

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 385 of 2022

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the 'Order' dated 10.10.2022 in
CP (IB) No. 43/7/HDB/2020, passed by the 'Adjudicating Authority',
(National Company Law Tribunal', Hyderabad Bench-I, Hyderabad)**

In the matter of:

M/s. GVK Energy Ltd.

Being the 100% Shareholder of
GVK Power (Goindwal Sahib) Ltd.,
Represented by its Director
Mr. Anicattu Issac George
Having address at:
42, Villa Grande,
Dandamudi Enclave Road,
Pet Basheerabad Qutbullapur,
Jeedimetla, Medchal – Malkajgiri Dist.
Telangana – 500067

..... 1st Appellant

Mr. Palicherla Venkata Prasanna Reddy
Suspended Director of GVK Power
(Goindwal Sahib) Limited
Having address at:
Plot No. 148, Road No. 10,
Jubilee Hills, Hyderabad – 500033
Telangana

..... 2nd Appellant

v.

Axis Bank Limited
Represented by Ms. B. Lakshmi Sailaja
w/o. S. Seshu Ramakrishna
Asst. Vice President,
C/o. Corporate Banking Branch
1st Floor, G. Pulla Reddy

Building Greenlands,
Begumpet, Hyderabad – 500016

..... 1st Respondent

Mr. Ravi Sethia, Interim Resolution
Professional of GVK Power
(Goindwal Sahib) Limited
Having is Office at:
C/o. BSRR & Co., 8th Floor,
Building 10, Tower-C,
DLF Cyber City,
Gurgaon, Haryana – 122002
C/o. 7-1-79 / A, Dharamkaram Road,
Ameerpet, Hyderabad – 16

..... 2nd Respondent/IRP

Present:

For Appellants : Mr. P.H. Arvinth Pandian, Senior Advocate
For Mr. Anant Merathia, Mr. Rishi Srinivas
and Ms. Poornima Devi, Advocates

For Respondent No. 1 : Mr. Vivek Reddy, Senior Advocate
For Ms. Aparna Ravi, Ms. Neha Pandey &
Mr. Aakash Sherwal, Advocates

For Respondent No. 2 / : Ms. Kanishka Prasad, Advocate
IRP

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Introduction:

The Appellants have preferred the instant Comp. App (AT) (CH)
(INS.) No. 385 of 2022, on being dissatisfied with the 'impugned order'
dated 10.10.2022 in CP No. 43/7/HDB/2020 (Filed by the `1st Respondent

/ Financial Creditor / Bank / Petitioner’), under Section 7 of the I & B Code, 2016, read with Rule 4 of I & B (AAA) Rules, 2016, passed by the ‘Adjudicating Authority’ (‘National Company Law Tribunal’, Hyderabad Bench-I, Hyderabad).

2. The ‘Adjudicating Authority’ (‘National Company Law Tribunal’, Hyderabad Bench-I, Hyderabad), while passing the ‘impugned order’ dated 10.10.2022 in CP (IB) No. 43/7/HDB/2020 (Filed by the ‘1st Respondent / Financial Creditor / Bank / Petitioner’), under Section 7 of the I & B Code, 2016, read with Rule 4 of I & B (AAA) Rules, 2016, among other things, at Paragraph Nos. 60 to 70, had observed as under:

60. *“In the above backdrop, we proceed to decide the Point, by referring at the outset to Direction 9 of the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019, wherein it is stated that:*

“In any case, once a borrower is reported to be in default by any of the lenders mentioned at 3(a), 3(b) and 3(c), lenders shall undertake a prima facie review of the borrower account within thirty days from such default (‘Review Period’). During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. The lenders may also choose to initiate legal proceedings for insolvency or recovery.”

61. *Therefore, it is manifest from the above The Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 (‘RBI Directions, 2019’ for brevity) which came*

into effect on 07.06.2019, the lenders shall mandatorily undertake a prima facie review of the borrower's account within 30 days from such default and decide on a resolution strategy and in the event of Lenders deciding to adopt a possible plan, the Lenders to enter into an 'Inter Creditor Agreement' providing framework for finalization and implementation of a possible resolution plan.

Since some of the Senior Lenders of the Corporate Debtor entered into an Inter Creditor Agreement, for short 'ICA'; dated 06.07.2019, Ld. Sr. Counsel for the Corporate would contend that the same signifies that the lenders have decided to adopt a possible resolution plan, therefore, Clause in terms of clause 13.2 of the ICA, which says that the standstill provision shall extend during the implementation of the Resolution Plan (which is currently 180 days from the end of the Review period, i.e., upto 19.08.2020, however, the Company Petition having been filed on 19.12.2019, well before the completion of 180 days is not only premature but also in violation of the Stand Still Clause 13 of the ICA dated 06.07.2019 hence not maintainable.

62. Learned senior counsel in this regard also placed reliance on Clause 7.3 (a) and (b) of the RBI Circular which provide that:

“(a) the Resolution Plan that is approved by the Majority Lenders shall be final and binding on all the Lenders and each Lender (including the Dissenting Lenders) agrees and undertakes to be bound by the approved Resolution Plan;

(b) during the resolution process and during the implementation of the Resolution Plan that has been approved by the Majority Lenders in accordance with this Agreement and the Regulatory Framework, each Lender (including if such Lender is a Dissenting Lender) agrees that it shall not initiate any legal action or proceedings (including proceedings under IBC) against the Borrower or any other person that may jeopardise the successful

implementation of the Resolution Plan in accordance with the terms of such Resolution Plan.’’

63. *Having examined the above along with relevant provisions / clauses in RBI Directions, 2019 and the ICA dated 06.07.2019, supra, we are unable to subscribe to the view of the Ld. Sr. Counsel for the corporate debtor as, Clause 13.2 of the ICA, categorically states that in the event the Lenders decide on implementation of a Resolution Plan the standstill period shall extend during the implementation of the Resolution Plan (which is currently 180 (one hundred and eighty) days from the end of the Review period, thus making the approval of the resolution plan if any within 30 days imperative and only upon such approval the stand still period gets extended to 180 days. Therefore, the sine qua non, for extension of the standstill period from initial 30 days to 180 days, the lenders should decide to implement the Resolution Plan, lest the initial period of 30 days will not get enlarged to 180 days.*

64. *During the course of hearing, we have specifically inquired with the learned Senior counsel for the financial creditor whether any resolution plan as contemplated under the RBI Directions, supra, has been received from the Corporate Debtor within the initial period of 30 days, to which the learned senior counsel submitted that no resolution plan has been received by the Senior Lenders, however, discussions in this regard have happened with the Senior Lenders, in the JLF Meetings held on 02.07.2019, 15.11.2019 and 21.01.2020. Therefore, it is overwhelmingly clear that no Resolution Plan has been submitted by the Corporate debtor within the initial standstill period of 30 days which had commenced on 07.06.2019, as such enlargement of time of 180 days as pleaded is unsustainable and untenable.*

65. *Now coming to the other submission of the learned counsel for the Corporate Debtor that the fact that the creditors have entered into Inter-creditor Agreement (ICA) itself is indicative of the fact that the lenders intend to consider implementation of the Resolution Plan, as such it is imperative for the lenders to wait till*

completion of the standstill period of 180 days for taking recourse to recovery of their dues, it is to be stated that we have already held that the submission of the Resolution Professional that within the initial 30 days' time is, *sine qua non*, for enlargement of initial standstill period of 30 to 180 days and in the case on hand as no such Plan has been submitted the question of enlargement of time beyond 30 days does not arise. We may therefore, add herein that the embargo in terms of Clause 13.2 of the ICA in so far as the case on hand is concerned at the best may have prevented the Financial Creditor from initiating recovery proceedings only during the initial 30 days period and not beyond.

66. That apart, it is apt to refer herein to Clause 10 of the ICA which provides for exit from Resolution process in the above back drop of no resolution plan having been received by the lenders, which is as below:

“10.2 At the end of the standstill period specified in Clause 13.2 below, each lender shall be entitled to take necessary actions in accordance with the Regulatory Framework including taking any enforcement action under IBC or otherwise and to this extent, this Agreement shall prevail over the terms of the Amended and Restated Inter Creditor Agreement. It is clarified that no notice or waiting period shall be applicable to any Lender for taking any necessary actions including enforcement action against the borrower after the expiry of the standstill period specified in Clause 13.2 below.”

Moreover Clause 13.3 of the ICA says that:

“The aforesaid standstill provision shall not preclude the lenders from initiating or continuing any action against the borrower or its promoters / directors / officials or other persons for criminal offences.”

Hon'ble NCLAT in re. Amitabh Kumar Jha Vs. Bank of India, supra, held that:

“ The Clauses in the ‘Inter-Creditor Agreement’ would not supersede the rights and obligations of Rupee Lenders in their independent capacity and this is further reinforced by Clause 1.3 of the ‘Inter-Corporate Agreement’.”

The ruling below, in re, relied on by the Ld. Sr. Counsel for the Applicant wherein it was held that;

“..... notwithstanding the fact that neither the claims barred by law nor do such Financing Documents clothe the ‘Corporate Debtor’, with a right to disentitle the ‘Financial Creditor’ from enforcing its claim, in its individual capacity, despite being a member of the consortium of lender.” Further, the statutory right across the ambit of Section 7 of the IBC cannot be curtailed or made subservient to any inter-creditor agreement and accordingly the appeal was dismissed.”

