



**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH -I**

CP (IB) 3219/MB/2018

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

UNION BANK OF INDIA

[CIN: U99999MH1919PTC000615]

Union Bank Bhavan, 239, Vidhan Bhavan
Marg, Nariman Point, Mumbai – 400021.

... Financial Creditor /Petitioner

Versus

**SUPREME MANOR WADA BHIWANDI
INFRASTRUCTURE PRIVATE LIMITED**

[CIN: U45202MH2010PTC198376]

Supreme House, Pratap Gadh, Plot No. 94/C,
Opp. IIT Bombay, Powai,
Mumbai 400076

...Corporate Debtor / Respondent

Order Delivered on :19.05.2023

Coram:

Hon'ble Member (Judicial) : Mr. H. V. Subba Rao,
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam,

Appearances:

For the Financial Creditor : Adv. Nausher Kohli a/w Adv.
Naveli Reshamwalla and
Adv. Dhruvee Patel
For the Corporate Debtor : Adv. Shyam Kapadia a/w Adv.
Ashish Pyasi i/b Adv. Avinash
R. Khanolkar



ORDER

Per: H.V. Subba Rao, Member (Judicial)

1. This is a Company Petition filed under section 7 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by Union Bank of India Limited (“the Financial Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Supreme Manor Wada Bhiwandi Infrastructure Private Limited** (“the Corporate Debtor”).
2. The present Petition was filed on 23.08.2018 before this Adjudicating Authority on the ground that a total loan of Rs.168,83,00,000/- (Rupees One hundred Sixty-eight crores eight-three lakhs only) was granted to the Corporate Debtor and the Corporate Debtor has defaulted in repayment of the same.
3. The Corporate Debtor is company incorporated on 04.01.2010 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its registered office is at Supreme House, Pratap Gadh, Plot No. 94/C, Opp. IIT, Powai, Mumbai - 400076 MH. Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by Financial Creditor by way of Petition:

4. The Financial Creditor submits that the total amount of Debt granted is Rs.168,83,00,000/- (Rupees One hundred Sixty-eight crores eight-three lakhs only) and the amount claimed to be in default in Part IV of the Petition is Rs.165,19,44,296.81. The date of default stated to be is 31.07.2018. The date of filing of this Petition is 23.08.2018. The debt thus, is not time-barred. Working



of computation of amount and days of default as on 31.07.2018 is annexed to the Petition as **Exhibit – A**

5. The Ld. Counsel for the Petitioner submits that the Financial Creditor granted and disbursed the following facilities:

Types of Facilities granted	Amount in Rupees
Term Loan – I (“Term Loan – I”)	60,00,00,000/-
Term Loan – II (“Term Loan – II”)	83,66,00,000/-
Funded Interest Term Loan – I (“FITL - I”)	5,56,00,000/-
Funded Interest Term Loan – I (“FITL - II”)	7,16,00,000/-
Non-Convertible Debentures (“NCD”)	12,45,00,000/-
Total	168,83,00,000/-
(Term Loan – I, Term Loan – II, FITL – I, FITL – II and NCD are hereinafter referred to as “Facilities”)	

6. The Financial Creditor submits that it is a scheduled Public Sector Bank having its Branch office, through which the distribution of the loan facilities was sanctioned, situated at IFB Branch, Mumbai, Union Bank Bhavan, First Floor, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai – 400021.
7. The Corporate Debtor is a Special Purpose Vehicle (“SPV”) promoted by Supreme Infrastructure India Limited.



8. The Govt. of Maharashtra ("GOM") through its Public Works Department had granted the Corporate Debtor a concession for a period of 22 (Twenty Two) years and 10 (Ten) months by way of exclusive right, license and authority for construction, operation, maintenance and handing over of 4 (four) laning of Manor Wada Bhiwandi section from SH-35 km 49.10 to 89.01 Manor Wada SH No.34 km, 29.55 to 53.18 in Taluka Wada/Bhiwani/Palghar, District Thane (hereinafter referred to as "Project"), on build, operate and transfer ('BOT') basis. In this regard on 08.03.2010, the GOM and the Corporate Debtor executed a Concession Agreement ("Concession Agreement") for implementing the Project. A copy of the Concession Agreement is annexed to the Petition at **Exhibit – D pgs.42-539**
9. The total cost of the Project was estimated at INR 430,00,00,000 (Indian Rupees Four hundred Thirty crore).

