Financial Creditor's counsel at 4:30 pm.). Even in this Reply, debt & default is not disputed by the Corporate Debtor. **<u>In fact the same is admitted.</u>** Therefore, even if the previous reply is to be ignored for the	

Date	Event	Pg/s
	sake of argument, the position does not change. Relevant extract from the said Reply are as under:- *Para 19 at Page 7/10: "………It is submitted that the above-referred MoU makes it abundantly* ***the Petitioner has clearly deferred the present IBC Petition <u>till the term of the MoU</u>…****….."* *Para 20 at Page 8/11: "The Clauses of the MoU also make it clear that the Petitioner has for the consideration of restoration of its pledge and as recorded in the MoU agreed* ***that the payment of the debt shall be deferred <u>till the term of the MoU</u>*** *and thereafter, till the approval of the Settlement Plan."* *Para 21 at Page 8/11: It is submitted that in view of the MoU dtd. 22.07.2019,* ***no debt is due from the Respondent Company <u>as of today till the term of the MoU</u>****……………..".* *Para (c) at Page 11/14: "…..the* ***<u>default in re-payment of loans</u>*** *is also attributable to the Petitioner who has mismanaged the affairs of the Company."*	

Date	Event	Pg/s
	Para 22: "…….it is clear that ***<u>the default in re-payment of loan</u>*** *is attributable to the Petitioner…………"* *Para (d) at Page 26/29: "………..Furthermore****<u>, the default in repayment of Loans</u>*** *is clearly attributable to the Petitioner….."* *Para 47 at Page 33/36: "………..It is further submitted that* ***<u>the default as contemplated under Insolvency and Bankruptcy Code, 2016</u> is solely on account of the Petitioner……."*** "*50. Further, the usage of Rs 384.59 crores out of the Rs 600 crore of Unsecured Loan which was disbursed by the Petitioner was towards declared payment of property compensation to oustees; development work on acquired rehabilitation land; payment to MPPMLC to restart work; payments to BHEL, SEW, salaries, Statutory payments etc. as can be seen from the Notice of Drawl dtd. 02.05.2017.* ……………..." **Note:** **(i).** Certain arguments were made by Corporate Debtor & Interveners w.r.t.	

Date	Event	Pg/s
	the IDC charged by the Lenders of the Project. In this regard it is submitted that the Financial Agreements executed by Corporate Debtor themselves provided for all cost and expenses including IDC as part of the Project Cost (Amortization Schedule to the Loan Agreements). Further all the Lenders (which are public sector lenders) are subject to monthly, half-yearly and yearly audit by CAG, the RBI and any illegality or even an irregularity would have been exposed in such audit, which is not the case. It may be noted that IDC has been charged in accordance with the Financial Contracts executed between the Corporate Debtor and the Lenders and to keep the loan accounts standard and prevent it from degrading into being declared as sub-standard/Non-Performing Asset (NPA) as per the RBI Norms. It is also submitted that there is no moratorium on the IDC & the moratorium was only on the principal amount repayment as per the Financial Contracts.	

Date	Event	Pg/s
	(ii). It was argued by Entegra that in case the project completion gets delayed, the IDC component (which is part of the Project Cost) shall keep on increasing and if Lenders have to inflate their books, they will not let the Project complete as they have done in the present case. This argument is wholly absurd. The public sector lenders who are subject to CAG audit and RBI supervision do not gain anything out of delay in project completion. In fact the Lenders stand to lose, because the borrower (Corporate Debtor in this case) would ultimately default, thereby making the account NPA.	
5.3.20	A communication was addressed by the CMD of the Corporate Debtor to Entegra Ltd. recording that the invoked shares had been transferred from the Financial Creditor to Entegra Ltd. and share certificates had been handed over to Entegra Ltd., and therefore, Entegra Ltd. should create pledge of such shares in favor of the Financial Creditor at the earliest.	58/59 Financial Creditor Affidavit 31.8.20

Date	Event	Pg/s
17.3.20	Entegra filed an Application u/s 65 of the Code on **<u>17.03.2020</u>** (IA No. 60/2020). **Note:** **(i).** Strangely, the said IA was filed after Orders were reserved by the predecessor Bench on 28.02.2020 & therefore being highly belated (two years after filing of Section 7 Application & that too when orders had been reserved) and filed as an afterthought, ought to be dismissed on this ground alone. Furthermore, for more than a year, though the matter was listed on numerous occasions, Entegra did not press the said Application & no notice was issued on the said Application. **(ii).** The contents of IA No. 60/2020 are almost *ad-verbatim* the Reply dated 28.2.20 filed by the Corporate Debtor, which has already been dealt with hereinabove. Therefore, all the admissions of the debt & default made by the Corporate Debtor in the said Reply shall be applicable to Entegra as well. *(See Paras 23, 30, 33 & 34 of IA No. 60/2020).*	

Date	Event	Pg/s
18.3.20	The Financial Creditor addressed a communication to Entegra Ltd. wherein it highlighted the defaults & breach of the MoU committed by Entegra Ltd.	***60/61*** Financial Creditor Affidavit 31.8.20
27.4.20 **STF Dissolved And therefore IBC**	In view of the above position, the Task Force constituted by the GoMP for the purpose of examining the difficulties being faced by the Project and to submit its recommendations to GoMP**,** <u>has been annulled/disbanded by the GoMP</u>. MPPMCL vide its letter dated 27.04.2020 addressed to the Task Force, has communicated the decision of the GoMP, while recording that the option of <u>allowing legal process initiated by Financial Creditor under the **IBC to reach a logical conclusion *was accepted***, making the existence of the Task Force infructuous</u> *(Pg. No. 63/64 of the Additional Affidavit dated 31.8.20).* <u>Thus, the Task Force, which was constituted by the GoMP in order to find a way forward for completion of the Project (a direction given by the Hon'ble NCLAT in the Order dated 12.3.18), has opined and concluded that the present Application under</u>	

Date	Event	Pg/s
	<u>Section 7 ought to be brought to its logical conclusion.</u> **Note**: (i) Admittedly, no further proposal/modified proposal was given by the Corporate Debtor/Entegra. Even at the stage of hearing of Section 7 Application by the previous Bench in February, 2020 and/or before the annulment of Task Force by the GoMP on 27.04.2020, Entegra had neither brought in the amount of Rs. 9 crore, nor was any concrete proposal for settlement of dues of lenders given by it. (ii). In the hearing, Entegra admitted its default of bringing in Rs 9 crore as undertaken by it under the MoU, however, sought to explain it by contending that the said monies were required to be brought in were for immediate fund requirement for the Project including administrative expenses, liabilities such as salaries, wages etc., and therefore not infusing the said amount cannot be said to be a default as the same was not to be paid to the Lenders. This contention is misconceived. Irrespective of the	

Date	Event	Pg/s
	purpose, admittedly, the very first of the obligations under the MoU were not complied by Entegra. It is settled law that a party in breach of contract cannot seek to enforce the same. (iii). In the previous hearings, Entegra claimed that it had given another proposal for settlement vide Application being IA No. 184/2020 filed by it in CP No. 175/2017. Pertinently, as opposed to offer, the IA contains a demand by Entegra that now Financial Creditor must bring an amount of Rs. 250 core and Entegra will bring in an amount of Rs. 25 crore for restarting the Project & the validity of MoU (which admittedly stands terminated) must be extended by an Order to be passed by this Tribunal. Evidently, this is not a proposal for settlement of dues of the lenders, but a proposal seeking more monies from the Lender. (iv). It was argued on behalf of the Corporate Debtor that the said Order is without any reasons and is therefore not in accord with the legal principle that all orders of Government, administrative or otherwise, must contain reasons. Reliance was placed	

Date	Event	Pg/s
	on the judgment of the Hon'ble Supreme Court in *Kranti Associates Private Limited v. Masood Ahmed Khan* reported at *(2010) 9 SCC 496* and more specifically Para 46 thereof, where the Hon'ble Supreme Court held that administrative authorities must record reasons in exercise of their power, as without reasons the Court cannot review the decision. In this regard, Financial Creditor submits that the present proceeding u/s7 of the Code has limited scope & extent and challenge to the said Order of the GoMP cannot be laid before this Hon'ble Tribunal in the present proceeding, that too by way of oral submissions. There is no such pleading in the 3rd Reply of the Corporate Debtor. Admittedly, the said Order has not been challenged by the Corporate Debtor or Entegra Ltd. in any independent proceeding & therefore has attained finality and stands accepted by all concerned. In any event, it is incorrect to suggest that the Order is unreasoned.	
May 2020	Before the Orders could be pronounced, both the Ld. Members of the Adjudicating Authority, Indore	

Date	Event	Pg/s
	Bench were transferred to different Benches.	
18.6.20 /10.7.20	The newly constituted Bench of the NCLT adjourned the matter to 23.07.2020 while observing that *'CP(IB) 111/2018 and CP(IB) 389/2018 are fixed for hearing on 23.07.2020. It is made clear that intervention applications pending in both CPs shall be considered after order of admission of Corporate Debtor in CIRP or otherwise passed by the Bench.'*	
22.7.20	Upon expiry of one year from the date of its execution, the MoU stood automatically terminated in terms of Clause 22 thereof.	
31.8.20	In Section 7, IBC Application, the Financial Creditor filed an Additional Affidavit to place on record certain facts, submissions & documents which had come into existence after filing of the Section 7 Application including the disbanding of the STF.	
11.9.20	The Application under Section 7 of the IBC was again adjourned by the NCLT for hearing on 01.10.2020.	