67. *The submission of the learned senior counsel for the Financial Creditor that, even if there is violation of the terms of ICA, the parties to the said ICA alone can initiate action against the applicant herein and the Corporate Debtor who admittedly is not a party cannot take shelter under any of the clauses in ICA, is not without force, as the said clause was incorporated to protect the interests inter se, all the lenders, and the Corporate Debtor especially when they fail to submit any resolution plan with the standstill period, cannot have any locus standi, to fall back on the said clause.*

68. *We are therefore, are not convinced with the submission of the Ld. Sr. Counsel for the Corporate Debtor that the present application as filed is premature, violative of RBI Directions and the clauses in ICA, as such the same is not maintainable.*

69. *Now coming to the yet another contention of the Corporate Debtor that unless the obligations of the priority lenders are met by the Corporate Debtor the other lenders like the applicant cannot raise their demand for discharge of their loans, and as the present*

demand having been raised before the priority lenders were discharged, the same is not maintainable, we are not convinced by the said submission in as much what priority lenders can get under the agreement is priority in payment of their dues over other lenders and nothing more. It is pertinent to note that even though the priority lenders' claims have been satisfied, since no worthwhile payment has been made to other Senior Lenders, including this applicant the applicant has preferred this application.

70. Therefore, in light of the above discussion, upon considering the submissions of the learned senior counsel, we are of the view that the applicant herein has established that neither the directions of the RBI nor the terms of ICA create any legal embargo for repayment of the debt that was admittedly due and payable by the Corporate Debtor. The applicant herein is able to prove existence of a financial debt which is over Rs.1 crore and its default, hence the application as filed by the Financial Creditor is found to be fit for admission. Accordingly the application is allowed. The Corporate Debtor was put under CIRP forthwith.''

and place the 'Corporate Debtor', under 'Corporate Insolvency Resolution Process' forthwith, by admitting the 'Section 7 Application' and declared 'Moratorium', etc.

Appellants Submissions:

3. According to the Appellants, the 'Adjudicating Authority' ('National Company Law Tribunal', Hyderabad Bench-I, Hyderabad), had not applied its mind, while 'Admitting' the Section 7 Petition

`CP (IB) No. 43 / 7 / HDB / 2020', because of the fact that basic requisites of `Debt' and `Default', that are required to be examined and `proven', prior to the `admission' of `Petition', seeking to initiate `Insolvency Process', was not established.

4. The Learned Senior Counsel for the Appellants contends that other than the existing `Term Loans', the `Corporate Debtor' / `GVK Power (Goindwal Sahib) Ltd.', had required the `Additional Funds', for `Working Capital', and meeting the `Operational Expenses'. Indeed, according to the `Appellants', the `Project Lenders', including the `1<sup>st</sup> Respondent', had agreed for the `Corporate Debtor', to receive the `Financial Assistance', from `Deutsche Bank AG, Mumbai Branch and Deutsche Bank International Asia Limited (i.e., the `Priority Lenders').

5. The Learned Counsel for the Appellants submits that, in terms of the `Priority Facility Agreement' dated 30.04.2017, and the `Priority Debenture Trust Deed' dated 30.04.2017, the `Corporate Debtor', was bound to `repay', the `Priority Lenders' in full, before making any payments, to the other `Project Lenders', including the `1st Respondent'.

6. It is represented on behalf of the Appellants, that it was agreed that the `Loan Facility', lent or to be lent and advanced by the `Priority Lenders', shall be a `Priority Facility', and that the `Priority Lenders',

shall at all times, be entitled to a 'Priority in Payment' and 'Priority Security Interest', over the 'Cash Flows', and the 'Accounts', among other 'Entitlements'.

7. It is the stand of the Appellants that, as per 'Clause 20.23' of the 'Priority Facility Agreement', the 'Corporate Debtor', shall not make any accelerated, voluntary or non-scheduled repayment of any of its 'Financial Indebtedness', before the 'Loan', and also 'Outstanding Monies', were 'repaid in full', to the 'Priority Lenders', or make any change in the 'Facility Documentation', for any 'Financial Indebtedness', which would have the effect of accelerating the repayment of such 'Financial Indebtedness'.

8. The Learned Counsel for the Appellants points out that, as per the said 'Priority Debenture Trust Deed', the 'Corporate Debtor', is under an 'Obligation', to clear all the 'Outstanding Sums', which are due to the 'Priority Lenders', in full, prior to making any payments, to the other 'Project Lenders', and 'Clauses 4.1.5 and 5.6' of the said 'Deed', clearly mentions and emphasise on this vital aspect. Moreover, as the 'Corporate Debtor', is also a 'Party', to the aforesaid 'Agreements', the 'Priority Rights', agreed were not 'Inter se', the 'Lenders', but also saddling a

`Liability' or `Duty', on the `Corporate Debtor', to pay to the `Priority Lenders', in full, in `Priority', over the `Other Lenders'.

9. The Learned Counsel for the Appellants points out that the `Reserve Bank of India', had issued the `Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019' (`RBI Directions of 2019'') dated 07.06.2019, for the purpose of providing a framework for early Recognition, Reporting and Time Bound `Resolution of Stressed Assets'.

10. The Learned Counsel for the Appellants comes out with a stand that the `Lenders', including the `1st Respondent / Bank / Financial Creditor / Petitioner', were required to undertake a prima facie review of the Corporate Debtor's Account, within 30 days, and according to the Corporate Debtor, the `Review Period', came into effect from 07.06.2019.

11. It is the version of the Appellants that, on 02.07.2019, the `Consortium of Lenders', had decided that the `Resolution Plan', outside the scope of the I & B Code, 2016, would be a better option and had agreed to execute an `Inter Creditor Agreement', after taking internal approvals from their respective managements. As a matter of fact, on 06.07.2019, an `Inter Creditor Agreement', was executed between the `Project Lenders' and `Priority Lenders' and the `E & Y', was appointed

by the `Corporate Debtor`, as the `Process Advisor`, to help prepare a suitable `Resolution Plan`.

12. The Learned Counsel for the Appellants points out that as per Clause 7.3 (b), read in consonance with the ingredients of Clause 13 (Stand Still Clause) of the ICA dated 06.07.2019, during the `Resolution Process`, no `Lender`, including the `Dissenting Lender`, can initiate any `Legal action`, against the `Corporate Debtor`, including a Civil action or the initiation of the proceedings, under the I & B Code, 2016. That apart, the stand-still period from 06.07.2019 is for 180 days, which would have ended on 06.01.2020, prior to that, Section 7 Petition, was filed by the `1<sup>st</sup> Respondent / Bank`, in a premature fashion.

13. The Learned Counsel for the Appellants takes an emphatic plea that pursuant to the `Inter Creditor Agreement`, dated 06.07.2019, that was entered into in tune, with the `Reserve Bank of India Directions of 2019`, dated 07.06.2019, the `1<sup>st</sup> Respondent / Bank`, had while taking part in all the `Joint Lenders Meetings`, and negotiating for better `OTS Proposals`, from the `Corporate Debtor`, issued a `Recall of Credit Facilities Notice`, dated 17.12.2019, calling upon the `Corporate Debtor`, to pay the `Outstanding Sum` of INR 442,20,14,321.40/- immediately, together with

`Interest', `Additional Interest(s)', `Compound Interest', `Liquidated Damages', and other `Charges'.

14. The grievance of the Appellants is that, the 1st Respondent / Bank, had filed a Section 7 Petition (under the I & B Code, 2016), before the `Adjudicating Authority' (`National Company Law Tribunal', Hyderabad Bench-I, Hyderabad), dated 20.12.2019, in an arbitrary manner, when there was `No Default', in place, at the time of preferring the Section 7 Application, under the `Code', given the holistic reading of the `Priority Facility Agreement', the `Priority Debenture Trust Deed', the `Inter Creditor Agreements', dated 30.04.2017 and 06.07.2019 together, there was a clear stipulation that the `Priority Lenders', have to be repaid in Full, before the `Other Lenders', can be entitled to receive payments.

15. The Learned Counsel for the Appellants, relies on the Judgment dated 31.08.2017 of the Hon'ble Supreme Court, in the matter of Innoventive Industries Limited V. ICICI Bank & Anr. (vide Civil Appeal Nos. 8337 – 8338 of 2017), to the effect that the existence of both `Debt' and `Default', has to be mandatorily proved, prior to the `Section 7 Application', can be `admitted', by the `Adjudicating Authority' (`Tribunal').

16. Besides the above, the Learned Counsel for the Appellants, adverts to the Judgment dated 31.08.2017 of the Hon'ble Supreme Court, in the matter of 'Innoventive Industries Limited V. ICICI Bank & Anr.' (vide Civil Appeal Nos. 8337 – 8338 of 2017), wherein at Paragraph 30, it is observed as under:

30. ``..... 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.’’

17. Advancing his argument, the Learned Counsel for the Appellants points out that post the filing of 'Section 7 Petition / Application', by the '1st Respondent / Bank', the 'IDBI Trusteeship Services Limited' ('Bond Trustee'), had filed a 'Commercial Suit', before the Hon'ble High Court of Bombay, for release of a sum of Rs.292.70 crores from the 'Trust and Retention Account' ('TRA') for repayment of debt, payable by the 'Corporate Debtor', to the 'Priority Lender – II', from the TRA Account, to enable the 'Corporate Debtor', to pay the 'Outstanding Dues', to 'Priority Lender'. Further, the Hon'ble High Court of Bombay, had passed an 'Order' on 26.06.2020, restraining all the 'Lenders', from withdrawing any sum from the 'TRA' of the 'Corporate Debtor'.

18. According to the Appellants, the Hon'ble High Court of Bombay through its Order dated 19.08.2020, had recognised and upheld the 'Priority Rights', to payments by the 'Corporate Debtor', to the 'Priority Lenders', in the instant case, thereby, concretely establishing the fact that the '1st Respondent / Bank', would be entitled to recover its 'Outstanding Dues', only after the 'Priority Lenders', were repaid in 'Full'.