Term Loan - I

10. In order to fund the Project, the Corporate Debtor availed a rupee term loan facility of Rs.322,50,00,000/- (Rupees Three hundred Twenty Two Crore Fifty Lakhs only) (**Term Loan – I**) from the Financial Creditor other lenders forming a part of a consortium led by the Financial Creditor.
11. On 30.08.2010, a common loan agreement (**Common Loan Agreement**), was executed by and between the Corporate Debtor, Allahabad Bank, Bank of India, Indian Overseas Bank, L&T Infrastructure Finance Company Limited, Oriental Bank of Commerce, State Bank of India, State Bank of Patiala and the Financial Creditor (hereinafter collectively referred to as the



(**Consortium Lenders**) and Union Bank of India (as **Erstwhile Security Trustee**). As per the terms of the Common Loan Agreement, out of the total amount availed, the Financial Creditor's share granted to the Corporate Debtor was INR 60,00,00,000/- (Indian Rupees Sixty Crore only). Copy of Common Agreement is annexed to the Petition as **Exhibit – F (pgs. 606-706)**

12. The following documents were executed for securing the Term Loan – I:

- (a) Lender's Agent Agreement dated 03.08.2019. Copy of the said Agreement is annexed to the petition as **Exhibit – G (pgs 747-774)**
- (b) Security Trustee Agreement dated 30.08.2010. Copy of the said Security Trustee Agreement annexed to the Petition as **Exhibit – H (pgs 775-821)**
- (c) Inter Creditor Agreement dated 30.08.2010. Copy of the Inter Creditor Agreement is annexed to the petition as **Exhibit -I (pgs 822-864)**
- (d) Escrow Agreement dated 30.08.2010. Copy of the said Agreement is annexed to the Petition as **Exhibit – J (pgs 865-907)**
- (e) Indenture of Mortgage dated 23.09.2010. Copy of which is annexed to the petition as **Exhibit – K (pgs 908 to 951)**
- (f) Deed of Personal Guarantee dated 30.08.2010 executed by Vikas Sharma. Copy of the said Personal Guarantee Deed is annexed to the Petition as **Exhibit – L (pgs 952-972)**



- (g) Deed of Personal Guarantee dated 30.08.2010 executed by Vikram Sharma is annexed to the Petition as **Exhibit – M (pgs 973-993)**

Term Loan – II

13. The Ld. Counsel submits that the Corporate Debtor missed the original commercial operation date for the Project and subsequently, the scope of the Project was changed by the GOM vide its order dated 20.07.2013, whereby the Corporate Debtor was mandated to undertake construction and development of the bypass State Highway at Vishwabharti Phata Bhinar Vdpa Junction from 0.000 kms to 7.900 kms District Thane State of Maharashtra on BOT basis (**Bypass Project**).
14. For the purpose of part financing the Bypass Project, another common loan agreement was executed on 30.07.2013 (“Second Common Loan Agreement”) between the Corporate Debtor, the Financial Creditor (“New Lenders”), the Lender’s Agent and the Security Trustee for availing the additional facility of INR 83,66,00,000/- (Indian Rupees Eighty-Three crores Sixty Six lakhs only) (Term Loan – II). Copy of the Second Common Loan Agreement dated 30.07.2013 is annexed to the Petition as **Exhibit – N (pgs. 994-1126)**
15. The following documents were executed for securing the Term Loan – II
- (a) Security Trustee Agreement dated 20.07.2013 annexed to the Petition as **Exhibit- O (pgs 1127-1168)**