Date	Event	Pg/s
11.2.21	Matter was adjourned to 05.03.2021.	
16.2.21	Aggrieved by the aforesaid Order, the Financial Creditor filed an Appeal being Comp Appeal No (AT)(Ins) No. 99/2021 before the Hon'ble NCLAT. The Appeal was disposed of with a direction to NCLT to dispose of Section 7 Application within two weeks.	
25.3.21	Section 7 was heard and Orders were reserved. However, before the Orders could be pronounced the Hon'ble Judicial Member in the said Bench superannuated.	
28.7.21	The matter was heard for the third time by the reconstituted Bench in July, 2021 and Orders were reserved.	
8.10.21	On 08.10.20221 two separate Orders were pronounced. Whilst the Judicial Member admitted the Petition, the Technical Member rejected the Petition. Both the Members framed questions on which they differed.	
21.2.22	In view of the difference of opinion between the two members, the matter was referred to the Hon'ble President,	

Date	Event	Pg/s
	NCLT for reference to the third member as per Section 419(5) of the Companies Act, 2013 and the reference was made by the Hon'ble President. The reference was made by the President on 21.02.2022.	

15. Further submissions of Ld. Sr Counsel on various issues raised by Corporate Debtor are summarized as under:

a. ***Limitation***

i. Though both CD & Promoter argued the objection of limitation, it is submitted that the said issue is no longer open. In the Order dated 08.10.2021 of the Hon'ble Judicial Member, the issue of limitation has been decided and the Application u/s 7 has been held to be within limitation (Para 40 of the Order). The Hon'ble Technical Member has not decided the issue of limitation in the dissenting order; however, the Hon'ble Member has not dissented with the Hon'ble Judicial Member on this issue. There is therefore no question framed on limitation by either of the said two Members for referral to this Hon'ble Bench. The issue of limitation thus stands decided and has attained finality. Therefore, it is not open for CD and/or Promoter to re-agitate such issue, more so when the same has not even been framed by the two Hon'ble Members.

ii. Further, submissions on Limitation are contained in Paras 9-15 of the written submissions dated 04.08.2021 filed by the Applicant.

iii. In any event, there are multifarious provisions in IBC which empowers this Adjudicating Authority to examine & scrutinize the transactions carried out by the CD as well as the manner in which the business/affairs of the CD were being run (Section 43, 44, 45, 47, 48, 49, 50, 51 & more particularly Section 66 & 67). There is thus no merit whatsoever in the allegation that the present Application has been filed to obviate any accountability. Admittedly, the CD is in default of colossal amount of money. Apart from the Petitioner, there are various other Lenders to whom the CD owes monies. The total debt in default of the CD is to the tune of Rs 5,000 crore. Various operational creditors and other financial creditors have filed Applications u/s 9 and u/s 7 of the Code respectively, which are pending before the Ld. Adjudicating Authority. In this regard, it would be pertinent to refer to the explanation to Section 7 of the IBC recognizes as under: -

"Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."

b. ***Allegation of CD being a subsidiary of PFC***

i. Although neither pleaded nor argued before, in any of the three previous rounds, CD raised an argument that as per the Report of the RoC Gwalior titled *'Details of **Preliminary Findings** on Issues Raised by this Office During the Course of Inquiry' (at Pg 313 of 3rd Reply of CD)*, the CD is a subsidiary of Government Company (PFC acting in concert with other lenders as per definition of control u/s 2(27) of the Companies Act, 2013) and such company is exempt from the provisions of IBC. Reliance was placed on the judgment of the Hon'ble Supreme Court in ***Hindustan Construction Company Ltd. v. Union of India-AIR 2020 SC 122***.

ii. In this regard it is submitted that the shares of CD held by the Applicant herein have already been returned and the conversion of debt into equity also stands cancelled (Submissions made in dates 22.07.2019 & 23.09.2019 above). PFC does not have any director on the board of the CD. In fact Entegra & PII (along with other foreign investors) are seeking to fully assert themselves as majority shareholders of the CD

(68.85% equity). Therefore, the entire basis of the RoC Report to give a preliminary view that CD is subsidiary of PFC is non-existent.

iii. Without prejudice to the above & in any event, the Hon'ble Supreme Court in **HCC judgment** (Para 53), made a distinction as regards those government companies that operate as a sovereign arm of the government. In the said case, the Court analysed the provisions of the National Highways Authority of India Act and was of the view that the National Highways Authority of India ("**NHAI**") was undertaking functions as an *extended limb of the central government which* cannot be taken over by a resolution professional or by any other corporate body. Therefore, insolvency proceedings under the IBC could not be initiated against NHAI. In the present case the CD is not functioning as an extended limb of the Government, and therefore is not exempt. As brought out above, Entegra & PII are seeking to fully assert themselves as majority shareholders of the CD (68.85% equity).

iv. Notably, insolvency applications have been filed against government companies both, prior to and post the HCC case. For example, insolvency initiated against West Bengal Essential Commodities Supply Corporation Limited was admitted by the National Company Law Tribunal, ("**NCLT**") Kolkata bench on 29 May 2017 (***Bank of Maharashtra vs West Bengal Essential Commodities Supply Corporation Limited***). On appeal by West Bengal Essential Commodities Supply Corporation Limited, the Hon'ble NCLAT refused to accept the argument that the appellant cannot be subjected to insolvency proceedings under IBC since it is a state government undertaking and did not interfere with order passed by NCLT, Kolkata Bench under section 7 of IBC. However, the said proceedings were withdrawn pursuant to a one-time settlement recorded before the NCLT on 20 November 2017. Similarly, in the matter of *Satish Agro Industries vs The Maharashtra Agro Industries Development Corporation Limited* ("**Satish Agro Case**"), the Mumbai bench of the NCLT admitted an application under section 9 of the IBC filed by Satish Agro Industries against Maharashtra Agro Industries Development Corporation Limited on 16 July 2021. However, on 11 August 2021, the NCLT allowed withdrawal of the insolvency process on account of a settlement agreement entered into between the parties.

v. NCLT Mumbai in the matter of ***Lark Chemicals vs. Goa Antibiotics & Pharmaceuticals ltd***, stated that provisions of the IBC will equally apply to a corporate person as defined under section 3(7) of IBC. The relevant excerpts are as follows:

> *"7. ...The Corporate Debtor is a company registered under the Companies Act and the same is an artificial person which can sue or be sued in its own name independent of the fact whether it is owned by any Government or by private persons. The provisions of the Code will equally apply to a corporate person as defined under Section 3(7) of the Code.* ***The mere fact that the Corporate Debtor is owned by Central or State Government cannot be a ground for excluding the jurisdiction of the Code/this Adjudicating Authority. Neither the Code nor the statement of objects clause of the Code provides any special treatment to a Public Sector Government Undertaking.*** *In fact, under the provisions of the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and the Companies Act, 1956, the Government dues are treated as preferential creditor on the concept of "Crown Debt" but whereas under the waterfall mechanism provided under the Code Government dues are arrayed after unsecured creditors."*

(Emphasis Supplied).

vi. Although, the NCLT made the aforesaid observations, the matter was ultimately disposed of in NCLAT on account of procedural irregularities.

i. Separately, there are cases where government companies initiated voluntary insolvency proceedings under Section 10 of IBC, both prior and post the SC's judgement in the HCC case. For example, insolvency proceedings against Burn Standard Company Limited were initiated under section 10 on 31 May 2017 and a resolution plan under the IBC was approved on 6 March 2018. Similarly, insolvency proceedings initiated against Bihar State Construction Corporation Limited under section 10 have been allowed by NCLT, Kolkata bench on 16 October 2019 and the resolution process is currently on-going.

i. Therefore, there is no merit in the submission made by CD that subsidiary of Government company or even a Government Company is exempt from IBC.

c. ***<u>Argument with respect to loan Recall Notice, 'Created' or 'Engineered' Default & Malicious Proceeding or Proceeding for a purpose other than insolvency resolution (Section 65.</u>***

i. As brought out above, the Agreement was executed much prior to the Hon'ble NCLAT Order dated 12.3.18, in fact **prior to** Hon'ble NCLT Order's dated 15.6.17. On account of acquisition of the shareholding of CD by the Lenders having been declared invalid vide the said Orders, further disbursals under the Loan Agreement could not be made, as the conditions precedent for such disbursal could not be fulfilled. The interest amount of Rs 10 crores was due by the CD on 15.07.2017 (Interest Payment Dates), i.e. after the NCLT's Order 15.6.17. This amount could not be disbursed to the CD on account of the NCLT Order as submitted in detail above. At the time of disbursal of Rs 384 crore, the amount of Rs 10 crore had not become due for payment by CD, and therefore, it was not disbursed along with Rs 384 crore. (Please see Para 14 of the Loan Recall Notice dated 17.01.2018 at Pg 86). Thus, the allegation of default having been 'created' or engineered' is wholly incorrect and baseless. However, the position remains that the CD received the amount (debt) and defaulted in payment of interest on the amounts already disbursed.

ii. The fact that CD is in default of debt is not in dispute. Argument from CD & Promoter is that the default is not attributable to them but to the

Lenders. Lenders have never stopped the Promoter/CD to repay the debt. It is not a case where CD/Promoter want to repay the debt, however, the Lenders, instead of receiving the monies, are proceeding for insolvency of the CD. Therefore, the question of the proceeding being malicious does not arise. Further, in view of the GoMP's decision (28.04.2020) as well as the stand of the GoI (discussed above), it is quite evident that not only the present proceeding is for resolution of the CD but there is no other alternative left for the Project, as the Promoter has repeatedly failed to bring in funds and the Lenders cannot have more exposure in the Project.