19. The stand taken on behalf of the Appellants is that, an 'Acceleration Notice', was issued by the 'Priority Lenders', but, not at the instance of any action / omission, on the part of the 'Corporate Debtor', but, due to the 'illegal distribution of monies', available in the 'TRA Account', by the 'IDBI Bank', in breach of the 'Priority Rights' of the 'Priority Lenders'.

20. Added further, that it is pointed out on behalf of the Appellants that, when the 'Priority Lenders', had assailed the said illegal acts of 'IDBI Bank' (a 'Lead Lender'), the Hon'ble High Court, had directed the said sums, to be deposited back into the 'TRA Account', within 48 hours, and later, as all the 'Lenders', including 'Axis Bank', had settled the issue among themselves and pursuant to which, IDBI Trusteeship, had paid a sum of INR 292 Crores, to the 'Priority Lender', as a 'Full and Final

Settlement', and this was not questioned by any 'Lender', including the '1st Respondent / Bank'.

21. The contention of the Appellants, is that, the above facts go to prove that the 'Corporate Debtor', could have made the payments to the '1st Respondent / Bank', only after the 'Priority Lenders', were 'Repaid' in 'Full', and any deviation from the same, was 'disallowed', as can be inferred from the fact that the Hon'ble High Court of Bombay, had in fact, expressly observed and held that no 'Lenders', shall be permitted to take any money from any Account, under the 'TRA' Agreement, until further orders, were passed in the matter, which firmly established that there was 'No Default', with reference to the '1st Respondent / Bank', at the time of 'Filing' of a 'Petition / Application', under Section 7 of the I & B Code, 2016, on 20.12.2019.

22. The Learned Counsel for the Appellants points out that the 'Punjab State Electricity Regulatory Commission' ('PSERC'), through its 'Order', dated 17.01.2020, had approved the 'Capital Cost' of the 'Project' of the 'Corporate Debtor', to the tune of INR 3,058.37/- Crores, only against the 'Total Capital Cost', that was incurred and claimed, by the 'Corporate Debtor', Viz. INR 4,267.38/- Crores.

23. The Learned Counsel for the Appellants submits that, the aforesaid 'Capital Cost', is to be paid by the 'Punjab State Electricity Regulatory Commission', to the 'Corporate Debtor', over a period of time and that the said monies, so paid, will be used for the payments to be made to the 'Lenders'. Also that, the 'Corporate Debtor', had preferred an 'Appeal', against the 'Order' dated 17.01.2020 of 'Punjab State Electricity Regulatory Commission', before the 'Appellate Tribunal' for Electricity and the said 'Appeal No. 41 of 2020', is presently, pending for an 'Adjudication'.

24. According to the Appellants, if the 'Capital Cost', as claimed by the 'Corporate Debtor', is declared by 'APTEL', as payable, then, in terms of the 'PPA' and applicable 'Punjab State Electricity Regulatory Commission Tariff Regulations', a 'Corporate Debtor', will be entitled for an interest at 13.50% per annum (SBI rate of interest + 350 base points), from the date the said amount is incurred, till the date the said amount is paid.

25. The Learned Counsel for the Appellants contends that the aforesaid amount includes, the 'Principal Sum', lent by the 'Senior Lenders' itself, including the '1st Respondent / Bank', as well as the 'Interest', during 'Construction' ('IDC') 'paid / payable', by the 'Corporate Debtor', to the

said 'Lenders', for the 'Project Construction Period', and in reality, the said 'Sum', is payable to, by the 'Punjab State Power Corporation Limited', in terms of the 'Punjab State Electricity Regulatory Commission Tariff Regulations'. Apart from that, the said 'Sum' of INR 4,267.38/- Crores, is only the completed 'Capital Cost' of the 'Project', and the said Cost, will be treated as 'Fixed Cost' / 'Capacity Charge' of the 'Project', which is one component of the Tariff, payable by the 'PSCPL', and the other component of the Tariff, being the 'Variable Cost', which is also the part of the 'Appeal', pending 'Adjudication', by the 'APTEL'. Therefore, INR 6,000/- Crores is shown as the 'Liability' of the 'Corporate Debtor', in its 'Balance Sheet', which is to be repaid to the 'Lenders', over a period of time, but, not at a stretch.

26. The Learned Counsel for the Appellants, brings it to the notice of this 'Tribunal' that the 'details of monies', paid by the 'Corporate Debtor', to the 'Project Lenders', including the '1st Respondent / Bank', is mentioned in the Chart, given below:

S. No	NAME OF THE LENDERS	PAID UP TO DB (Priority Lender) EXIT in 2020	PAID AFTER DB (Priority Lender) EXIT in 2020	TOTAL PAID TO EXISTING LENDERS
1	IDBI Bank Ltd.	43,12,59,883	2,04,00,32,367	2,47,12,92,250
2	Union Bank of India	22,25,60,211	84,73,66,746	1,06,99,26,957
3	Axis Bank Limited	3,20,88,512	76,50,60,911	79,71,49,423
4	IIFCL	2,84,79,463	68,03,33,440	70,88,12,903

5	<i>LIC of India</i>	2,84,79,463	68,03,33,440	70,88,12,903
6	<i>United Bank of India</i>	16,09,71,841	60,91,02,963	77,00,74,804
7	<i>Bank of Baroda</i>	2,58,34,770	61,71,28,786	64,29,63,556
8	<i>Punjab & Sind Bank</i>	2,31,12,940	55,20,77,950	57,51,90,890
9	<i>UCO Bank</i>	2,36,60,573	56,42,96,615	58,79,57,188
10	<i>Bank of India</i>	1,42,41,187	34,02,14,415	35,44,55,602
11	<i>Indian Bank</i>	1,55,29,366	37,09,69,959	38,64,99,325
12	<i>Aditya Birla ARC (taken over from Karnataka Bank)</i>	1,72,23,502	41,14,78,885	42,87,02,387
13	<i>Oriental Bank of Commerce</i>	7,66,58,289	29,02,23,525	36,68,81,814
	<i>Total</i>	1,10,01,00,000	8,76,86,20,001	9,86,87,20,001

27. The Learned Counsel for the Appellants submits that the 'Adjudicating Authority' / 'Tribunal', and the Proceedings, under the I & B Code, 2016, ought not to be used as a 'Recovery Forum', and therefore, an 'Action', would be in negation to the tenets of the I & B Code, 2016. To fortify his contention, the Learned Counsel for the Appellants, falls back upon the decisions of the Hon'ble Supreme Court in (a) Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited, reported in (2019) 12 SCC 697 (b) Mobilox Innovations Private Limited v. Kirusa Software Private Limited, reported in 2018 1 SCC 353 and (c) The decision of this 'Tribunal', in Neelkanth Township and Construction Private Limited v. Urban Infrastructure Trustee Limited.

28. The Learned Counsel for the Appellants, brings it to the notice of this 'Tribunal', that the facts and circumstances of the instant case of hand, are similar, to the factual Matrix in the Hon'ble Supreme Court's Judgment dated 12.07.2021, in Vidarbha Industries Power Limited v. Axis Bank Limited (Civil Appeal No. 4633 of 2021). Further, in both the cases, it can be inferred that there is a substantial sum of money that is payable by the 'Punjab State Power Corporation Limited' to the 'Corporate Debtor', even if the same is over a period of time, the monies and proceeds realised, would ultimately, be paid to the 'Lenders', which were supposed to be paid over a period of time in terms of the 'Facility Agreements'.

29. The Learned Counsel for the Appellants, takes a plea that when an 'Admission', is opposed on the basis of an existence of an 'Award' or a 'Decree', in favor of the 'Corporate Debtor', 'Awarded' / 'Decretal Amount', exceeds a Sum of Debt, the 'Adjudicating Authority / Tribunal', will have to exercise its discretion, as per Section 7 (5) (a) of the I & B Code, 2016, to keep the admission of an Application, in abeyance, unless, there is good reason, not to do so, but, the 'Adjudicating Authority / Tribunal', had overlooked the same and wrongly had admitted the 'Corporate Debtor', into an 'Insolvency'.

30. The other contention advanced on behalf of the Appellants is that, the 'Adjudicating Authority' / 'Tribunal', had blindly admitted the 'Corporate Debtor', into the 'CIRP' Process, unmindful of the repercussion of a such decision on the Corporate Debtor, its 'Stakeholders', 'numerous Employees', 'Workmen' and their 'Families'.

31. The Learned Counsel for the Appellants, takes a stand that the 'Adjudicating Authority', had not disclosed the reason for determining the date as 26.06.2020, as the 'Date of Moratorium', and that the Hon'ble High Court of Bombay, through its Order dated 26.06.2020, had restricted the 'Lenders', from 'Withdrawing', any amount from the 'TRA' of the 'Corporate Debtor', while considering the 'Priority Rights', in receiving their 'Dues', by the 'Priority Lenders'. But the said fact, ought not to be relevant for the fixation of the 'Moratorium Date', and even the fixation of such 'Retrospective Date' is 'untenable in Law', because, it is 'Arbitrary', even assuming, such a 'Power', exists under Rule 11 of the NCLT Rules, 2016.

32. According to the Appellants, Section 5 (12) of the I & B Code, 2016, defines 'Insolvency Commencement Date', to be the 'Date', on which the 'Application' for 'CIRP', is admitted. Section 13 of the IBC provides that the Adjudicating Authority shall ``... *after admission of the*

application under Section 7 ... '', declare a 'Moratorium'. Section 14(4) of the IBC provides that the 'Order of Moratorium', shall have effect till the date of order till the completion of 'CIRP' process.

33. The Learned Counsel for the Appellants submits that in the Judgment dated 06.08.2019, in Shobhnath & Ors. v. Prism Industrial Complex Limited, (vide Comp. App (AT) (INS.) No. 557 of 2018 – reported in India Kanoon), wherein, it is observed that *''The consequential impact of the commencement of CIRP will be moratorium''*.