- (b) Lender's Agent Agreement dated 30.07.2013 annexed to the Petition as **Exhibit – P (pgs 1169-1195)**
 - (c) Indenture of Mortgage dated 05.09.2013 annexed to the Petition as **Exhibit – Q (pgs.1196-1247)**
 - (d) Deed of Personal Guarantee dated 30.07.2013, executed by Vikram Sharma annexed to the Petition as **Exhibit – R (pgs.1248-1270)**
 - (e) Deed of Personal Guarantee dated 30.07.2013, executed by Vikas Sharma annexed to the Petition as **Exhibit – S (pgs 1271-1294)**
 - (f) Escrow Agreement dated 30.07.2013 annexed to the Petition as **Exhibit – T (pgs.1295-1344)**
16. The Financial Creditor submits that the Corporate Debtor continued to encounter difficulties in meeting its debt obligations in a timely manner. Considering the enormous debt obligation of the Corporate Debtor, the Financial Creditor along with the other Consortium Lenders on 18.02.2015, approved a restructuring package wherein it was agreed to restructure the debt of the Corporate Debtor and make available to the Corporate Debtor loans for an aggregate principal amount not exceeding INR 414,18,00,000/- (Indian Rupees Four hundred fourteen crore eighteen lakhs only) hereinafter referred to as “**JLF Restructuring Package**”.
17. Out of the overall JFL Restructuring Package, the Financial Creditor's share was as follows:



- (a) **Term Loan – I** — INR 59,65,37,049.22 (Indian Rupees Fifty Nine Crore Sixty Five lakhs Thirty Seven Thousand and Forty Nine only)
- (b) **Debenture Loan** — INR 12,45,00,000/- (Indian Rupees Twelve Crore Forty-Five Lakhs only)
- (c) **Term Loan II** — INR 76,98,28,676.05 (Indian Rupees Seventy-Six crore Ninety-Eight lakhs Twenty-Eight thousand Six Hundred and Seventy-Five only)
- (d) **FITL Facility** — INR 12,72,00,000/- (Indian Rupees Twelve crore Seventy-Two lakhs only).

Term Loan I, Term Loan — II, FITL Facility and Debenture Loan are hereinafter collectively referred to as “**Facilities**”)

18. The Financial Creditor issued a sanction letter on 23.03.2015, approving the terms of the JLF Restructuring Package. In furtherance of the same, on 27.03.2015, a Master Restructuring Agreement (Master Restructuring Agreement) was executed by and between Corporate Debtor, the Financial Creditor, other Consortium Lenders, SBICAP Trustee Company Limited (acting as the project security trustee, bypass security trustee and debenture trustee, bypass debenture trustee and debenture trustee and hereinafter referred to as the “**Security Trustee**”. Copy of the Master Restructuring Agreement dated 27.03.2015 is annexed to the Petition as **Exhibit -U (pgs 1345-1412)**.
19. On 27.03.2015, a Debenture Trust Deed (**Debenture Trust Deed**) was executed by and between the Corporate Debtor and SBICAP Trustee Company Limited in the capacity of Debenture



Trustee. Copy of the Debenture Trust Deed is annexed to the Petition as **Exhibit – AA (pgs 1549-1619)**

20. As per the terms of the Master Restructuring Agreement, the Corporate Debtor was required to issue to the Financial Creditor secured, unlisted, redeemable, non-convertible debentures in consideration of the JLF RESTRUCTURING Package. Accordingly, the Corporate Debtor allotted the Financial Creditors NCDs of an aggregate nominal value of INR 12,45,00,000/- (Indian Rupees Twelve Crore Forty-Five lakhs only). Copy of the Non-convertible Debenture Certificate dated 06.03.2015 is annexed to the Petition as **Exhibit – BB (pages 1620-1626)**
21. The following documents were executed to secure the JLF Restructuring Package:
 - (a) Escrow Agreement dated 30.07.2013 (**New Escrow Agreement**), as amended by a supplemental agreement to the common loan agreement.
 - (b) Indenture of Mortgage dated 16.09.2015 (**New Indenture of Mortgage**), executed by and between the Corporate Debtor in favour of the Security Trustee as the Project Security Trustee), Security Trustee (as the Bypass Security Trustee) and Security Trustee (as the Debenture Trustee).
 - (c) Pledge Master Report dated 16.09.2015 (**Pledge Master Report**), with respect to the Compulsory Convertible Debentures executed by Supreme Infrastructure BOT Private Limited in favour of the Security Trustee. Copy of