iii. The attempt on the part of the Promoter to alleged malice & fraud on the part of the Lenders is to blame the Lenders for its own misdeeds. For Promoter to suggest that all public sector Lenders were colluding since the year 2005 to oust the Promoter and take over the Project and therefore the present Application is malicious is wholly absurd. Not only is there no evidence or material or even a specific instance or allegation of malice or fraud on the part of the Lenders (necessary for invoking Section 65), it is the Promoter who failed in its duty to complete the Project, that the Lenders had to step in with GoMP being involved from the time of revalidation of loan facility and execution of A&RA in the year 2005. However, in the course of hearing, the counsel for Entegra submitted that he is alleging malice only in respect of the Loan Agreement dated 27.04.2017 and not the previous loans and disbursal made by the Lenders, in respect whereof, his argument was that the debt is time barred. As brought out above, limitation is no longer an issue open to be re-agitated. It has already been held in Para 40 of the judgment that CD has acknowledged its liability first on 17.11.2014 (in the Balance Sheet of FY 2013-14), thereafter on 28.08.2017 (in the Balance Sheet for FY 2016-17), and the present Application having been filed on 16.02.2018 is therefore within limitation.

iv. The GoMP, who was directed by the Hon'ble NCLAT, has, through the Task Force come to a clear conclusion that the present proceeding under IBC ought to be brought to its logical conclusion to find resolution for the CD. It is case of the CD & Entegra itself that that appointment of Task Force by GoMP was to implement the directions of the Hon'ble NCLAT. Therefore, the purpose of the present proceeding, as acknowledged by the GoMP in terms of the Order dated 12.03.2018 passed by the Hon'ble NCLAT is to find resolution for the CD. Therefore, the present proceeding is solely for the purpose of resolution of the CD. Even otherwise, the CD has failed to specifically plead much less substantiate as to how the present proceeding is malicious or fraudulent.

Submissions of Mr. Arjun Seth, learned Counsel for the Corporate Debtor.

16. Mr. Arjun Seth, learned Counsel for the Corporate Debtor, while seeking rejection of application under section 7 of the Code, has strenuously argued on the following points and has taken me to its reply affidavit/other pleadings and written submissions filed by and on behalf of Corporate Debtor.
17. Mr Arjun Seth submitted that he would argue on the following five points:

a. Limitation.

b. Default was engineered.

c. Malicious intent of the Financial Creditor.

d. Directions of the Hon'ble NCLAT which resulted in the Task Force.

e. Corporate Debtor is carrying on the work of the Government and whether it can be put into Insolvency.

18. The contentions of the Corporate Debtor are summarized hereinafter:

i. Mr. Seth submitted in the petition that there are two recall notices the first recall notice being 5th January, 2016 thereafter he led me to the recall notice wherein the subject of the notice was, "Notice for recall of the credit facilities provided to Sri Maheshwar Hydel Power Corporate Limited". In paragraph 6 of the recall notice it has been stated that the loan account of the Company i.e. Corporate Debtor has been classified as Non-Performing Asset ("NPA") by the lenders on or around 31.03.2012 and the account never turned regular and remained a NPA. The learned Counsel placed reliance on the judgment of the Hon'ble NCLAT being ***Jagdish Prasad Sarada v. Allahabad Bank Company Appeal (AT) (Insolvency) No. 183 of 2020*** dated 28.08.2020 (paras 8 to 13) and on the judgment of the Hon'ble Supreme Court in the case of ***Babulal Gurjar v. Veer Gurjar AIR 2020 SC 4668*** (paras 30 and 32), and ***B.K. Educational Services Private Limited v. Parag Gupta and Associates AIR 2018 SC 5601***(para 27).

ii. The learned Counsel submitted that in light of the above, it is very clear that the date of default for the purpose of section 7 insolvency petition continues at all times to be the date of declaration as NPA, and nothing would shift the date of default, being the declaration of the account as NPA.

iii. Further, it is crystal clear that the account of the Corporate Debtor had turned NPA on 31.03.2012, and no insolvency petition under the then available insolvency law has come to be filed by the Financial Creditor within the then available limitation period, and no new lease of life can be given to a debt which is time-barred, and hence the present petition is hopelessly time barred.

iv. Mr. Seth submitted that at the very outset, it is submitted that when the loan agreement dated 27.04.2017 came to be executed/released, it was the Financial Creditor itself that was in control of the management of the Corporate Debtor.

v. That since the account of the Corporate Debtor had turned NPA as of 31.03.2012, there was no question of providing a further loan *vide* 27.04.2017 loan agreement, which itself is illegal in nature.

vi. Loan granted pursuant to loan agreement dated 27.04.2017 was deposited in Trust and Retention Account ("TRA") controlled by Financial Creditor and lenders.

vii. Mr. Seth submitted that in total there were 10 directors representing the lenders in the Board and the condition at Article 89, 105, 108, 109, 126 and 134 of the Articles of Association gave full veto powers to the lenders. Hence, the Financial Creditor was in control of the management of the Corporate Debtor even during 2017. Shareholding structure of Corporate Debtor as of 27.04.2017 is lenders having 51% shareholding and being in control of the Corporate Debtor.

viii. Mr. Seth then referred to the loan agreement dated 27.04.2017 and led us through the recitals of the agreement. At this juncture in 2017, the project was not generating any revenue, hence the loan was the only source of funds. He then led us through Clause g at page 686 of the petition wherein it is stated that an additional loan of Rs. 377 Crore is being sanctioned by SBI, CBoI and LIC and clause O at page 687 of the petition wherein it has been stated that the Financial Creditor shall increase the project cost from Rs. 2760 Crore to Rs. 8121 Crore and requirement of additional debt of Rs. 3022 Crore for the project.

ix. Mr. Seth submitted that the agreement is malicious which is clear from the purpose of the loan which is given in page 696 of the petition. Mr. Seth submitted that there were several dues already pending as is reflected in Article II under the heading "Amount and purpose of the additional facility" but it is interesting to note that in the said agreement the interest servicing of the instant loan was also mentioned as the purpose of taking this additional loan. Hence, in a way the Financial Creditor gave money to the Corporate Debtor only for the money to be returned to the Financial Creditor in the manner of interest.

x. Mr. Seth submitted that in the reply filed by the Corporate Debtor in page 11 paragraph C it has been elaborated that this petition has been filed with a malicious intention. In the drawdown notice of the agreement, it has been stated that Rs.10Crore was for the interest and hence default arose as the Corporate Debtor defaulted in paying the interest amount. It is pertinent to note the Financial Creditor is managing the Corporate Debtor and failed to pay Rs.10Crore as interest from the Corporate Debtor to the Financial Creditor and thereafter, on such failure the Financial Creditor sent notice to the Corporate Debtor. Mr. Seth urged us to take note of the fact that the demand notice that was sent by Financial Creditor was received by the Financial Creditor on behalf of the Corporate Debtor. Hence, the Financial Creditor can be seen to be wearing several hats. Hence the entire default was engineered by the Financial Creditor as it was the Financial Creditor who issued the letters to the Corporate Debtor stating that the Corporate Debtor failed to pay the interest and this was the triggering event for the initiation of the present petition.

xi. The loan agreement entered on 27.04.2017 and the notice and the consequent filing of this Section 7 petition is malicious in nature when the Financial Creditor was in the management of the Corporate Debtor.

xii. Mr. Seth placed reliance on ***Parmanand Kewalramani v. Modlite Holding Pvt. Ltd, C.P. (IB) No. 1415 of 2017*** passed by the NCLT, Mumbai Bench on 30.07.2020.

xiii. Mr. Seth then moved on to the next question of his arguments. Mr. Seth submitted that the Corporate Debtor is involved in Govt. projects and hence it is a part of a Govt. of India undertaking.

xiv. He submitted that the Hon'ble NCLAT has observed that the completion of the project shall benefit the farmers of the State of Madhya Pradesh. He placed reliance on the Judgment of the Hon'ble Supreme Court Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of ***Hindustan Construction Co. Ltd. & Anr. V. UOI & Ors. (2020) 17 SCC 324*** (para 76)**,** wherein it is held that if Corporate Debtor if performing governmental functions and is an extended limb of the Government, then no insolvency proceedings would lie against it and is not a corporate person within the meaning of section 3(7) of Code.

xv. Hence, no insolvency can lie against the Corporate debtor, since it is a subsidiary of Financial Creditor being a Central Government company and is in control of the Corporate Debtor.

xvi. Mr. Seth then submitted that despite the order of the Hon'ble NCLAT wherein the Hon'ble NCLAT had directed the Government and the State Government of Madhya Pradesh to urgently find a way out in public interest to get the project completed. However, the State and the Central Government did not take any steps which is clear from the minutes of the meeting dated 24.03.2018 wherein it can be seen that the State Government is not able to take any decision and requested the Central Government to guided further. Mr. Seth submitted that in the light of the above it is clear that the State Government of Madhya Pradesh clearly washed away its hands from the project which is of national interest, and was in blatant violation of the order of the Hon'ble NCLAT.

xvii. Pursuant to this the Financial Creditor promoter of the Corporate Debtor and the Corporate Debtor entered into a memorandum of understanding dated 22.07.2019 wherein time was given to the promoter and Corporate Debtor to provide a restructuring proposal and the MoU was for a period of 1 year that is up to 22.07.2020. However, before completion of the one year the Financial Creditor started arguing the present petition. Hence it is clear that the MoU was not entered with bona fide intentions and that the Financial Creditor was not interested in restructuring or settling the debt.