34. Also, in the Judgment in Mahendrabhai Bhaskarbai Patil v. Maitreya Plotters & Structures Pvt. Ltd., reported in 2019 , SCC Online, NCLT 4910, wherein, it is held that *''The consequential impact of the commencement of CIRP will be moratorium''*.

35. The Learned Counsel for the Appellants, adverts to the 'Order' dated 15.06.2020, in Narendra Kumar Mohta v. Vintage Foods & Industries Limited and others (vide IA No. 148 / 2020 in CP(IB) No. 64 / BB / 2019), passed by the 'Adjudicating Authority' ('Tribunal'), wherein, it is observed that *''ordinarily moratorium cannot have retrospective effect''*.

36. The Learned Counsel for the Appellants takes a stand that a Certified Copy was applied for and obtained by the 'Corporate Debtor', on 19.10.2022, which reflects the 'Date of Commencement of Moratorium', to be 26.06.2020. But, the 'Certified Copy' of the 'Impugned Order', was secured by the '1st Respondent / Financial Creditor', on 21.10.2022 and that the 'Date of Commencement of Moratorium', was on 10.10.2022.

37. The Learned Counsel for the Appellants, points out that the copy of the Impugned Order currently available on the 'Tribunal's Web Portal', as on date, states that the 'Date of Commencement of Moratorium', is '26.06.2020', and that the 'change in date', was not made by means of filing a 'Requisite Application', and / or vide mentioning, before the 'Tribunal'.

38. While rounding up, the Learned Counsel for the Appellants pray for, allowing of the instant 'Appeal' and to dismiss the CP(IB)/43/7/HDB/2020.

Contentions of the 1st Respondent :

39. The Learned Senior Counsel for the 1st Respondent / Bank submits that from 01.02.2010 to 27.07.2017, 'Four Term Loan Facilities' and one

`Working Capital Facility', were sanctioned by the `Consortium of Lenders', including `Financial Creditor', to the `Corporate Debtor'.

40. According to the 1st Respondent / Bank / Financial Creditor, the 1st Term Loan, was `Rupee Facility Agreement', dated 01.02.2010, the 2<sup>nd</sup> Term Loan, being `Rupee Facility Agreement', dated 07.08.2015, the 3rd Term Loan `Rupee Facility Agreement', dated 15.04.2016 and further that the Working Capital Consortium Agreement (acceded to) by the 1<sup>st</sup> Respondent was through `Deed of Adherence', dated 29.06.2016, the 4th Term Loan was `Rupee Facility Agreement' dated 21.07.2017. In short, these `Term Loan No. II, III and IV, were sanctioned by the `Consortium Lenders', including the `1st Respondent' / `Financial Creditor', owing to costs overruns on the `Project'. Indeed, the 1st Respondent / Bank / Financial Creditor, had disbursed Rs.328,45,00,000/- (under Facilities).

41. It is represented on behalf of the 1st Respondent / Bank / Petitioner that main CP No. 43 / 7 / HDB / 2020, was filed by it as `Financial Creditor', against the GVK Power (Goindwal Sahib) Ltd., before the `Adjudicating Authority', National Company Law Tribunal, Hyderabad, for a total sum of Rs.442,20,14,321.40, as on the date of Filing of the Petition, under Section 7 of the I & B Code, and the said Petition, was admitted on 10.10.2022, through the `Impugned Order', by the

`Adjudicating Authority'. Also that the Total Sum owed to all Consortium Lenders (consisting of 13 Financial Institutions) was over, INR 3,000 Crores.

42. The plea of the 1st Respondent / Bank / Petitioner is that, the sanction of `Loan Facilities`, to the `Consortium Lenders` (including the `1<sup>st</sup> Respondent / Financial Creditor`), and the fact that the payments under such Facilities, are outstanding were not denied by the `Corporate Debtor`, as mentioned in Paragraph 22 of the `Impugned Order`.

43. The 1st Respondent / Bank, takes a stand that the `Corporate Debtor`, had issued a `Revival Letter`, dated 13.06.2019, acknowledging the `Debt`, owed to all the `Lenders`. Also that, the `Loan Account Statements` of the `Corporate Debtor`, shows that ``no payments, were received after December 2017, till the date of filing of the Application''. Besides these, the `Record of Default`, was filed with `NESL`, and further that, a `Recall Notice`, dated 17.12.2019, was issued by the 1st Respondent / Bank / Financial Creditor`, declaring all amounts approximately due sum of Rs.442 Crores, payable immediately.

44. The Learned Counsel for the 1st Respondent / Bank points out that the `Priority Arrangements` or an `Inter se Arrangement`, regarding the manner of `Distribution of Proceeds`, among the various `Creditors` of

the 'Corporate Debtor', and do not have any bearing on the 'Admission of the Company Petition'.

45. The clear cut contention of the 1st Respondent / Bank is that, there is no provision in any of the 'Lending Agreements' of the Corporate Debtor, suspending the payment obligations of the Corporate Debtor, in respect of the 1st Respondent / Bank.

46. The Learned Counsel for the 1st Respondent / Bank submits that there is nothing in the 'Lending Documents', that could suggest that the 'Priority Lender', required to be 'Paid in Full', before any Sums became payable to the 'Senior Lenders'. In this connection, the Learned Counsel for the 1st Respondent / Bank projects an argument that as per the Terms of the 'Priority Debenture Trust Deed', the Corporate Debtor was under an obligation to 'clear all outstanding amounts which are due to the Priority Lender in full prior to making any payments to the other Project Lenders'.

47. The Learned Counsel for the 1st Respondent / Bank contends that 'no sums', were outstanding to the 'Priority Lender', on the date of filing of Section 7 Application, under I & B Code, 2016, and that the Application was filed on 20.12.2019, and this fact was affirmed by the 'Priority Lender', in the Minutes of the Meeting of the Lenders that took

place on 21.01.2020. Later, the 'Priority Lender', had issued an 'Acceleration Notice', dated 24.01.2020 to the Corporate Debtor, declaring 'all amounts owed to the Priority Lender, under the 'Bond Documentation', to be due and payable.

48. The Learned Counsel for the 1st Respondent / Bank, adverts to the fact that Clauses (d) and (e) of the said 'Acceleration Notice', specify numerous 'Events of Default', that were triggered, including Insolvency, 'Event of Default' and 'Cross Default' provisions, but, does not mention about the 'Existence of any Payment Default'.

49. The Learned Counsel for the 1st Respondent / Bank points out that, the 'Adjudicating Authority' / 'Tribunal', had exercised its discretion in terms of the Judgment dated 12.07.2022 of the Hon'ble Supreme Court of India, in Vidharbha Industries Limited v. Axis Bank Limited (vide Civil Appeal No. 4633 of 2021), in admitting, the 'Petition'.

50. The Learned Counsel for the 1st Respondent / Bank submits that the impugned order, correctly reflects the 'Date of Commencement of Moratorium as 10.10.2022', which is the date on which, Section 7 Application, was 'admitted', by the 'Adjudicating Authority' / 'Tribunal'.

51. Continuing further, it is the contention of the 1st Respondent / Bank that, it is critical for the `Corporate Insolvency and Resolution Process`, to continue, in accordance with the `impugned order`, in order to protect the interest of `1<sup>st</sup> Respondent / Financial Creditor`, and to prevent any further `deterioration` in the `Value of the Assets`.

52. According to the 1st Respondent / Bank, the `Debts` of the `Corporate Debtor`, are not transitory, as the initial defaults, occurred as early as 2017. In fact, as recorded in the `Minutes of the Meeting` of the `Joint Lenders Forum`, dated 11.01.2022, the other `Lenders`, also intend to initiate proceedings under the I & B Code, 2016, as the condition of the Corporate Debtor, was not improving and no acceptable `Resolution Plan`, was put forward by the Corporate Debtor or the Appellants.

53. The Learned Counsel for the 1st Respondent / Bank raises a plea that as of 31.03.2022, the Corporate Debtor's liabilities had exceeded its Assets, by approximately INR 2947 Crores and the Declaration of the Asset Value of the Corporate Debtor was evident from the fact that the Corporate Debtor had recorded a Cash Loss of INR of 631 Crores (approximately for the Financial Year 2021-2022 and INR of 887 Crores approximately for the Financial Year 2020-2021).

54. The Learned Counsel for the 1st Respondent / Bank points out that in regard to the negotiations with the 'Punjab State Electricity Board', the 'orders' of the 'Punjab State Electricity Regulatory Commission', dated 29.04.2008, and the 'Statutory Appeal' No. 104 of 2008, filed by the 1st Respondent / Bank, against the 'Referred Order' of the Punjab State Electricity Regulatory Commission, to the Hon'ble Appellate Tribunal for Electricity (APTEL), are not germane.

55. The Learned Counsel for the 1st Respondent / Bank, brings it to the 'Notice' of this 'Tribunal', for admitting an 'Application', under Section 7 of the I & B Code, 2016, the requirements as per Section 7 (5) of the Code, are that the 'Tribunal', must be satisfied that a 'Default', had occurred and the 'Application', under sub-section (2) is complete.

56. According to the Learned Counsel for the 1st Respondent / Bank / Financial Creditor, the 'Award', passed the 'Arbitral Tribunal', and the later 'Tarif Order', issued by the 'Punjab State Electricity Commission', on 17.01.2020, have no material bearing on the case.

57. The Learned Counsel for the 1st Respondent / Bank projects an argument that the Clauses that accord priority to the 'Priority Lender', under the 'Debenture Trust Deed', dated 30.04.2017 and 'Inter Creditor Agreement' dated 21.07.2017, do not absolve the Corporate Debtor, from

making payments to the `Senior Lenders`, including the `1<sup>st</sup> Respondent / Financial Creditor`, under the `Facility Agreements`.