the same is annexed to the Petition as **Exhibit – DD-1 (pgs 1663-1720)**

- (d) Deeds of Personal Guarantee dated 27.03.2015 (**New Deeds of Personal Guarantee**), each executed by Vikram Sharma and Vikas Sharma respectively in favour of the Security Trustee, to secure the various term loans and rupee term loans availed by the Corporate Debtor from the Consortium lenders. (Copy of the same is annexed to the Petition as **Exhibit – DD (pgs 1645-1662)**).
22. However, since the Corporate Debtor was unable to pay the debt owed to the Financial Creditor and the other Consortium Lenders and accordingly was declared a Non-Performing Asset (**NPA**) on 24.11.2016.
23. The Corporate Debtor has also acknowledged its debt which was due and payable by executing and signing a Revival Letter on 22.01.2018 (**Revival Letter**) in favour of the Financial Creditor and the other Consortium Lenders. Copy of the same is annexed to the Petition as **Exhibit – SS (pgs 2062-2071)**
24. On 01.06.2018, the Financial Creditor issued as Recall Notice on the Corporate Debtor, recalling the entire facilities granted by the Financial Creditor and demanding an immediate payment of INR 160,80,69,112/- (Indian Rupees One hundred and Sixty crore Eighty lakhs Sixty nine thousand one hundred and twelve only) due and payable as on 30.04.2018. the Recall Notice was duly acknowledged by the Corporate Debtor. Copy of the said Notice is annexed to the Petition as **Exhibit – C (pg. 34-41)**



25. Further, the Corporate Debtor has admitted in the audited Balance Sheet for FY 2016-17 the debt due and payable to Financial Creditor.
26. It is submitted that on perusal of the aforesaid facts it is evident that the Corporate Debtor has duly availed the Financial Debt from the Financial Creditor and other Consortium Lenders lead by the Financial Creditor and utilized it for its Project as stated above. Further it is clear that the Corporate Debtor has defaulted in repaying its debt to the Financial Creditor. Despite having granted several opportunities by way of additional funds and restructuring of loans, the Corporate Debtor has failed to regularize the account and committed defaults under the Transaction Documents and failed to clear the dues of the Financial Creditor.
27. The Corporate Debtor has also executed and signed the Revival Letter (at *Exh-11 Pg.2062 of the petition*) wherein the Corporate Debtor and its promoters have acknowledged their liability towards the lenders for payment of their outstanding dues under the Facilities.
28. The Corporate Debtor has also admitted the default in audited Balance Sheet for FY 2016-17 with respect to the said debt due and payable to the Financial Creditor in audited Balance Sheet.
29. The Petitioner submits that the Corporate Debtor in its Additional Affidavit dated 20th February 2023 (**Additional Affidavit**) has purportedly sought to contend that, as per the terms of the Concession Agreement dated 08.03.2010, and the Substitution



Agreement dated 31.08.2010, there is no debt due from the Corporate Debtor to the Financial Creditor.

30. The Corporate Debtor relied on the terms under the Concession Agreement under Article 16 which provides for '*Events of Default*' and '*Termination*'. According to the Corporate Debtor as per the terms of the Concession Agreement, default is defined to be either (a) 'Concessionaire Event of Default' and (b) GOM Event of Default. Further, it has been contended that as per the terms of the Concession Agreement a 'Termination Payment' was due and payable on the occurrence of any event of default and same was towards the 'Debt Due'.
31. The Petitioner in response to the aforesaid defense of the Corporate Debtor submits that the Corporate Debtor is trying to confuse the terms 'Default' and 'Debt Due' in respect of a financial debt availed from a Financial Creditor as required under Sec.7 of the I&B Code with its own 'Default' in performance of the terms and conditions of the Concession Agreement with a third party namely GOM. It is further submitted that the Corporate Debtor has admittedly availed the Financial Debt/Credit Facilities from the Financial Creditor under an independent transaction.
32. It is submitted that the two are independent transactions which are governed by terms and conditions of their respective agreements. The default under the Concession Agreement is in the context of failure of the Concessionaire (being the Corporate Debtor in the present case) to fulfil or comply with its obligations under the Concession Agreement, whereas, the default under the Transaction Documents is, as contemplated under section 7 of the



Code, in discharge of financial debt under the Financial Debt/Credit facilities availed by the Corporate Debtor from the Financial Creditor.