xviii. Mr. Seth placed reliance on the judgment of the Hon'ble Supreme Court in ***Kranti Associates Pvt. Ltd. Vs. Masood Ahmad Khan and others, 2010 SCC 496,*** wherein it was held that "*in India the judicial trend has always been to record reasons even in administrative decisions if such decisions affect anyone prejudicially. A quasi-Judicial authority must record reasons to support its decision".* Hence it is clear that even administrative decisions are required to record reasons for all decisions. Thus, the letter dated 24.04.2020 of the MP Power Management Coal Ltd. wherein a decision has been taken to continue the present Insolvency proceedings cannot be taken into consideration since no reasonings are set as to why such decision is taken in the wake of the order of the Hon'ble NCLAT. The Insolvency proceedings are being conducted nor for the benefit of the farmers and neither for the benefit of Kasliwal's.

xix. Thereafter, Mr. Seth argues as to how this petition came to be filed. He submitted that this petition was filed on the basis of the RBI circular dated 12.02.2018 which has now been set aside by the Hon'ble Supreme Court in ***Dharani Sugars and Chemicals v. Union of India, 2019 SCC OnLine SC460*** and therefore, the present petition will fail and it has relied on the circular.

xx. Mr. Seth then placed reliance on the judgment of the Hon'ble NCLAT in ***Telha Sareshwala Vs. Parsoli Motors works Pvt. Ltd. and Or***s. wherein the Hon'ble NCLAT held that as far as Section of the Code is concerned no protection mechanism is provided in Section 7 of the Code but it can be done through Section 65 of the Code if there is fraudulent or malicious initiation of proceedings. The Hon'ble NCLAT further held that the objection of the Code is to ensure revival and continuation of Corporate Debtor by protecting the Corporate Debtor from its death. The Court/ Tribunal has to ensure that the Code is not being used by perverted human ingenuity and to protect against distortion and abuses. he further placed reliance on ***Jagmohan Bajaj Vs. Shivam Fragrances Pvt. Ltd and anr. , 2018 SCC OnLine NCLAT 413*** that warring shareholders cannot be an excuse for initiation of a Section 7 petition.

Submissions/Contentions of Mr. Abhishek Puri, the learned Counsel for the Intervenor, Entegra Limited are summarised as under:

19. The learned Counsel during the course of the arguments submitted that the disbursement of money by the Financial Creditor is not debt. Mr. Puri argued that this Adjudicating Authority should consider whether the Financial Creditor has breached the terms of disbursement, whether it was for normal course business or not or whether it was a collusive transaction
20. Mr. Puri submitted that the Financial Creditor by controlling and being a management of the Corporate Debtor just wanted to prolong the project so that it keeps receiving the interest from the loan and had no intention of completing the project hence the funding was done by the Financial Creditor only with a view of prolonging the project
21. Mr. Puri submitted that the control of the management of the Corporate Debtor was with the lender and then to clean up their books by declaring the Corporate Debtor as NPA, there cannot be an equity brought in by the lenders. Mr. Puri submitted that this petition has been filed only with the purpose to bring in blue eyed boy into the Committee of Creditors. Mr. Puri submitted that the money was brought in by the Financial Creditor in 2017 and no instalment was paid. He submitted that vide the additional loan agreement executed on 27.04.2017 an amount of Rs. 600 Crore was disbursed and the same was done for the purpose of the payment of the interest of the said loan as is clear from Clause 2.1 of the loan agreement.
22. Mr. Puri submitted that this is a premature petition and the Corporate Debtor cannot be taken into insolvency and has been filed for the purpose of recovery and not resolution of the Corporate Debtor.
23. In the scenario that this Section 7 petition is admitted then the petition filed under section 240-242 of the Companies Act, 2013 would be stayed and

Entegra would be out of the Insolvency proceedings in the view of Section 29 A of the Code.

24. In the aspect of limitation, it was submitted that the Financial Creditors were time barred hence they invoked the shares and then gave an additional loan disbursement in 2017 and they called it within 3 months just to come within the scope of limitation.

25. Mr. Puri submitted that the judgment passed in ***Vidarbha Industries Power Ltd. v. Axis Bank Ltd., MANU/SC/0874/2022***, gave a way out. He submitted there were other bona-fide lenders. He submitted that due to the MoU, time was wasted for four months not 12 months. The MoU was entered in order to keep Entegra from filing contempt petition and within four months the Financial Creditor breached the MoU.

26. Mr. Puri submitted that there are three provisions for filing petitions for commencement of insolvency in the Code i.e. Section 7, Section 9 and Section 10. Hence, in this present case the Financial Creditor who was in management of the Corporate Debtor cannot wear another hat i.e. of the Financial Creditor and contest. The present petition should have been filed under Section 10 of the Code as a Corporate Applicant. If the statute prescribes a particular manner, it is to be done in that manner itself. Hence the Financial Creditor if it goes to file under the Code it would have been under Section 10 of the Code and not under section 7 of the Code. He placed reliance ***Phoenix ARC Pvt. ltd. V. Spade Financial Service ltd. and ors., 2021 SCC Online SC 51***.

27. Mr. Puri then relied on the Hon'ble NCLAT Order dated 12.03.2018 paragraph 'e' and 'f' to convey that the Financial Creditor was in control and management of the Corporate Debtor. He then refer to paragraph 21(C) wherein it has been stated thus, Petitioner wanted the Board not only to resolve regarding empowering the managing team which it would nominate. Thus, the Financial Creditor was dictating terms. Petitioner also wanted to ensure flow back of funds to itself. With respect to the flow back he led us to page 43 of the said judgment wherein it is stated that "*Thus, in spite of earlier agreement, dated 16.09.2005, the restart of the product was being held back by not releasing funds and push in for amendment Articles Association to empower the management team of the lenders to*

exercise management control till the entire debt is serviced and repaid. Thus, development and completion of the project was not the main object. Management control was targeted to ensure flow back of funds".

28. Mr. Puri submitted that the justification of the new loan agreement was due to the high-level committee that was constituted by the Government of Madhya Pradesh *vide* order dated 16.10.2014 which provided for three scenarios and the agreement was the result of scenario II which is contradictory to the NCLAT order which states that the Financial Creditor has breach scenario II which has been stated in Paragraph 47 of the NCLAT order. Mr. Puri then submitted that vide order dated 29.05.2018, this Tribunal directed that the matter be taken up by the MCA as also the Govt. of Madhya Pradesh and pursuant thereto, the Govt. of Madhya Pradesh constituted a task force on 18.04.2019 to consider a way out of implementation of the project by cooperation between various stakeholders including the lenders and promoters. Thereafter the promoters vide letters dated 03.08.2018 and 19.10.2018 issued to the Financial Creditor presented a complete offer of funding. *Vide* email dated 05.11.2018 the promoter also submitted the draft MoU to the Financial Creditor. The MoU was executed between the Financial Creditor the Corporate Debtor and the promoters i.e. Entegra Ltd. The term of the MoU was to subsist for 12 months from the date of execution. This was done to ensure that the viability of the project could be assessed and the Articles of Association could be amended, the Board of Directors could be reconstituted, the ownership could be reverted to the promoter and that the settlement plans could be executed as well as interim finance could be brought into the company. However, the MoU was repeatedly breached by the Financial Creditor and the other lenders.
29. Mr. Puri submitted that in the breach of Clause I and 19 of the MoU, the Financial Creditor continued to prosecute this petition.
30. Mr. Puri then relied on a judgment passed by this Tribunal dated 18.12.2020 passed in I.A. (IB) no. 67 of 2018 and IA(IB)No.68 of 2018 in CP No. 175 of 2018 wherein it was recorded and directed as follows:

"27. During the course of hearing on behalf of the company it is being pleaded the respondent no. 2 (Financial Creditor) (sic) is not taking initiatives to restructure the Board and management of the company. Thus, there is a complete deadlock and interest of the company are suffering in a great manner. In this background, both the parties are claiming that their applications/petitions be heard first.

28.We are of the view that to hear the application filed under Section 7 of the IB Code, 2016 the representation on behalf of the Corporate Debtor is required as the applicant hereunder cannot represent the company whilst putting the company under the process of Insolvency and Bankruptcy. Hence we direct the applicant here and the respondent No. 2 to reconstitute to the Board of directors of the respondent No. 1 company within a period of 30 days from the date of this order in terms of order of Hon'ble NCLAT duly confirmed by the Hon'ble Supreme Court. The applicant herein, then, can represent a respondent No. 1 company, being Corporate Debtor in application filed under Section of IB Code, 2016. The necessary statutory compliances under the provisions of the companies Act 2013 are done on priority and a copy of all documents be provided to NCLT to proceed further in the matter."

31. Mr. Puri submitted that the petition is barred by limitation, and there are two arguments to substantiate this. Firstly, the date of default has not be clearly mentioned in Part IV of the petition only the total amount of debt has been mentioned. Hence, the DoD is not clear. Secondly, the loan account was declared as NPA in 2012 and thereafter no documents have been filed along with the petition to give a clear picture of the timeline since 2012 till 2018. The Financial Creditor has annexed the Financial Statements for the FY ending 2014 in its written statement. A written statement cannot be substitute for the pleadings. Mr. Puri then relied on ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd., (2020) 15 SCC 1*** wherein it has been observed that "*It remain indisputable that neither has any other date of default been stated in the application*

nor has any situation or any acknowledgement be made. As noticed, even in part V of the application, respondent 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said part V of the application and even in residuary point 8 therein, nothing was at all stated at any place about the so called acknowledgement or any other date of default."