58. The Learned Counsel for the 1st Respondent / Bank points out that the `Reserve Bank of India's Circular dated 12.02.2018`, and its impact on the `Resolution Plan` discussions of the `Corporate Debtor`, are not relevant, to the case on hand. Furthermore, a plea is taken that the `Application`, filed under Section 7 of the Code, against the Corporate Debtor by the `IDBI Bank`, has no bearing on the matter at hand.

59. The Learned Counsel for the 1st Respondent / Bank contends that although the 1st Respondent / Bank / Financial Creditor was a `Party`, to the Inter Creditor Agreement dated 06.07.2019, it withdrew itself from the said Agreement on 01.10.2019, as no `Resolution Plan`, was put forth and no `Lenders Meeting`, that took place post execution of the `Inter Creditor Agreement`, to decide on a `Resolution Plan`. In fact, a Letter dated 01.10.2019, was issued to the `Lead Bank / IDBI Bank`, by the `1<sup>st</sup> Respondent / Financial Creditor`, and email communications, were also exchanged between the `Lender Banks`.

60. The Learned Counsel for the 1st Respondent / Bank, brings it to the notice of this `Tribunal`, that the `Inter Creditor Agreement`, was not signed by all the `Members`, including the `Priority Lender`, and the

Appellants had omitted Clause 13 (2) of the said Agreement, which specifies that the stand still provision applies to the initial period of 30 days, from the date of commencement of the review period and admittedly the review period commenced from 06.07.2019.

61. The Learned Counsel for the 1st Respondent / Bank points out that Clause 13 of the 'Inter Creditor Agreement', mandating the stand still is not prohibiting the 1st Respondent / Bank / Financial Creditor from preferring an Application, under Section 7 of the I & B Code. In reality, the Section 7 Application was filed by the 1st Respondent / Bank on 20.12.2019, well past the conclusion of the stand still period. Moreover, the 1st Respondent / Bank in the Meeting that took place on 30.04.2020, had stated that the 'One Time Settlement Proposal', ought not to be less than 45% of the Principal Sum as majority of the Lenders were not in favour of 'Restructuring the Debt', and only inclined to consider an 'Acceptable One Time Settlement Proposal' or a 'Resolution', under the I & B Code, 2016.

62. The Learned Counsel for the 1st Respondent / Bank submits that the Hon'ble High Court of Bombay order dated 19.08.2020, had not given any legal finding that the 'Priority Lender', must be 'paid in full', before paying the remaining 'Lenders', and from the 'Order', dated 19.08.2020,

it is evident that the dispute with the 'Priority Lender', was settled and the entire 'Claim' of Priority Lender', was satisfied with the payment of Rs.295 Crores. In fact, the Hon'ble High Court of Bombay, had just recorded a 'Settlement', that was arrived at, between the 'Corporate Debtor', and the 'Priority Lender', this cannot be treated as a 'Legal Finding', on the aspect of whether new amounts, were due to the other 'Lenders', until the 'Priority Lender', was 'paid in full'.

63. The Learned Counsel for the 1st Respondent / Bank points out that the requirement of 'prepayment', to the 'Priority Lender', after 24.01.2020 and the Hon'ble High Court of Bombay's Order does not affect the 'Default', committed by the 'Corporate Debtor', towards the 1st Respondent / Bank, as on the date of Filing of the Application, under Section 7 of the Code, on 20.12.2019.

64. The Learned Counsel for the 1st Respondent / Bank takes a stand that the 'Dues', owed to the 'Consortium Lenders', including the '1st Respondent', remain 'unpaid', and are 'outstanding', and that the 'Dues' of the 'Priority Lender', was settled and the whole 'Claim' of the 'Priority Lender', was satisfied with the payment of Rs.295 Crores (approx.), as per Order dated 19.08.2020 of the Hon'ble High Court of Bombay.

65. The Learned Counsel for the 1st Respondent / Bank points out that the 'Appellants', wrongly contend that the 'Corporate Debtor', is 'Solvent', and can meet its 'Debts Obligation(s)', pursuant to the 'Approval' of 'Total Project Cost' of Rs.3,058 Crores, as per 'Punjab State Electricity Regulatory Commission' Order dated 17.01.2020 ('Tariff Order').

66. The Learned Counsel for the 1st Respondent / Bank raises a plea that the Corporate Debtor, had claimed the 'Total Project' of Rs.4,441 Crores, but the 'Punjab State Electricity Regulatory Commission', through its Tariff Order, had approved Project Cost of only Rs.3,058 Crores (approximately). Moreover, the 'PSERC', through the 'Tariff Order', had fixed the Tariff, that can be charged by the Corporate Debtor at Rs.1.419 per KWh (as opposed to the Provisional Tariff of Rs.2.2 per KWh, fixed earlier by the 'PSERC', through Order dated 28.03.2018).

67. The Learned Counsel for the 1st Respondent / Bank contends that contrary to the Appellants' Claim, the Corporate Debtor shall receive the 'Approved Project Cost Rs.3,058 Crores', over a long period of time, as required by the 'Tariff Regulations'.

68. As a matter of fact, the Corporate Debtor, was permitted to recovery only a sum of Rs.135.98 Crores for the Financial Year period

2016-2017, and even in the event of Corporate Debtor succeeding before APTEL in its Appeal, the approved Project Cost of Rs.4,441 Crore, shall be recovered over several years. That apart, the Corporate Debtor, had already commenced recovering a Portion of these amounts, which were insufficient to meet its current 'Debt Obligations', towards the '1st Respondent / Bank', and the other 'Consortium Lenders'.

69. The Learned Counsel for the 1st Respondent / Bank, adverts to the fact that, as on 01.11.2022, the 'Dues' of the Corporate Debtor is more than Rs.6,500 Crores and the 'List of Claims' of the 'Corporate Debtor', are given in Tabular Form, as under:

List of Financial Creditors (as on 01.11.2022):

S. No.	Bank / FI	Amount Claimed (INR)	Amount Provisionally Admitted (INR)	Amount under Verification (INR)	Claim Rejected	% Share
1	IDBI Bank	14,12,80,84,102	13,82,95,76,446	29,85,07,656	-	21.27%
2	Punjab National Bank	7,72,26,17,488	7,72,26,17,488	-	-	11.88%
3	Union Bank of India	6,82,98,18,435	6,82,98,18,435	-	-	10.50%
4	Axis Bank Ltd	5,59,75,78,051	5,59,75,78,051	-	-	8.61%
5	Indian Infrastructure Finance Company Ltd.	5,14,50,23,511	5,14,50,23,511	-	-	7.91%
6	Life Insurance Corporation	5,04,06,63,313	5,04,06,63,313	-	-	7.75%
7	Bank of Baroda	4,87,22,00,808	4,56,06,02,889	31,15,97,919	-	7.01%
8	UCO Bank	4,49,61,47,620	4,46,17,72,672	3,43,74,948	-	6.86%
9	Punjab & Sind Bank	4,22,24,85,884	4,20,15,95,210	2,08,90,674	-	6.46%

10	<i>Aditya Birla ARC Limited</i>	3,17,30,12,306	3,13,99,94,138	3,30,18,168	-	4.83%
11	<i>Bank of India</i>	2,61,13,13,818	2,49,22,61,907	11,90,51,911	-	3.83%
12	<i>Indian Bank</i>	2,00,71,11,290	2,00,71,11,290		-	3.09%
	Total	65,84,60,56,625	65,02,86,15,349	81,74,41,276	-	100.00%

70. The Learned Counsel for the 1st Respondent / Bank, submits that the inability of the Corporate Debtor, to meet its 'Debt Obligation(s)', is evident from the 'Audited Financials' of the 'Corporate Debtor', for the Financial Year 2021 – 2022. In fact, the Assets of the Corporate Debtor, as per the Financials, is valued only at Rs.3,874 Crores. However, its Liabilities are Rs.6,821 Crores.

71. The Learned Counsel for the 1st Respondent / Bank contends that the decision in Vidarbha Industries Power Limited v. Axis Bank Limited (vide Civil Appeal No. 4633 of 2021), dated 12.07.2022, is inapplicable to the facts of the present case, because in Vidarbha Industries matter, by virtue of an APTEL ruling, the company stood to receive funds of over Rs.1,730 crores immediately, which had been disallowed due to the fuel cost incurred by them for two financial years. Further, the claim of the financial creditor who had filed the Section 7 Application, in that case, was approximately Rs.553 Crores. As such, there was a possibility that the Corporate Debtor in Vidarbha Industries, would receive sufficient funds to repay the Financial Creditor.

72. Apart from the above, even in the instant case, if APTEL rules in favour of the Corporate Debtor and determines the capital cost as Rs.4,441 Crores, that amount does not accrue to the Corporate Debtor. Rather, the Corporate Debtor is only permitted to recover 4.5% (appx.) of such amount for every year of operations.

73. The Learned Counsel for the 1st Respondent / Bank points out that in the present case, the 'PSERC's Tariff Order', merely calculated the 'capital cost', of the 'Project', which would be factored in while determining the tariff. The entire capital cost is not immediately realisable.

74. According to the Learned Counsel for the 1st Respondent / Bank, in the present case, as seen from the Balance Sheet of the Corporate Debtor, in respect of the Year 2021 – 2022 Financial Year, the 'Financial condition of the Corporate Debtor', is 'Precarious', with 'Liabilities', far exceeding its Assets, by almost Rs.3,000 Crores.

75. Furthermore, 'No Acceptable Resolution Plan', was received from the Corporate Debtor and added further, 'No Acceptable Resolution Plan', was received during the three year period, when the Section 7 Petition was pending. Even, the 'Other Lenders' of the Corporate Debtor,

had considered preferring a 'Section 7 Petition / Application', as per the 'Minutes of the Joint Lenders Meeting', dated 11.01.2022.