33. Further, in support of the aforesaid submissions, reliance is placed on the order of this Tribunal in the case of *Union Bank of India vs. Rajahmundry Godavari Bridge Ltd. C.P. No.2677/I&BP/2018*. Wherein a similar question of facts and law were before this Tribunal for consideration. The relevant paragraphs are reproduced below for reference:

“3. The brief facts of the case are that the Corporate Debtor entered into a concession agreement with the Government of Andhra Pradesh through Andhra Pradesh Road Development Corporation (Referred to as “APRDC”) for construction, operation and maintenance of a bridge across Godavari River on 05.11.2008 (referred to as the “project”). The total cost of the project was estimated at Rs. 861 Crores.

h) The Corporate Debtor further submitted that there is no event of default as per the clauses 37.1.1 and 37.1.1 (j) or any other clauses of various agreements by the Corporate Debtor. It is clear from these clauses that the reason for the Corporate Debtor’s default, if any as alleged by the Petitioner is consequent to the breaches attributed by the APRDC under the Concession Agreement. Despite gross violation of the terms of the Concession Agreement by APRDC, being a prudent concessionaire, the Corporate Debtor still carried out the development of the project



which stands completed as on date and in operation since October 2015.

14. The above contention of the Corporate Debtor cannot be taken into account which considering the Petition for admission under Section 7 of the Code, in view of the decision of the Hon'ble Supreme Court of India in the case of "Innoventive Industries Ltd. v/s. ICICI Bank and Ors. — (2018) 1 SCC 407

15. On perusal of the documents submitted by the parties, it is evident that the Applicant has granted Financial assistance of Rs.184,85,00,000/- (Rupees One hundred Eighty-Four crore and Eighty-Five lakhs only) to the Corporate Debtor, the same was disbursed to the Corporate Debtor and there was default in repayment of the said dues. Considering the above facts, we opine that the nature of the debt is a "Financial Debt" as defined under section 5(8) of the Code. It has also been established that admittedly there is 'Default' as defined under section 3(12) of the Code on the part of the Debtor."

34. The learned Counsel for the Financial Creditor submits that the Corporate Debtor in its Additional Affidavit has purportedly sought to contend that the Financial Creditor has already taken steps under the Substitution Agreement for the Substitution of the Respondent with a new concessionaire.

- Additionally, it has purportedly contended that, in view of the Arbitral Proceedings pending, the Financial Creditor having approached the GOM for Substitution and simultaneously proposals have been advanced, the Petition deserves to be dismissed in light of the judgement of the



Hon'ble Supreme Court in the case of M/s. Vidarbha Industries Limited vs. Axis Bank Limited.

- It is submitted that the contentions of the Corporate Debtor are based upon the distorted presentation of the facts and the same also fall flat upon its mouth in the light of proper understanding of the facts. The Corporate Debtor being solely responsible for its obligation towards the Financial Creditor / Lenders under the borrowing transactions, cannot take refuge on any misconceived notions of default under Concession Agreement/substitution/arbitration etc., as contended by it.
- Further the aim and purpose of the Substitution Agreement being limited to completion of the remaining part of the project, does not relieve the Concessionaire of its obligations to discharge its liability under the bilateral arrangements with the lenders which is an independent transaction altogether.
- Further, without prejudice to the aforesaid submission, it is clarified that while the Lenders had recommended the name of one Kalyan Toll Infrastructure Limited for substitution of the Concessionaire, the same did not materialize on account of the conditions put forth by the GOM.
- The GOM has issued termination notice to the Corporate Debtor as per the terms and condition of the Concession



Agreement in light of its gross negligence of the Concessionaire/Corporate Debtor in performance of its obligations. Further, the substitution arrangement does not in any way discharges the Corporate Debtor of its liability towards its debt due to the Lenders.

- Further, the Corporate Debtor's reliance upon the Hon'ble Supreme Court judgement in the case of M/s. Vidarbha Industries Limited vs. Axis Bank Limited, is also misconceived. It is submitted that the GOM has issued the termination notice for termination of the Concession Agreement on account of gross negligence of the Corporate Debtor itself whereas in the case of M/s. Vidarbha Industries Limited, the project was duly completed, and dispute was limited to payment of revised tariff as per the order passed by the Appellate Tribunal for Electricity which had allowed the tariff as per actual fuel cost.
- In view of the aforesaid it is evident that the Corporate Debtor is in default in repayment of financial debt beside having committed default and in gross negligence in compliance of its obligations under the Concession Agreement.