32. Mr. Puri submitted that Mr. Srinivasan is relying on the so-called acknowledgment in the balance sheet of 2014, which has not been attached to the petition but has been attached to the written notes hence the petition is liable to be returned. He then referred to ***Asset Reconstruction Company (India) Ltd. v Bishal Jaiswal, 2021 SCC Online SC 321,*** in support of his contention that any acknowledgment made should be an arm's length. He then placed reliance on para 56 of the ***Pioneer(supra)*** judgment. He further submitted that in the present petition the order the judgment relied on by the Financial Creditor i.e. ***Jagmohan Bajaj(supra)*** is not applicable. Mr. Puri then relied on ***Vidarbha(supra)*** in support of the proposition that if by virtue of other proceedings and there is a finding that the Insolvency is technical then it is not important to admit the petition. In the present case if the petition of the Financial Creditor is not allowed it will lead to further litigation.
33. There can be a resolution but not under Section 7 which is tainted with Section 65. He thus concluded that the petition must be dismissed.
34. Mr. Abhishek Puri led us through the MoU, wherein the parties who have entered into the MoU the Entegra Ltd., Power Finance Corporate ltd. and Sri Maheshwar Hydel Power Corporate Ltd. It is clear that the MoU has been signed between Entegra Ltd. and the Financial Creditor and the Corporate Debtor was only a confirming party and had no obligations.
35. Mr. Puri then led us to the first paragraph of MoU wherein it has been stated that during the pendency of the MoU, the Financial Creditor will endeavour to persuade the other lenders from not pursuing or withdrawing any legal proceedings, including the IBC proceedings, if filed during the pendency of the MoU.

36. Thereafter he referred to paragraph 25 of the MoU wherein it has been stated that the parties agree to act in good faith in relation to the performance of each party's obligation under this MoU and not to make any false representation. Mr. Puri submitted that the Financial Creditor jeopardized the MoU so that no one would invest in the Corporate Debtor.
37. Mr. Puri then referred to Clause 6 of the MoU in order to show that the Financial Creditor has breached this term of the MoU as well i.e. the Financial Creditor was to take necessary steps to facilitate restoration of Entegra's ownership in the Corporate Debtor by cancelling the transfer of shares acquired by the Financial Creditor. Mr. Puri submits that the Financial Creditor claims that it has returned its 20% of the shareholding and hence it has complied with the said clause but other lenders have not returned the shares taken by them.
38. Mr. Puri states that Clause 6(iii) of the MoU lays down two parts as the basis of the resettlement plan i.e. the remaining shares held by the other lenders on account of invocation of pledge shares of Entegra Ltd. shall be restored in the name of Entegra Ltd. and that the Financial Creditor would engage the other lenders to facilitate the same at the earliest. Mr. Puri submitted that the money was not meant for any lender, it was for the immediate payment to the employees.
39. There was a complete deadlock in the Board of Directors, the Financial Creditors showed that they were complying with the terms of the agreement but were actually jeopardizing the MoU.
40. Mr. Puri submits that as per Clause 16 of the MoU the parties were to facilitate convening of an extraordinary general meeting as soon as possible for short notice for altering the AOA. However no such EOGM has been held. Mr. Puri then lead us through the AOA wherein the definitions of fundamental issue, amendments, transfer of shares were given. In the internal page 4 of the AoA the definition of "pledge shares S.Kumar's. Hence if the AoA had to be amended a Board Resolution was required and the shareholders were required to return the shares. Mr. Puri then relied on Clause 22 of the Memorandum of Association which stated that in the event of failure to implement the contents of the MoU in 12 months from the execution date then this MoU would stand automatically

terminated. No other termination has been mentioned other than the ones specified in Clause 22 of the MoU. Mr. Puri concluded that since the MoU has come to an end does not mean that it is an acknowledgement.

Submissions/Contentions of Ms. Feresthe Sethna, the learned Counsel for the Intervenor.

41. Ms. Fereshte Sethna submitted that she is representing a FSI and along with two other Mauritius investors comprise 41% shareholding of the Corporate Debtor. Therefore, as per the AOA Power Infrastructure India is a strategic investor. Ms. Fereshte Sethna began her submission citing Section 180 of the Companies Act stating that Section imposes certain restrictions to the borrowing. The Article of Associations also has these restrictions mentioned.
42. Ms. Sethna Submitted that a sanction letter was submitted for the purpose of restructuring on 12.01.2017 with the intent of sanctioning additional loan. In the sanction letter it has been stated that as a revival major of the project the Financial Creditor i.e. Financial Creditor is agreeable for the following subject to Gov. Companies/lender holding majority equity in the project and receipt of similar dispensation from all lenders.
43. Increase in project cost from Rs. 2760 Crore to Rs. 8121 Crore which schedule CoD as December 31.2019. NOC in favour of the additional debt of Rs. 3,022 Crore be tied up for the project.
44. Hence from the said letter it can be seen that the letter was issued for;

    a. Re-schedulement of existing loans

    b. Re schedulement of zero coupon bonds

    c. Payments of Optionally fully convertible debentures

    d. Conversion into Redeemable Cumulative Preference Shares (RCPS).

45. Ms. Sethna then lead us through the relief sought in her intervention petition which are

“a. *That the present application for intervention by the proposed intervenor be permitted, and the Proposed Intervenor be granted permission to object to and/or oppose the grant of any orders on the present petition, as prayed in the petition or at all;*

b. That the Proposed Intervenor and/or alternately an independent person/committee of persons be constituted in order to represent the defend the interest of the Respondent in the present petition against the petitioner;

c. That the present petition be put into abeyance until the orders of the Hon'ble National Company Law Appellate Tribunal in Company Appeal (AT) No. 237 of 2017;”

46. Ms. Sethna submitted the proceedings u/s 241 of the Companies Act, 2013 prior to the initiation of Section 7 petition. She strenuously argued since petition under Section 241 was filed prior in time therefore Section 7 petition cannot be heard without deciding earlier petition under Section 241.
47. On a query raised by the Bench, whether the Financial Creditor is barred to file a section 7 petition, Ms. Sethna submitted that she relies specifically by virtue of the interpretation of Section 10 of the Code. She submits that the petitioner is wearing three hats:

    a. Lender,

    b. They were in the management and

    c. Also a shareholder by invoking pledge (although it was reversed)

48. Ms. Sethna submitted that the Financial Creditor itself brought in the S.7 petition and then filed the reply in the said petition. Hence it is the malicious intent of the Financial Creditor to overcome the inevitable and to reverse the findings of the NCLAT.
49. Ms. Sethna submitted that therefore recourse u/s.7 is not available to the petitioner.

50. Hence Ms. Sethna stated that power Infrastructure India instituted petition under Section 241 of the Companies Act in the view of the conduct of the Financial Creditor in the Annual General Meeting. She then submitted where a prior 241 proceeding has been initiated and a petition u/s 7 of the Code has been filed in the same NCLT and the petition under Section 241 can be road rolled by a Section 7 petition.
51. Ms. Sethna submitted that as a strategic investor Power Infrastructure Ltd. pumped in Rs. 200 Crore for the purposes of the project to be brought online which has been mentioned in the Section 241 petition. but the section 241 petition has not been taken up for hearing.
52. Ms. Sethna submitted that contrary to the covenants for the use of the money, the Financial Creditor used the money to pay its own interest. Using the principles of Vidarbha (supra) that this is a place where in investor should not be placed. Ms. Sethna submitted that this Adjudicating Authority is hearing the Section 7 petition out of turn, the petition under Section 241 of the Companies Act has not been heard but the petition under Section 7 of the Code is being heard ahead of the Section 241 petition and urged this Adjudicating Authority to take cognizance and hear her Section 241 petition. She then urged us to note the two dates one being the date in which the MoU had been entered into i.e. 22/07/2019 and the day of the NCLAT order i.e. 12.03.2018 and the Section 241 petition had been filed in November 2017. She submitted that the Power Infrastructure Limited being a strategic partner was not a party to the MoU.
53. The Bench put a query that why didn't the intervenor object to the MoU but instead accepted the money, to which Ms. Sethna submitted that the Financial Creditors attempted to sanction the loan on January, 2017 and Power Infrastructure Limited sent a letter objecting to the said loan disbursal on March 2017. She then submitted that merely there is a scope for settlement does not mean that everything will be white washed. It is not an intention to raise allegations but there has been a commercial breach. Nowhere in the MoU it has been stated that the allegations would be withdrawn.
54. It is averred in paragraph 7 of this application, the application that seeks to obtain a right to intervene by proposed intervener, in order to oppose

the present petition, filed in relation to the purported Corporate Debtor under the Insolvency and Bankruptcy Code, 2016, principally on the grounds that: the petition filed under IBC, 2016, is motivated *mala fide* endeavour to avert accountability of lenders, through securing declaration of moratorium in relation to Company Petition No. 11 of 2018 instituted by the proposed intervener, and also to challenge the notice of recall dated 17th of January, 2018, the proposed applicant seeks to oppose the application under Section 7 on the various grounds mentioned in the application.

55. The applicant in this application seeks intervention on the events mentioned in para 10 of this application. In the prayer, it is mentioned, present application for intervention be allowed and the intervenor be allowed to object to and oppose the grant of any orders in application under Section 7. It also seeks in the alternative independent person/committee of persons be constituted in order to defend the interest of the respondent in application under Section 7 against the petitioner therein.