76. The Learned Counsel for the 1st Respondent / Bank points out that the Corporate Debtor is not the 'Party', to the 'ICA', being an 'Inter se Agreement', among some of the 'Consortium Lenders'. In fact, the Corporate Debtor, according to the 1st Respondent / Bank, cannot take shelter under 'ICA', with a view to evade its obligations, under the 'Loan Facility Agreement'.

77. The Learned Counsel for the 1st Respondent / Bank, refers to the Judgment of this 'Tribunal', in Amitabh Kumar Jha v. Bank of India & Anr. in Comp. App (AT) (INS.) No. 1392 of 2019, wherein, it was observed and held that the 'Statutory Rights', of the 'Financial Creditor', provided under I & B Code, 2016, cannot be barred by, any 'Inter-Creditor Agreement'.

78. The Learned Counsel for the 1st Respondent / Bank, brings it to the notice of this 'Tribunal', that in the instant case, the 'Review Period', which commenced on 06.07.2019 (being the date of 'ICA') and ended on 07.08.2019. In this connection, the Clause 13 (2), proceeds as under:

13.2 "The aforesaid standstill provision will be operative for the initial period of 30 (thirty) days from the commencement of the

Review Period. In the event that the Lenders decide on implementation of a Resolution Plan as the resolution strategy in accordance with Regulatory Framework, then the standstill provision shall extend during the implementation of Resolution Plan (which is currently 180 (one hundred and eighty) days from the end of the Review Period or such other period as may be prescribed for implementation of Resolution Plan under the Regulatory Framework) provided that the standstill shall immediately lapse on implementation of the Resolution Plan or if the resolution process is terminated by the Majority Lenders.’’

and hence, it is pointed out that as ‘no Resolution Plan’, was ‘Agreed in Principle’, among the ‘Consortium Lenders’, the ‘stand still expired’, and the ‘1st Respondent / Financial Creditor’, was free to initiate an ‘Application’ / ‘Petition’, under Section 7 of the I & B Code, 2016. Also that the ‘1st Respondent’ / ‘Financial Creditor’, withdrew itself from the ‘ICA’, on 01.10.2019.

79. The Learned Counsel for the 1st Respondent / Bank, while winding up, prays for ‘Dismissal’ of the instant ‘Appeal’, by this ‘Tribunal’, to secure the ‘ends of Justice’.

Status Report of 2nd Respondent / Resolution Professional :

80. The ‘2nd Respondent / Resolution Professional’, took control of the ‘Management’ of the ‘affairs’ of the ‘Corporate Debtor’, along with his Team, on 19.10.2022, and further that a ‘Public Announcement’, was

issued on 21.10.2022, announcing the 'Initiation' of 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor', and calling for the 'Submission of Claims', as per Section 15 of the Code, which was published in 'Economic Times', 'Nava Telangana', 'Punjabi Tribune', Newspapers. The last date for 'Submission of the Claims', was on 01.11.2022.

81. The 2nd Respondent, upon receipt of 'Claims', from numerous 'Creditors', had verified the same and the 'Total Financial Creditors' Claims were INR 6,584.60 Crores, out of which, INR 6,502.90 Crores, were provisionally admitted. Indeed, the 'Total Operational Creditors' Claims received, till date, were INR 245.40 Lakhs, which are under consideration. Moreover, a 'Report', on the 'Constitution of Committee', was filed, before the 'Adjudicating Authority', as per Regulation 17 (1) of the 'CIRP' Regulations.

82. It comes to be known that the '1st Meeting' of the 'Committee of Creditors', was convened, on 18.11.2022, through 'Audio / Video Conferencing', in terms of 'Regulations 23 and 24 of CIRP Regulations'. The 'Members' of the 'Committee of Creditors', had affirmed and approved the 'Appointment' of the '2nd Respondent', as the 'Resolution

Professional' of the 'Corporate Debtor', vide 'Voting Results' of the '1st Committee of Creditors Meeting', dated 28.11.2022.

Bird's Eye View of I & B Code, 2016 :

83. It is to be pointed out that the 'Petition / Application', under Section 7 of the I & B Code, 2016, is to be 'disposed of', within the purview of 'Section 7 of the Code'. In an application under Section 7, the 'Petitioner', must be able to establish the 'Existence' of a 'Debt', which is due from a 'Debtor'.

84. Although a 'Debt', is disputed, if the amount is more than the 'threshold limit', as per Section 4 of the I & B Code, 2016, then the 'Petition', under Section 7, per se, is 'maintainable'. No wonder, 'Section 7 Application / Petition', is to be considered by an 'Adjudicating Authority', on its own merits, taking into consideration the record, even though, the 'Debt', is 'disputed', and if the amount is more than the 'threshold limit', then, the 'Application', is 'maintainable'.

85. It is to be remembered that a reason for inability of 'Corporate Debtor', to pay its 'Debt', is not required to be looked into, by an 'Adjudicating Authority'. To put it succinctly, the circumstances, under

which, a 'Corporate Debtor', could not 'repay', the 'Financial Debt', need not be taken as a 'defence', in a 'Proceeding(s)', under the 'Code'.

86. That apart, a mere 'Dispute', about the 'Quantum of Payment', does not affect the 'Right' of a 'Financial Creditor'. Moreover, an 'Adjudicating Authority' / 'Tribunal', is not a 'Civil Court', to determine the 'Violation of Contract', between the 'Parties', in the considered opinion of this 'Tribunal'.

The Indian Contract Act, 1872:

87. As per the ingredients of Section 7 of the Indian Contract Act, 1872, with a view to convert a 'Proposal', into a 'Promise', the 'Acceptance', must be 'absolute' and 'unqualified'.

88. As a matter of fact, the 'Terms of a Contract', between the 'Parties', can be established, not only by their 'Words', but by their 'Conduct', as per decision of the Hon'ble Supreme Court in Bharat Petroleum Corporation Limited v. Great Eastern Shipping Company Ltd., reported in AIR 2008 SC 357.

Tribunal's Role:

89. Undoubtedly, the 'Orders' and 'Judgments' of a 'Tribunal' / an 'Appellate Tribunal', do have 'sanctity', in 'Law'. In fact, 'Inviolability

of Judicial Proceedings’, is the foundation of the matter. There may not be an ‘Expediency’, in ‘Pronouncement’ of an ‘Order’ / ‘Judgment’, by a ‘Tribunal’ / an ‘Appellate Tribunal’. An ‘Order’ / ‘Judgment’ of a ‘Tribunal’ / an ‘Appellate Tribunal’, in a given case, must be written with a positive vein. No wonder, the ‘Function of a ‘Tribunal’, is to enthuse confidence and maintain the trust and faith of the ‘Litigants’ / ‘Stakeholders’, in our ‘Processual Justice Delivery System’

Evaluation:

90. As seen from Section 7 Petition in CP (IB) No. 43/7/HDB/2020, on the file of ‘Adjudicating Authority’ / ‘NCLT’ Bench, Hyderabad, Form I (‘Part – IV) ‘Particulars of Debt’, it is mentioned that the Total Debt, sanctioned by the ‘Financial Creditor’ / ‘Axis Bank Ltd.’ (‘Petitioner’), to the ‘Corporate Debtor’ / ‘GVK Power (Goindwal Sahib) Ltd.’, pursuant to the ‘Term Loans’ and ‘Working Capital Facilities’, aggregated to Rs.355,05,00,000/-, consisting of ‘Term Loan – 1’, which reads, as under:

“Term Loan I : Upon the request of the Corporate Debtor, the Financial Creditor vide its Sanction Letter No. AXISB/CCG-HYD/2014-15/439 dated 07.12.2009 sanctioned Short-Term Loan of Rs.200,00,00,000/- (Rupees Two Hundred Crore only). Pursuant to the Rupee Facility Agreement dated 01.02.2010 (hereinafter referred as ‘Original Facility Agreement’), entered into by and among, (a) GVK Power (Goindwal Sahib) Limited (hereinafter

referred as ‘‘Corporate Debtor’’, and (b) IDBI Bank (c) Union Bank of India (d) Axis Bank Limited (hereinafter referred as ‘‘Financial Creditor’’ (e) Other Rupee Lenders viz. India Infrastructure Finance Company Limited, Life Insurance Corporation of India, United Bank of India, Bank of Baroda, Punjab & Sind Bank, UCO Bank, Bank of India, Indian Bank, Karnataka Bank Limited and Oriental Bank of Commerce (lenders mentioned hereinabove from (b) to (e) collectively referred hereinafter as ‘‘Rupee Lenders’’), the Corporate Debtor availed Rupee Loans in an aggregate Principal amount not exceeding Rs.2,400,00,00,000 (Rupees Twenty Four Thousand Crore only), for part financing the costs for setting up of 540 MW (2x270 MW) coal-fired thermal power plant at Goindwal Sahib, District Taran Tarn, Punjab (‘‘Project’’). The commitment of the Financial Creditor in terms of the Original Facility Agreement is Rs.200,00,00,000/- (Rupees Two Hundred Crore only). The Original Facility Agreement was subsequently amended vide Amendment Agreement to the Facility Agreement dated 23.10.2015.’’

91. That apart, upon the request made by the ‘Corporate Debtor’ / ‘GVK Power (Goindwal Sahib) Ltd.’, the ‘1st Respondent / Bank / Financial Creditor’, through Sanction Letter dated 23.12.2014, had sanctioned the ‘Term Loan – II’ of Rs.41,00,00,000/-, and that the ‘Corporate Debtor’, had also executed a ‘Bilateral Term Loan Agreement’, dated 24.12.2014, with the ‘Financial Creditor’, for Disbursement of Term Loan – II of Rs.41,00,00,000/-.