Submissions made by the Corporate Debtor by way of Affidavit in Reply

35. At the outset the Corporate Debtor submits that, there is no debt due from the Respondent to the Applicant and hence, this Petition merits dismissal. The Corporate Debtor submits that the Petition



filed by the Financial Creditor is liable to be dismissed for the following among other preliminary grounds:

- i. SDR – Prior to filing of the Petition, the SDR scheme under the aegis of RBI Circular was invoked and virtually implemented by the Applicant and duly complied by the Respondent and the Applicant took the benefit of the same therefore, the Applicant is estopped from claiming any debt and default.
- ii. Individually not permitted to proceed – as the facility is extended by the consortium and JLM being formed, the Applicant cannot proceed unilaterally and ought to have taken the approval from the other lenders before filing the present petition. It is a settled law that such unilateral actions are not permitted as a single lender cannot unilaterally seek insolvency resolution under the Code as held in *Rakshit Dhirajlal Doshi v. IDBI Bank & Ors.*

36. In the present instance, a Concession Agreement dated 8th March 2010 (hereinafter referred to as “CA”) was entered into by the Government of Maharashtra through its Public Works Department with the Respondent for the construction, operation, maintenance and hand over of a four-lane road in Bhiwandi. To facilitate the financing of this project, a Substitution Agreement (hereinafter referred to as “SA”) was subsequently entered into



amongst the Government of Maharashtra, the Respondent and the Applicant (as lead bank for the consortium) on 31st August 2010. It is submitted that a perusal of the terms of these contracts makes it evident that there is no debt due from the Respondent to the Applicant and the debt stands assigned to GOM and to be paid by the GOM to Lenders.

37. Article 16 of the CA dealt with the “Events of Default and Termination”. Under Article 16.1, an event of default was defined to be either (a) a “Concessionaire Event of Default” or (b) a “GOM Event of Default”. Article 16.2 then made a provision for termination of each of the events of default. Subject to the provisions of the SA, the Government of Maharashtra was entitled to terminate the CA for a Concessionaire Event of Default and the Respondent herein was entitled to terminate the CA for a GOM Event of Default. However, irrespective of whether it was a Concessionaire Event of Default or a GOM Event of Default and irrespective of whether the CA was terminated by the Government of Maharashtra or by the Respondent herein, the CA envisaged the concept of a ‘Termination Payment’.

38. The Corporate Debtor submits that Article 16.2(a)(3) reads as follows:

“Upon Termination by the GOM on account of occurrence of a Concessionaire Event of Default during the Operations Period, the GOM shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% of the Debt Due actually spent on the project less pending insurance



claims, if any. Provided, however, that in the event of such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from the GOM further sum equal to 80% of amount of such claims not admitted.” (emphasis supplied)

Similarly, Article 16.2(b)(2) said,

“Upon Termination of this Agreement by the Concessionaire due to a GOM Event of Default, the Concessionaire shall be entitled to receive from the GOM, by way of Termination Payment, a sum equal to:

- i. The Total Debt Due, plus
- ii. 120% (one hundred twenty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the charges in WPI during such year and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.” (emphasis supplied)



39. The term 'Termination Payment' was in turn described in Article 16.4 of the CA in the following fashion,

“The Termination Payment pursuant to Article 15 or 16 as the case may be, shall be payable to the Concessionaire by the GOM within ninety days of demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If the GOM fails to pay Termination Payment in full within the said period of 120 days, the amount remaining unpaid shall be paid along with interest @ SBI PLR plus two percent from the Termination Date till payment.”

40. Therefore, it is urged that on the occurrence of any of the events under Articles 15 or 16 of the CA, the Government of Maharashtra was liable to pay the Respondent a sum by way of 'Termination Payment'. Importantly, it was not material under the CA whether the Government of Maharashtra or the Respondent herein was responsible for the default. As long as there was a default, whether it be by the Government of Maharashtra or by the Respondent, a 'Termination Payment' was due and payable. Moreover, in both cases, this 'Termination Payment' was towards the 'Debt Due', a defined term under the contract. Keeping this contractual set-up in mind, it is important to now refer to certain material provisions of the SA.