56. Further, it is mentioned in paragraph 4;

> ***"Through the present application, the proposed intervenor seeks to intervene in present petition filed under the Insolvency and Bankruptcy Code, 2016, and to secure adequate representation for the Respondent."***

Submissions of Mr. Ramji Srinivasan, in rejoinder to the reply of the Corporate Debtor and Intervenors.

57. Mr. Ramji Srinivasan replied to eight points in his rejoinder. The first one being the point of limitation. Mr. Ramji Srinivasan submitted that the point of limitation does not arise and in the previous deferred order there was no question framed with respect to limitation. Mr. Srinivasan submitted the debt has been acknowledged by the Corporate Debtor in various occasions:

    a. The balance sheet dated 17/11/2014, the financial statements have been filed with the Registrar of Company and is a public document available in the website of the MCA;

b. Board meeting of 29th May, 2015 which was attended by Mr. Kashniwal;

c. The additional loan agreement dated 27.04.2017;

d. The balance sheets for the FY 2016 and 2017 which was signed on 28.05.2017;

e. MoU dated 22.07.2019 which states the two sets of financial facilities provided.

Hence, these are sufficient to carry the limitation true. Admission qua the previous loan and admission qua the last agreement.

58. Mr. Ramji Srinivasan submitted that the Corporate Debtor did not bring in 600 Crores but did not object when the Financial Creditor brought in Rs.364 Crore and then vide the order of the Hon'ble NCLAT the entire pledge was wiped out. Hence how can they rely on this MoU. The Corporate Debtor and its promoters did not object when they received the amount but only objected when they had to fulfil their obligations to the MoU. One cannot take the stand of approbation and reprobation. Mr. Ramji Srinivasan relied on Bhartiya Airtel Ltd. V. Tata Teli Services Ltd. and Ors., MAMU/TD/0198/2012. On paragraph 28 wherein the judgment of Shyam Telelink v. Union of India wherein it has been held that the appellant cannot be allowed or permitted to accept what is favorable to it and reject what is not. In this Judgment the maxim qui approbate non reprobate (one who approbates cannot reprobate) has been taken into consideration.
59. Mr. Ramji Srinivasan stated that the judgment of Vidarbha would not apply to this case scenario.
60. With respect to the conflict-of-interest Mr. Ramji Srinivasan submitted that the Financial Creditor gave loan as the other lenders had also done the same.
61. Mr. Ramji Srinivasan concluded that the resolution of the Corporate Debtor would also help the farmers of Madhya Pradesh and public at large

instead of going for a recovery which would only benefit the Financial Creditors.

Analysis and Findings:

62. The instant petition under section 7 of the Code was admittedly filed on 16.02.2018. Thereafter numerous affidavits, reply affidavits, multiple written submissions have been filed and arguments have been heard spreading over number of days before various benches and now before this bench in view of dissent amongst two Hon'ble members of NCLT on the following points.

I. Whether Entegra Ltd., the original promoter and. Power Infrastructure India as strategic investors, have any locus to intervene in the matter on behalf of the corporate debtor?

II. Whether, notice dated 17.01.2018 recalling the loan is bad in law?

III. Whether, present application filed under section 7 of IBC, 2016 is an instance of fraud/malicious initiation of insolvency proceedings under section 65 of the Code?

IV. If point No. III above is affirmative then whether the application under section 7 of the Code ought to be rejected on that ground?

63. With the above four points/questions in focus, while dealing with point (I) *"Whether M/s Entegra Ltd., the original promoter and M/s Power Infrastructure India as strategic investors, have any locus to intervene in the matter on behalf of the corporate debtor",* it needs to be mentioned that Entegra Limited has filed two IAs, i.e. I.A. No 53 of 2018 (T.A. (IBC) No. 1/KB/2022) and I.A. No. 60 of 2020 (T.A. (IBC) No. 2/KB/2022). Whereas Power Infrastructure India has filed IA No 54 of 2018 2018 (T.A. (IBC) No. 3/KB/2022).

64. For the purpose of question no. I, this Adjudicating Authority shall first consider IA No. 53 of 2018 2018 (T.A. (IBC) No. 1/KB/2022) and IA No

54 of 2018 2018 (T.A. (IBC) No. 3/KB/2022). In IA No. 53 of 2018 2018 (T.A. (IBC) No. 1/KB/2022), it is stated at page 4 of this IA that the applicant is apprehending that the Corporate Debtor is not raising bonafide defence. **Further at page 5 at para 4 it is stated applicants seeks to intervene in the present petition in order to ensure that the respondent i.e. the corporate debtor is adequately presented.** In relief applicant has sought to be impleaded as the parties to these proceedings.

Emphasis supplied.

65. This IA is liable to be rejected on the face of it in view of law laid down by Hon'ble NCLAT in ***IDBI Bank Ltd. v. Odisha Slurry Pipeline Infrastructure Ltd.*** that except the applicant (financial creditor) and the 'corporate debtor', there is no requirement of hearing a third-party including Intervenor at the stage of admission.

> "*Further, we may observe that except the applicant (financial creditor) and the 'corporate debtor', there is no requirement of hearing a third party including Intervenor at the stage of admission*."

66. Now coming IA No 54 of 2018 2018 (T.A. (IBC) No. 3/KB/2022), it be noted and reproduced herein, the prayer sought in the application by the applicant.

> "a. *That the present application for intervention by the Proposed Intervenor be permitted, and the Proposed Intervenor be granted permission to object to and/or oppose the grant of any orders on the present petition, as prayed in the petition or at all;*
>
> *b.That the Proposed Intervenor and/or alternately an independent person/committee of persons be constituted in order to represent and defend the interest of the Respondent in the present petition against the petitioner"*.

67. It is significant to note paragraph 11 at page 6 of this IA **wherein the applicant has contended the petitioner (Financial Creditor) has**

abandoned 'revival measures' is found to be incorrect as this petition seeks to revive the Corporate Debtor through CIRP. Further, **the applicant seeks to defend the Corporate Debtor** as is contended paragraph 14 of this IA.

Emphasis supplied.

68. Again, this application and relief sought is hit by the law laid down Hon'ble NCLAT in ***Odisha Slurry Pipeline (supra.)*** as referred herein above. Also there is no bar in hearing petition under section 7 under IBC 2016 pending Company petition under Section 241 of Companies Act.

69. **Hence, issue/point No. (I) is answered in negative holding that neither Entegra Limited nor Power Infrastructure India have any locus to intervene in the Company Petition on behalf of the corporate debtor.**

70. While adverting to answer the question/issue no. (II) as referred above, it is relevant to refer to the three reply affidavits filed by the Corporate Debtor:

a. **16.04.2018:** The Corporate Debtor filed its *first reply* dated 13.04.2018 through its Company Secretary on 16.04.2018. *Vide* Order dated 27.09.2018, the NCLT observed that the said affidavit did not contain categorical stand of the Corporate Debtor *vis-à-vis* the Company Petition and therefore, time was granted to file a better affidavit.

b. **15.04.2019:** In pursuance to above order of NCLT, the Corporate Debtor filed its *second reply* affidavit sworn on 11.04.2019, signed by its Managing Director.

c. **28-02-2020:** *Third reply affidavit* by the Corporate Debtor was filed on 28.02.2020.

It is stated by the Corporate Debtor in its 3rd affidavit that the Respondent Company is withdrawing its reply affidavit dated 13.04.2018 and 11.04.2019, filed by erstwhile Company Secretary and one Sri P.C. Pankaj respectively, upon the reasons as stated in Para 3 to 10 of this affidavit.

71. The relevant portion of the Second Reply filed on 15.04.2019 is reproduced hereunder:

a. *I state that I am the Managing Director of the Respondent Corporate Debtor. I state that I am fully conversant with the facts of the case and duly competent to file this affidavit-in-reply on behalf of the Respondent Corporate Debtor. I am filing this affidavit with a view to a better affidavit as per the order dated 27/09/2018 of the Hon'ble NCLT, Ahmedabad Bench in the given case.*

b. In para 2 it has been stated;

"*I say and submit that the corporate debtor has no funds. The corporate debtor is totally dependent on funds from lenders or promoter. None of them are lending any funds. The issue of funds is being raised continuously in Board Meetings of the company, but to no resolution of the same. There is no sign of support for funding from lenders and promoter. The minutes of the 156th meeting of the Board of Directors is annexed here as Annexure A".*

c. In para 5 it has been stated;

"*The salaries of workers are pending for 2 months and that of staff/executives/KMP's is unpaid for the last 4 to 6 months".*

d. In para 10 it has been stated;

"*Government of Madhya Pradesh vide its letter dated 29/01/2019 has withdrawn its nominee director from the Board of the Corporate Debtor on grounds of defaults in the compliances of the provisions of the Companies Act, 2013. The said letter and reply to the same is annexed here as Annexure D".*

e. In para 13 it has been stated;

"With the expiry of insurance, lack of security and unpaid electricity bills; the safety of the project asset and maintenance of the dam, powerhouse and other establishments is not possible.".

f. In para 14 it has been stated;

"The project assets are deteriorating and maintenance of the same is an issue when no refunds are available to the company".

g. In para 15 it has been stated;

"Time is the essence. The delays are only pushing project towards non-revival. In case, if the project fails to revive back, there will be heavy loss to livelihood to all those associated with the project and loss of public money".

h. In para 16 it has been stated;

"In the Board of Directors Meeting held on 22/02/2019, the directors of the company decided to ***file a better affidavit stating the factual status of the company in compliance of the directions given by the Hon'ble Tribunal by its order dated 27/09/2018".***

i. In para 17 it has been stated;

"I say, submit and pray that the Hon'ble Tribunal may take further decision in the best interest of the Corporate Debtor, keeping in view the facts and circumstances mentioned in the preceding paras".