92. The 1st Respondent / Bank / Financial Creditor in 'Part IV' of 'Form I of Section 7 Petition', had averred that because of the delay in implementing the Project, there was Cost Overrun (1st Cost Overrun'), and the 'Corporate Debtor', in order part-finance, the cost overrun, requested an Additional Rupee Facility, not exceeding in aggregate Rs.497,00,00,000/- (Rupees Four Hundred and Ninety Seven Crore Only) and a Facility Agreement dated 07.08.2015 ('Second Facility Agreement') was entered between the Corporate Debtor and the Rupee Lenders, which superseded the bilateral arrangements entered into between the 'Corporate Debtor' and certain 'Rupee Lenders', including the 'Financial Creditor'. As a matter of fact, the financial commitment of the 'Financial Creditor', in terms of the 'Second Facility Agreement', remained the same as per its 'Bilateral Term Loan Agreement', dated 24.12.2014, i.e., Rs.41,00,00,000/- (Rupees Forty One Crore only).

93. Furthermore, pursuant to a request from the 'Corporate Debtor', the '1st Respondent / Bank / Petitioner', through a Sanctioned Letter dated 22.09.2015, had sanctioned a Term Loan – III of Rs.40,25,00,000/- and because of further delays in implementing the 'Project', there was cost overrun (2nd and 3rd Cost Overrun'), and the 'Corporate Debtor', in order to meet the united debt and part finance the cost overrun, requested an

Additional Rupee Facility, aggregate not exceeding Rs. 471,54,00,000/- (Rupees Four Hundred and Seventy One Crore and Fifty Four Lakh only) and a Facility Agreement dated 15.04.2016 ('Third Facility Agreement'), was entered between the 'Corporate Debtor', and the 'Rupee Lenders'. The financial commitment of the Financial Creditor in terms of the Third Facility Agreement is Rs.40,25,00,000/- (Rupees Forty Crore and Twenty Five Lakh only).

94. Indeed, the 1st Respondent / Bank / Financial Creditor', had sanctioned a 'Term Loan – IV', through 'Sanction Letter', dated 27.03.2017, of Rs.12,30,00,000/-, on the Terms and Conditions appended thereto, for Part-Financing the further cost overrun ('4th Cost Overrun'). Therefore, a 'Bilateral Term Loan Agreement', dated 28.03.2017, for 'disbursement' of Rs.12.30 Crores, was entered into between the 'Financial Creditor', and the 'Corporate Debtor'.

95. At this juncture, it is worthwhile, for this 'Tribunal', to make it a pertinent mention that the Total Amount Due and Claimed as on 30.11.2019, was Rs.4,422,014,321.40, which includes the Interest and Penal Interest on the 'Term Loans I, II, III and IV', on the 'Working Capital Loan', which Sum, the Corporate Debtor, had failed to 'repay', despite the 'Default Notice'. Also that, a 'Default' / 'Recall Notice', dated

17.12.2019, was issued by the 'Financial Creditor' to the 'Corporate Debtor'. Also that, a 'Revival Letter', dated 13.06.2019, was issued by the 'Corporate Debtor', to the 'Rupee Lenders', acknowledging the Debt of INR 412.14 Crores, owned by the 'Corporate Debtor', to the 'Financial Creditor'.

96. Before the 'Adjudicating Authority', the 'Corporate Debtor' / 'GVK Power (Goindwal Sahib) Ltd.', had in their 'Notes of Submissions', mentioned that as per the Agreements, executed with the 'Priority Lenders', which were approved by the 'Financial Creditor', and other 'Project Lenders', the 'Cash Flows', from the 'TRA', shall first be utilised to pay the 'Priority Lenders', in 'Full', and the Respondent, is under an 'Obligation', to clear all the Outstanding Sums, which are due to the 'Priority Lenders', in full, before making any payments to the other 'Project Lenders'.

97. The 'Corporate Debtor', before the 'Adjudicating Authority' / 'Tribunal', had adverted to the 'Direction 9 of the Reserve Bank of India Circular dated 07.06.2019', which reads as under:

'All lenders must put in place Board-approved policies for resolution of stressed assets, including the timelines for resolution. Since default with any lender is a lagging indicator of financial stress faced by the borrower, it is expected that the lenders initiate

the process of implementing a resolution plan (RP) even before a default. In any case, once a borrower is reported to be in default by any of the lenders mentioned at 3(a), 3(b) and 3(c), lenders shall undertake a prima facie review of the borrower account within thirty days from such default ('Review Period'). During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. The lenders may also choose to initiate legal proceedings for insolvency or recovery.''

98. On behalf of the Appellants, a reference is made to the 'Direction 10 of the RBI's Circular dated 07.06.2019', which reads as under:

''In cases where RP is to be implemented, all lenders shall enter into an intercreditor agreement (ICA), during the above-said Review Period, to provide for ground rules for finalization and implementation of the RP in respect of borrowers with credit facilities from more than one lender. 5 The ICA shall provide that any decision agreed by lenders representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of lenders by number shall be binding upon all the lenders. Additionally, the ICA may, inter alia, provide for rights and duties of majority lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows / differential security interest, etc. In particular, the RP's shall provide for payment not less than the liquidation value due to the dissenting lenders.''

99. In addition, on behalf of the Appellant, 'Direction 11 of the RBI's Circular dated 07.06.2019', is adverted to, which enjoins that 'Resolution Plan', pursuant to the 'RBI's Circular', shall be implemented, within a

period of 180 days from the end of Review of the period, which is 180 days from 07.07.2019 (which is by 06.01.2020).

100. On behalf of the Appellant, it is projected that the `1<sup>st</sup> Respondent / Bank / Financial Creditor`, in violation of the RBI's Circular dated 07.06.2019, had filed the instant Company Petition, before the `Adjudicating Authority`, and therefore, the Company Petition, filed by the `Bank / Financial Creditor`, is to be `dismissed`, for a `Statutory Violation`.

101. It is the version of the Appellant that pursuant to the RBI's Circular dated 07.06.2019, the `Creditors`, including the 1st Respondent / Bank`, had agreed to implement the `Resolution Plan`, Creditors had entered into an `Inter Creditor Agreement`, dated 06.07.2019, executed pursuant to the aforesaid RBI's direction dated 07.06.2019, within the `30 days Review Period`.

102. The Learned Counsel for the Appellant, falls back upon Clauses 13.1.1, 13.2 and 13.1.2, which read as under:

13.1.1. ``The Lenders agree and undertake that on and from the Reference Date, they shall not:

(a) commence any civil action or proceedings under IBC against the Borrower or other persons that have provided Third Party Security for recovery of their dues in respect of the Facilities or

enforcement of any security interest provided by the Borrower or other persons or accelerate any Facilities provided to the Borrower;

Explanation: For the purpose of this Clause, the term ``civil action'' shall mean such legal action or proceeding against the Borrower, or against individual(s) or entities that have provided any Third Party Security. For avoidance of doubt, nothing in this Clause shall restrict the right of Lenders to adjust or appropriate any margin monies, fixed deposits, cash collateral, bank guarantee / stand by letter of credit provided by any bank or financial institution, towards its Facility. For avoidance of doubt, it is clarified that in respect of ongoing legal proceedings / actions, the Lenders shall take necessary steps to not pursue such proceedings without adversely affecting its rights in respect of such proceedings.

(b) transfer or assign their Facility to any person, save and except to a Lender that agrees to enter into a Deed of Accession (if it is not already a party to this Agreement) and be bound by the Resolution Plan.

13.2. The aforesaid standstill provision will be operative for an initial period of 30 (thirty) days from the commencement of the Review Period. In the event that the Lenders decide on implementation of a Resolution Plan as the resolution strategy in accordance with the Regulatory Framework, then the standstill provision shall extend during the implementation of the Resolution Plan (which is currently 180 (one hundred and eighty) days from the end of the Review Period or such other period as may be prescribed for implementation of Resolution Plan under the Regulatory Framework) provided that the standstill shall immediately lapse on implementation of the Resolution Plan or if the resolution process is terminated by the Majority Lenders.

13.1.2. The aforesaid stand still provision shall not preclude the Lenders from initiating or continuing any action against the

Borrower or its promoters / directors / officials or other persons for criminal offences.

Notwithstanding the aforesaid, if: (i) legal remedies in respect of any claim of a Lender are likely to become barred by law of limitation and the Borrower or the relevant persons fail, refuse or omit to provide confirmation of debt or acknowledgement of liability in respect of it to extend the period of limitation, or (ii) if the security created in favour of a Lender is in jeopardy, the Lenders shall have the freedom to take such action as may be considered necessary to preserve their claim / security against the Borrower and / or such other persons and keep the Lead Lender informed about such action.’’

103. According to the Appellant, it is pointed out that, before the ‘Adjudicating Authority’, the ‘1st Respondent / Bank / Financial Creditor’, had suppressed the documents Viz. (a) ‘Priority Lender Facility Agreement dated 30.04.2017’ (b) ‘Priority Lender Debenture Trust Deed dated 30.04.2017’ (c) ‘RBI Directions of 07.06.2019 and the Inter Creditor Agreement dated 06.07.2019’, executed pursuant to the RBI Directions (d) All of minutes of Meetings of the ‘Joint Lenders Forum’ and some of ‘MOM’ of ‘Joint Lenders Forum’, exhibit that ‘Majority of Lenders’, were not keen on initiating the IBC Proceedings, against the ‘Corporate Debtor’, and the (e) No Objection Certificate dated 30.03.2017 and the Commitment Letter dated 27.04.2017, under which, the Applicant had agreed to grant ‘Priority Status’, to the ‘Priority Lenders’, in addition to the ‘TRA Agreement’, and ‘ICAs’.