41. Further the Corporate Debtor had invited our attention to Article 3.2 of the SA which reads as,



“(i) Where the Lender/Lenders’ Representative (on behalf of all the Lenders) communicates in writing that (i) the Lender/Lenders’ Representative does not intend to seek substitution of the Concessionaire or (ii) that the Lender/Lenders’ Representative has not been able to find suitable Selectee or (iii) that the GOM has declined to accept the Selectee proposed by the Lender/Lenders’ Representative, the GOM shall proceed to terminate the Concession and to make Termination Payment in accordance with the provisions of the Concession Agreement.

(ii) Notwithstanding anything contained hereinabove, the GOM shall not upon Termination of the Concession Agreement, be required to take over, the Debt Due save and except to the extent of Termination Payment due and payable under the Concession Agreement. In such an event the GOM’s obligation shall be limited to assumption of such liabilities and payments of Debt Due as the GOM has agreed to bear under the Concession Agreement.”

42. In the backdrop of the aforesaid clauses, for all intents and purposes, upon the termination of the CA, the debt would stand taken over by the Government of Maharashtra and there would be nothing due from the Respondent herein.



43. Further, it is the Corporate Debtor's contention that the CA has been terminated by the GoM by a letter dated 11th October 2019 and Respondent invoked arbitral proceedings and the same are pending at the stage of cross examination and huge amount is recoverable from PWD/Govt. of Maharashtra as stated above. In any event, the termination payment is due and payable by the Govt. of Maharashtra and therefore, the present case is squarely covered by the judgment of the Hon'ble Supreme Court in the matter of Vidharbha Industries.
44. It is submitted that the invocation of pledge of 51% shares - which are more than the total debt amount/facility extended by the Applicant to the Corporate Debtor.
45. Substitution of Concessionaire – On 24.08.2022, the Petitioner has already taken steps under the SA for substitution of the Respondent with new concessionaire and identified two prospective parties as proposed concessionaires. The Petitioner has addressed a letter dated 24.08.2022 to the Govt. of Maharashtra requesting the Govt. to restore its rights under the SA including the right of the lenders to substitute the concessionaire for the residual concession period.
46. OTS proposal at advanced stage – The Respondent vide its letter dated 12.07.2022 has offered Rs. 128 crores as one time settlement amount through induction of an investor by change in management via substitution route under the SA and the same is at the advanced stage. The Respondent's offer has been discussed by the lenders in the JLM. It is submitted that even in the JLM dated 29.10.2022 the Petitioner along with other lenders have



agreed to request the Respondent to enhance the offer and the revised proposal is pending for approval before the concerned authorities of the lenders which means same is at a such an advanced stage. In the event such an offer is accepted then there will not be any obligation on the Respondent in any manner whatsoever under either CA or SA.

Findings:

47. Heard the Ld. Counsel for the Financial Creditors and the Ld. Counsel for the Corporate Debtor and perused the records.
48. Upon perusal of records, this Bench is of the considered opinion the Counsel for Petitioner through his arguments articulated the existence of debt and default which are corroborated from the records annexed to the Petition. It is not disputed that the amount was disbursed to the Corporate Debtor and the Corporate Debtor has defaulted in repaying the amount.
49. Coming to the defenses raised by the Corporate Debtor, it is contended that under the Concession Agreement and Substitution Agreement, it is immaterial whether the default occurs at the behest of the Corporate Debtor or the Government of Maharashtra. The liability to repay the Corporate Debtor falls on Government of Maharashtra. The Ld. Counsel for the Corporate Debtor has submitted there was a concept of Termination Payment envisaged under the said contracts, and the obligation to make the Termination Payment to Corporate Debtor i.e. Concessionaire was on the GOM.



50. The aforesaid contention of the Corporate Debtor cannot be taken into consideration, as the Financial Debt as claimed by the Financial Creditor herein arises from a different transaction and the distinct finance documents executed between the Financial Creditors as the Lenders and the Corporate Debtor as the borrower. The default arising out these transactions falls within the meaning of Financial Debt under Section 5(8) of the Code and cannot be equated with the Debt Due under the concession Agreement or the Substitution Agreement for that matter.
51. The Respondent contends that arbitration proceedings have been invoked and the same pending at the stage of cross examination. This Adjudicatory Authority while adjudicating matters under Section 7 is only required to examine the existence of debt and default. The Hon'ble Supreme Court in *E.S. Krishnamurthy vs Bharath Hi-Tecch Builders (P) Limited 2022 3 SCC 161*