Emphasis supplied.

72. It is pertinent to note that the Second Reply of the Corporate Debtor is supported by resolution passed by the board of directors in the 156th meeting held on 22.02.2019 **(Pg. No. 6 of the Reply)**, wherein it is recorded as under:

Annexure – A

4

MINUTES OF 156th MEETING OF THE BOARD OF DIRECTORS OF SHREE MAHESHWAR HYDEL POWER CORPORATION LIMITED HELD ON FRIDAY, FEBRUARY 22, 2019 AT 11:10 A.M. AT 202-203 BMC HOUSE, N-1 BLOCK, MIDDLE CIRCLE, CONNAUGHT PLACE, NEW DELHI-110001 AND CONCLUDED AT 12:00 P.M.

PRESENT (ALL ITEMS):

S.No.	Name	Designation	Mode of Presence
1.	Shri P.K. Sinha	Nominee Director, PFC & Elected Chairman for the meeting	Physical
2.	Shri. P.C. Pankaj	Managing Director & CEO	Physical
3.	Shri P.K. Bajpai	Whole-Time Director (Finance)	Physical
4.	Shri Sanjiv Garg	Nominee Director-REC	Physical
5.	Shri D Subrahmanyam	Nominee Director-HUDCO	Physical
6.	Shri Rajeev Dak	Alternate Director to nominee of Strategic Investor	Physical
7.	Shri M Hudli	Nominee Director – Entegra Limited	Physical

In Attendance:

S.No.	Name	Designation	Mode of Presence
1.	Ms. Rashmi Santosh Mishra	Company Secretary	Physical

GENERAL ITEMS

ITEM NO. 156.1.1 ELECTION OF THE CHAIRMAN;

The Board discussed the need to elect the Chairman of the meeting for conducting the proceedings of Board and decided that nominee of the lead lender should be the Chairman. Thus, with the consent of all the members of the Board, the Board unanimously elected Shri P.K. Sinha, Nominee Director of Power Finance Corporation Limited as Chairman of the meeting.

ITEM NO. 156.1.2 LEAVE OF ABSENCE;

Shree Maheshwar Hydel Power Corporation Ltd. KHARGAON

...Power Corporation Ltd.

Managing Director

For Shree Maheshwar Hydel Power Corporation Ltd.

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"*The Board discussed and decided that in the present situation of extreme crisis of funds, the Managing Director or Whole-Time Director Finance or KMP on behalf of the Board of the company be authorized to file an affidavit stating the updated factual status of the Company to the NCLT, Ahmedabad and requesting for speedy directions/orders in order to safeguard the project, fate of the company and lives thus associated with the same*"

73. It is also significant to note at Pg. No. 11 of the said minutes, it is recorded that the nominee director of the strategic investor <u>(Now seeking rejection of this petition by filling T.A. (IBC) 1/KB/2022 objected to liquidation of the Corporate Debtor.</u> However, the issue of liquidation or otherwise was not relevant at that stage and even at this stage as the same would arise

only if the CIRP does not culminate into resolution of the Corporate Debtor.

74. A clear picture that emerges from the above position on record is concluded as under.

i. First reply by the Corporate Debtor dated 13.04.2018 was filed on 16.04.2018.

ii. Second reply affidavit was filed on 15.04.2019.

iii. Third reply affidavit by the Corporate Debtor was filed on 28.02.2020.

iv. The time gap between each of these reply affidavits is around between 8 to 12 months. Therefore, it was after a huge gap of 22 months from the date of filing the first affidavit, Corporate Debtor has come up with a completely new plea in the third reply that the first and second reply affidavits were filed in collusion and without any decision by the Board of Directors. It is stated in third reply affidavit that the Company Secretary who filed the 1st affidavit was acting at the behest of the applicant and the 2nd affidavit was filed by the managing director and the CEO and not the director as contended by the Corporate Debtor in 3rd affidavit. This is clear from minutes of 156 meeting placed on record along with the 2nd affidavit which has been reproduced above.

v. Corporate Debtor in its 3rd reply affidavit has wrongly described Mr. P.C Pankaj as the Director who was not only the managing director but also the CEO of the Corporate Debtor.

vi. On 27 September, 2018 the Corporate Debtor was merely asked to file a better affidavit by the Adjudicating Authority and in compliance of the said direction, the 2nd affidavit was filed on 11th of April, 2019 on behalf of the Corporate Debtor, extract of contents has been reproduced above.

vii. ***Permission for filing of better affidavit or for that matter of fact any subsequent pleadings in no way can be construed any permission or liberty to resile from the stand taken earlier.*** It is evident from the first two affidavits that the Corporate Debtor has in clear unambiguous language admitted its default, its financial crisis and further, in paragraph 17, it has clearly stated that the Adjudicating Authority may take further decision in the interest of Corporate Debtor keeping in view the facts and circumstances mentioned in preceding paras.

viii. The plea raised in the 3rd affidavit which has been filed after 22 months of the 1st affidavit and 10 months after the 2nd affidavit disputing the authority of the persons who filed those affidavits cannot be accepted and this Bench without any hesitation holds that this is a clear-cut case of approbation and reprobation by the Corporate Debtor while filing the 3rd affidavit. The allegations of having no authority while filing the first two affidavits is without any basis and merely an afterthought, based on surmises and conjectures merely to wriggle out of unambiguous and consistent stand taken in first two affidavits on oath and along with the requisite minutes of board authorizing those two persons to file the affidavits before this Adjudicating Authority. Upon the basis of documents referred above, it is held ***the persons filing earlier two affidavits had the lawful authority contentions of Corporate Debtor. And Corporate Debtor in third affidavit cannot be permitted to take a different stand in third reply affidavit.***

ix. In the first reply affidavit and in the better reply affidavit for which permission was granted by NCLT, the Corporate Debtor in clear terms has admitted its dues, debt and default and its complete inability even to pay wages to its workers.

x. Apart from the clear admission by Corporate Debtor in its two reply affidavits by persons duly authorised, it is significant to note paragraph 21, 22 at page 8 of third reply affidavit wherein it has been stated; -

> ***"<u>It is submitted that in view of the MoU dated 22.07.2019, no debt</u> is due from the Respondent Company as of today till the term of the MoU.***
>
> ***It is submitted that, on this ground alone the present Insolvency Petition deserves to be dismissed or deferred till the term of the MoU".***

Emphasis supplied.

75. The Corporate Debtor filed its third reply affidavit 28.02.2020, which is signed by its Managing Director. Thus, even if the first and second reply affidavit filed by the Corporate Debtor is not considered, in view of the specific averments as reproduced above and which is part of the 3rd reply affidavit, this bench has no hesitation to hold the amount of default by the Corporate Debtor as contained in Part IV of the application which is up to 15th January, 2018 is admitted.
76. This bench is of the view that for the purpose of filing a petition under section 7 of the Code, the debt due and in default could be calculated only till the date of filing of the application which was admittedly filed on 16.02.2018 and it contains the debt and the default up to 15.01.2018. A computation sheet of which has been annexed with the application as Annexure A5.
77. It is settled law that the moment the amount in default is more than Rs. 1 lakh, the petition under Section 7 of the Code needs to be admitted and the issue relating to quantum of debt is irrelevant for the purpose of admission of the Company Petition. Reliance is placed on the judgment dated 08.11.2019 of the Hon'ble NCLAT in ***Gouri Prasad Goenka v. Punjab National Bank and Anr.*** in Company Appeal (AT) (Insolvency) No. 28 of 2019, wherein the NCLAT held as under;

> *"11………In so far as joining of issue by the Corporate Debtor qua the quantum of payable debt is concerned, same does not fall for consideration of the Adjudicating Authority at the stage of admission of the application under Section 7 of the I&B Code. The*

only requirement is that the minimum outstanding debt should be to the tune of Rupees One Lakh. The actual amount of claim is to be ascertained by the Resolution Professional after collating the claims and their verification which comes at a later stage. The contention raised on this score also fails."

78. Besides the clear admission by Corporate Debtor of its debt and dues and also its inability to repay, as referred in preceding paragraphs/ record and documents furnished before this AA:

a. Plea raised by Financial Creditor *vis-a-vis* Additional loan agreement dated 27.04.2017 that;

i. In order to meet the immediate fund requirements as part of revival measure of the Project, the Financial Creditor in principle agreed to the increase in the Project cost from Rs. 2760,00,00,000/- to Rs. 8121,00,00,000/- and requirement of additional debt of Rs. 3022,00,00,000/- **('Additional Debt")** for the Project. Subsequently, at the request of the Corporate Debtor, a Loan Agreement dated 27.04.2017 was executed between the Financial Creditor and the Corporate Debtor **('Additional Loan Agreement')** for an additional term loan of Rs. 600 crores in order to meet the immediate fund requirements as a part of revival measure of the Project.

ii. Pursuant to the said Additional Loan Agreement, the Financial Creditor had disbursed an amount of Rs. 384,59,00,000. The said Additional Loan Agreement was entered into by the Financial Creditor in the capacity of Lender's Agent, Security Agent and Lender.

iii. The aforesaid loan was supported by the Promoter Sh. Mukul Kasliwal in the board meeting dated 02.03.2017, as recorded in the minutes of meeting as under, wherein it is recorded that ***"Shri Mukul Kasliwal specifically requested the Board to record that, the sanctioning of additional loan to complete the project is a welcome step apart from all the issues and concerns going on between the***

***Lenders and Promoters and Lenders will receive support from the promoters as well in view to complete the project.*"**

iv. Entegra is thus estopped from questioning the said Loan Agreement and any argument to the contrary is hit by doctrine of approbate and reprobate.

v. Schedule II of the Additional Loan Agreement dated 27.04.2017 acknowledges the already existing debt of Rs. 1750.93 crore including the aforesaid amount due to the Financial Creditor *(Pg. No. 736/758).* Further, the Recitals to the Loan Agreement *(Pg. Nos. 685/707)* also acknowledge the previous liabilities of the Corporate Debtor;

when seen and examined on the basis of record referred therein is found to be correct.