24. On a bare reading of the provision, it is clear that both, Clauses (a) and (b) of sub-Section (5) of Section 7, use the expression "it may, by order" while referring to the power of the Adjudicating Authority. In Clause (a) of sub-Section (5), the Adjudicating Authority may, by order, admit the application or in Clause (b) it may, by order, reject such an application. Thus, two courses of action are available to the Adjudicating Authority in a petition under Section 7. The Adjudicating Authority must either admit the application under Clause (a) of sub-Section (5) or it must reject the application under Clause (b) of sub-Section (5). The statute does not provide for the Adjudicating Authority to undertake any other action, but for the two choices available.



25. *In Innoventive Industries (supra)*, a two-judge Bench of this Court has explained the ambit of Section 7 of the IBC, and held that the Adjudicating Authority only has to determine whether a “default” has occurred, i.e., whether the “debt” (which may still be disputed) was due and remained unpaid. If the Adjudicating Authority is of the opinion that a “default” has occurred, it has to admit the application unless it is incomplete. Speaking through Justice Rohinton F Nariman, the Court has observed:

“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 24 unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be. [...]

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating



*authority may reject an application and not otherwise.”
(emphasis supplied)*

52. Further the Corporate Debtor has relied on the judgement of the Hon'ble Apex Court in ***Vidharbha Industries Power Limited vs Axis Bank Limited Civil Appeal NO. 4633 OF 2021*** wherein the Hon'ble Supreme Court has held that discretionary power vests with this Tribunal under Section 7 (5)(a). Further, it was held while discretion is conferred on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. The relevant provisions are reproduced herein below:

“88. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/ decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/ Decretal amount is incapable of realisation. The example is only illustrative.

89. In this case, the Adjudicating Authority (NCLT) has simply brushed aside the case of the Appellant that an amount of Rs.1,730 Crores was realizable by the Appellant in terms of the order passed by APTEL in favour of the Appellant, with the cursory observation that



disputes if any between the Appellant and the recipient of electricity or between the Appellant and the Electricity Regulatory Commission were inconsequential.”

53. In the present case, the Corporate Debtor merely states that the dues are receivable from the Government of Maharashtra and the dispute arising from the said issue is subject matter of arbitration. Hence, the dues receivable are yet to be crystallized. In the aforesaid backdrop of distinct facts, reliance placed by the Corporate Debtor on the Judgment Vidharbha Industries is misplaced.

54. Further, the Hon’ble Supreme Court in *M. Suresh Kumar Reddy vs Canara Bank & Ors. Civil Appeal No. 7121 of 2022* wherein the Apex Court has again clarified the position of law and has held as under:

“13. Thus, it was clarified by the order in review that the decision in the case of Vidharbha Industries was in the setting of facts the case before this court. Hence, the decision in the case of Vidharbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries and E.S. Krishnamurthy. The view taken in the case of Innoventive Industries still holds good.”

55. Since, in the present case the debt and default stands established, we have no option but to admit this Petition and initiate CIRP against the Corporate Debtor.

56. The Financial Creditor has proposed the name of **Mr. Sudip Bhattacharya**, Registration No.IBBI/IPA003/IP-N0080/2017-18/10703, as the Interim Resolution Professional of the Corporate



Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

57. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is more than minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

58. It is, accordingly, hereby ordered as follows: -

(a) The Petition bearing **CP (IB) 3291/MB/2018** filed by **Union Bank of India Limited**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Supreme Manor Wada Bhiwandi Infrastructure Private Limited [CIN: U45202MH2010PTC198376]**, the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, regarding the following:

(i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including



- execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium:-
- (i) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) The provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1)



of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IB Code.

- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr. Sudip Bhattacharya, Registration No. IBBI/IPA003/IP-N0080/2017-18/10703**, having address at 903, Queensgate Hiranandani Estate, Thane (West) - 400067 Email: resolutionsudip@gmail.com, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Financial Creditor shall deposit a sum of Rs.5,00,000/- with the IRP to meet the expenses arising out of issuing public



notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- (i) Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

19.05.2023
SAM/Jenny

Sd/-

H. V. SUBBA RAO
Member (Judicial)