79. Debt was also acknowledged in the **Annual Report/Balance Sheet** of the Corporate Debtor for the FY 2013-14 signed by Sh. Mukul Kasliwal (Promoter) as one of Directors of the Corporate Debtor on 17.11.2014. The Annual Report was filed with the RoC & is part of public record. The Annual Report is also filed by Entegra Ltd. as *Annexure-QQ* with CP No. 175/2017.
80. Debt is again acknowledged in the Balance Sheet of the Corporate Debtor for FY 2016-17 signed on 28.08.2017.
81. The Corporate Debtor again acknowledged its liability/debt in the meeting of the Board of Directors of the Corporate Debtor held on 29.09.2015 duly attended by the Promoter Sh. Mukul Kasliwal.
82. Reliance has been placed on behalf of Corporate Debtor to the judgement in case of ***Vidarbha (supra.)*** but it is clear that the Corporate Debtor is not in a position to repay its debt and hence, the Corporate Debtor's reliance on ***Vidarbha (supra.)*** is totally misplaced.
83. **Suffice it to say for the foregoing reasons, it is held in response to Point number (II), the Financial Creditor was well within its right to issue a recall notice dated 17.01.2018 demanding the Corporate Debtor to make payment of the total outstanding amount of Rs. 2139.20 crores**

including outstanding interest amounts payable as on 16.01.2018 within 15 (fifteen) days of the receipt of the said notice.

84. While considering Issue/Point No. (III) In I.A. No. 60 of 2020 (T.A. (IBC) No. 2/KB/2022), it is quite significant to note it that Entegra filed I.A. No. 60 of 2020 (T.A. (IBC) No. 2/KB/2022) under section 65 of the Code on **17.03.2020** after Orders were reserved by the predecessor Bench on 28.02.2020 after hearing both sides . I**t further be noted this IA was filed after more than two years after filing of section 7 Petition.** This IA filed on 17th of March, 2020 seeking dismissal of petition under section 7 filed in 2018 and refers to the dates and events of year 2018 and even prior to that. It further seeks dismissal of petition under section 7 on the ground that it was fraudulently prosecuted by the petitioner in violation of MOU executed on 27.07.2019 between applicant and the petitioner company. When the contents of this application are seen along with the contents of the 3rd reply affidavit filed by Corporate Debtor, it is apparent that similar contentions have been raised.

85. It can be seen from Clause 22 of the MoU provided "*In the event of failure to implement the contents of this MoU in 12 (twelve) months from the Execution Date, this MoU shall stand automatically terminated.*" Admittedly, the MoU was not implemented by Entegra/Corporate Debtor as it failed to bring in Rs. 9 crore and further failed to give a concrete settlement proposal/restructuring plan of the dues to the Lenders, much less acceptance thereof by the Lenders. Even as on **24.10.2019**, the said amount had not been infused. The same is recorded in the Lenders' meet held on the said date wherein Entegra was also a participant. The said meeting also records that the Corporate Debtor/Entegra needs to give a concrete & comprehensive proposal for settlement of dues of lenders. Relevant extract of the minutes of meeting held on 24.10.2019 (**Pg. No. 44 of IA No. 9/2019 filed by Entegra**):

86. It is correct as contended by financial creditor that MoU is not relevant for the present proceeding as the scope of the present proceeding is narrow and the NCLT is not a civil court where disputes relating to MoU can be agitated or specific performance thereof can be sought.

87. It is also established from record referred above by the Financial Creditor that MoU was executed in order to give an opportunity to Entegra /Corporate Debtor to settle the dues of the creditors (debt and default having been admitted). However, Entegra/Corporate Debtor failed even to come up with a concrete proposal for settlement of the dues of the lenders, much less paying/settling the same. Pertinently, the MoU stipulated that Entegra would bring in an upfront amount of Rs. 10 crore within three weeks from appointment of CMD i.e. by **27.08.2019** (the appointment having been made on 06.08.2019). Admittedly, only Rs. 1 crore that too in tranches was brought by Entegra. The balance amount of Rs. 9 crore was never brought, admittedly. <u>Thus, the first default under the MoU was committed by Entegra on 27.08.2019 itself.</u> Copy of correspondence exchanged between the parties in relation to the aforesaid is already on record along with Additional Affidavit filed by Financial Creditor on 31.08.2020 (55/56 Financial Creditor Affidavit 31.08.2020**).**

Emphasis supplied.

88. As noted above, it may be reiterated and as the facts and events noted above, reveal the MoU of 2019 in no way waived of the debt and default of the Financial Creditor occurred till the date of filing of petition under Section 7 on 16.02.2018. It also is noticed the allegations also are baseless, merely an attempt to create a hype and are based on surmises and conjecture.

89. On scrutiny of the application and the facts and events noted hereinabove, this Adjudicating Authority finds that this application has not been filed for any *bona fide* reasons.

90. **In view of the facts and events as noted hereinabove, while answering issue number (III), it is found that the Company Petition filed under section 7 of the Code is not at an instance of any fraud/malicious initiation of insolvency proceedings as laid down in section 65 of the Code.**

91. **In view of the above, issue/ point (IV) is, therefore, answered in negative** as it is established that there is a debt and default as discussed hereinabove.

92. And also, Financial Creditor had a right to file this petition under section 7 of the Code as there is a clear debt due and default by the Corporate Debtor. And the same has been established on the basis of documents and admissions referred above. This debt was payable by the Corporate Debtor to the Financial Creditor and Corporate Debtor clearly failed to repay the same.

93. This Bench is also of the considered view that the Corporate Debtor is a separate juristic entity different shareholder as well as the Management. It is only the Corporate Debtor alone as stipulated under the Code, which is a party. In view of the debt, the default and petition having been filed within limitation, it requires admission under section 7 of the Code as held by Hon'ble Supreme Court in the case of ***Innoventive Industries Ltd. v. ICICI Bank and Ors.*** reported at ***(2018)1 SCC 407***. The relevant paras from the said judgment are reproduced hereunder:

> *"**27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins**. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that **<u>a debt</u> <u>means a liability of obligation in respect of a "claim"</u>** and for the meaning of "claim", we have to go back to Section 3(6) which defines **<u>"claim" to mean a right to payment even if it is disputed.</u>** The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As*

opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

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 subsection (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.*

…x…x…x…

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)

94. This Bench seeks to reiterate the order of the Hon'ble NCLAT dated 12.03.2018 wherein the Hon'ble NCLAT directed that the *Government of Madhya Pradesh (GoMP) and Central Government both need to urgently consider the way forward in public interest to get the Project completed.* And the way out is through resolution process for which Corporate Debtor in its earlier two replies was also agreeable.
95. Hon'ble NCLAT in the Order dated 12.03.2018 has held that the Promoter i.e. Entegra had a responsibility and a duty to manage the Corporate Debtor as per the Companies Act in which they have failed. The Hon'ble NCLAT further held that "***the Promoter do not appear to be enthusiastic to get status quo ante restored in the Articles not inspire confidence that if we strike down these amendments made on 25.11.2005 (and subsequently) they can take charge and complete the project which attracts public interest. Promoters have not brought to our attention that at any time***

they opposed, or stood up to the gradual takeover." *(Para 44 of the Order).* ***(Pg. No. 759/770 of the 3rd Reply).***

96. This reference is accordingly disposed of in terms of answers to all the four points referred *vide* 22 July 2022 to this Bench.
97. With utmost regard to order of dissent by Hon'ble member (T), I for the reasons stated above agree with order of rejection of I.A.'s and admission of petition u/s 7 of the Code by Hon'ble member (J) made on 08.10.2021 along with moratorium u/s 14 of the Code and consequential directions including appointment of IRP.
98. Energy is a key source of economic growth. And the fortunes lie where water resource is available for generation of electricity in our country. A hydro power project of 400-megawatt capacity was conceived to be built upon river Narmada in the State of Madya Pradesh way back in the year 1993. It took off from the stage of drawing board to construction. However, before the water could fall into turbines for the shafts to move to generate electricity, it went into turbulence of multiple litigations. The ultimate consequence; deprivation of multipurpose benefits of project to citizens of the country and the State of Madya Pradesh in particular.
99. To conclude, it may be useful to refer and rely on as held by Hon'ble Supreme Court in the case of ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.***

> ***"The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors".***
>
> ***"Thus, resolution process is not adversarial to the corporate debtor but, in fact, protective of its interest".***

100. Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
101. List the matter on **28.10.2022** for the filing of the progress report before the Original Bench at Indore.

102. Registry is directed to remit back the records along with this order to the Original Bench at the earliest.

103. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 27th day of September, 2022