104. The Learned Counsel for the Appellant comes out with a plea that as per Clauses 5.6, 24.3 (a), 24.23, 6.1 (Page 1430), the Cash Flows from the Trust and Retention Account Agreement dated 21.07.2017, shall be first utilised to pay the 'Priority Lenders', and that the Respondent is under an obligation to clear all the Outstanding amounts which are due to the 'Priority Lenders', in 'Full', prior to making any payments to the other 'Project Lenders'.

105. Added further, the Learned Counsel for the Appellant adverts to Clause 10.1 of the Trust and Retention Account Agreement dated 21.07.2017, in and by which, the 'Management of TRA', is entrusted to the Account Bank and the Account Bank is required to release the Funds / allow withdrawals from the 'TRA', to repay any 'Creditors' / for Operation of the Project, in tune with the instructions of Priority Lender or the Security Trustee (acting in accordance with the Inter Creditor Agreement), and that the Respondent is not responsible for releasing any amount from the 'TRA', etc.

106. As a matter of fact, the 'Account Bank', holds control over the Funds of the Respondent and is bound to act in accordance with the 'TRA Agreement', dated 21.07.2017 to which even the Financial Creditor and the Priority Lenders were 'Parties', along with the 'Other Lenders'.

107. The Learned Counsel for the Appellant, brings it to the notice of this 'Tribunal', that in the 'Minutes of Meeting of the Joint Lenders Forum', on 11.01.2022, it was recorded that in view of the issuance of 'Preliminary Default Notice', dated 29.10.2021, by the 'Punjab State Power Corporation Ltd.', other 'Lenders', were of the opinion that if the Respondent failed to obtain any 'Interim Orders of Stay', on the said 'Default Notice', then, the 'Other Lenders', are likely to proceed to file proceedings, under the I & B Code.

108. In this connection, the Learned Counsel for the Appellant points out that the 'Punjab State Electricity Regulatory Commission through Petition No.4 of 2022', wherein, the 'PSERC', through Order dated 09.02.2022, was pleased to grant 'Interim Suspension', of the 'Notice', dated 26.01.2022, which was issued, pursuant to the Default Notice dated 29.10.2021. Also that, the 'Lenders', who had initially issued the Notice dated 01.02.2022 to 'PSPCL', revoking their right, to substitution, under the 'Power Purchase Agreement', had issued a Letter dated 18.02.2022, keeping the Notice dated 01.02.2022, under abeyance, in view of the Order dated 09.02.2022, granting 'Interim Suspension'.

109. According to the Appellant, in any event, the 1st Respondent / Bank / Financial Creditor, cannot place reliance on the proposed actions of the 'Other Lenders', to maintain the instant 'Company Petition'.

110. Per contra, the stand of the 1st Respondent / Bank / Financial Creditor (Petitioner) is that, the 'Priority Lending Arrangements', are an 'Inter se Arrangement', in regard to the manner of 'Distribution of Proceeds', among the various 'Creditors', of the 'Corporate Debtor', and do not have any bearing on the 'Admission' of the 'Company Petition', filed before the 'Adjudicating Authority'.

111. The plea of the 1st Respondent / Bank is that, the lending documents do not suggest that the 'Priority Lender', was required to be 'paid', in 'Full', before any Sum, became payable to the 'Senior Lenders'. Also that, on 20.12.2019, when Section 7 Application, was filed, before the 'Adjudicating Authority', no Sums were 'Outstanding', to the 'Priority Lender'.

112. In the instant case, there is no dispute, in regard to the sanction of Loans, amounting to Rs.355.40 Crores, by the 1st Respondent / Bank, to and in favour of the 'Corporate Debtor', beginning from the Year 2010. Furthermore, more than Rs.3,000 Crores, were advanced by the '12 Financial Institutions', together with the '1st Respondent / Bank',

amounting to over and above Rs.3,000 Crores, in part financing the costs for setting up of 540 MW Coal Fired Thermal Power Plant, in Taran Tarn, Punjab, and for ease of convenience, the 'Lenders', has referred to supra or termed as 'Senior Lenders'.

113. It is relevantly pointed out that the 'Deutsche Bank AG', had extended a 'Loan to the 'Corporate Debtor', on condition that they will be accepted as a 'Priority Lender', with 'Priority Rights'. Besides this, it is brought to the fore that the 'DB International (Asia) Limited', through 'Debenture Trust Deed', dated 30.04.2017, had subscribed to the 'Bonds', issued by the 'Corporate Debtor', thereby, became a 'Priority Bond Holder', represented by 'IDBI Trusteeship Services Limited', as 'Bond Trustee'.

114. In terms of the 'Master Amendment Agreement', dated 21.07.2017, entered into between the 'Senior Lenders' and the 'Corporate Debtor', the Clause 2.1 of the Agreement points out that the Corporate Debtor, had undertaken to repay the Facilities, advanced by the 'Senior Lenders', in 78 Structured Quarterly Instalments, beginning from 31.10.2017 to 31.01.2037, as mentioned in the 'Repayment Schedule'.

115. Admittedly, a 'Loan Recall Notice', dated 17.12.2019, was issued by the '1st Respondent / Bank / Petitioner / Financial Creditor', because of

the 'Default', committed by the 'Corporate Debtor', in making payments, as per 'Master Amendment Agreement' dated 21.07.2017. In reality, the 'Corporate Debtor' / 'GVK Power (Goindwal Sahib) Ltd.', had availed the 'Credit Facilities', but, failed and neglected to operate the same, in accordance with the agreed 'Terms and Conditions'. The 'Account', was classified, as 'Non Performing Asset', from 29.11.2017.

116. Consequent to the failure, in not complying with the aforesaid requirement, a 'Petition / Application', (under Section 7 of the I & B Code, 2016), was filed by the '1st Respondent / Bank', before the 'Adjudicating Authority', National Company Law Tribunal, Hyderabad Bench, in CP (IB) No. 43 / 7 / HDB / 2020.

117. It is pointed out that from the 'Information Utility' i.e., National E-governance Services Limited, a record of 'Default', was produced, before the 'Adjudicating Authority', on behalf of the '1st Respondent / Bank / Financial Creditor'.

118. Be it noted that, the 'Inter Creditor Agreement', was executed by some 'Consortium Lenders' of the 'Corporate Debtor' (including the 1st Respondent / Bank / Financial Creditor), pursuant to the Reserve Bank of India's Directions 2019. In reality, the 'Inter Creditor Agreement', dated 06.07.2019, was executed to afford a scaffold, for a possible 'Resolution'.

Hon'ble Supreme Court Judgment:

119. At this stage, this 'Tribunal', aptly points out the Judgment of the Hon'ble Supreme Court dated 02.04.2019, in Dharani Sugars And Chemicals Ltd v. Union Of India & Ors. (vide Transferred Case (Civil) No. 66 of / 2018 in Transferred Petition (Civil) No. 1399 of 2018), reported in India Kanoon, whereby and whereunder, at Paragraph 26, it is observed and held as under:

26. ``..... If a specific provision of the Banking Regulation Act makes it clear that the RBI has a specific power to direct banks to move under the Insolvency Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside the four corners of the statutes which govern them, namely, the RBI Act and the Banking Regulation Act.''

120. No wonder, there is no 'Fetter in Law', much less in the Reserve Bank of India's Directions 2019, for the 'Lenders', to resort to the 'Summary I & B Code Proceedings'. The 'Right of the 1st Respondent / Bank', especially, under the I & B Code, 2016, cannot be taken away or overridden, by any 'Reserve Bank of India's Rule', etc.

121. It is to be remembered that the Corporate Debtor, cannot seek an 'umbrage', under the 'Inter Creditor Agreement', with a view to avoid,

evade, circumvent and supplant its obligation(s), in terms of the 'Loan Facility Agreement'. Continuing further, the I & B Code, 2016 (vide Section 238 of the I & B Code, 2016), will have an 'overriding effect', in regard to anything inconsistent therewith contained in any other 'Law', for the time being in force.

122. By virtue of the Contract, the 1st Respondent / Bank / Financial Creditor, had executed an 'Inter Creditor Agreement', and it is well within its 'Rights', to take recourse to the available remedies in 'Law'.

123. The RBI's Circular dated 07.06.2019, cannot and shall not, in any manner come in the way of a 'Financial Creditor', to prefer a 'Petition' / an 'Application', as per Section 7 of the I & B Code, 2016. It cannot be forgotten that there was no determination on formulation of a 'Resolution Plan', and in any event, the stand still Clause, seen in Clause 13 (2) of the Inter Creditor Agreement dated 06.07.2019, cannot be pressed into service, after the 30 days Review Period, which began on 07.06.2019.

124. Looking at from the point of view of the 'Consortium Lenders', in not determining on the implementation of any 'Resolution Plan', within the period of Review, the standstill Clause in 'Clause 13(2) of the Inter Creditor Agreement', this 'Tribunal', is of the 'cocksure opinion', that the

same does not prohibit the `1<sup>st</sup> Respondent / Bank`, to approach the `Competent Authority` / `Adjudicating Authority` / `Tribunal`, in preferring the main Company Petition, for seeking appropriate `Reliefs`, thereto.

125. One cannot remain in oblivion as to the candid fact that the `1<sup>st</sup> Respondent / Bank / Financial Creditor`, had pulled out from the `Inter Creditor Agreement`, ofcourse, after the conclusion of `Period of Review`.

126. It is evident from the `Minutes of Joint Lender Forum`, dated 11.01.2022, the other `Consortium Lenders` (other than the `1<sup>st</sup> Respondent / Bank / Financial Creditor`), were in contemplation to commence the proceedings and in fact the facilities given by the `Senior Lenders` (inclusive of the 1st Respondent / Bank / Financial Creditor / Petitioner), was categorised as `Non Performing Asset`, from 29.11.2017.

127. In this connection, it is not out of place to this `Tribunal`, to relevantly point out that, for an `elongation of standstill period`, as per Clause 13.2 of the Inter Creditor Agreement, from the original 30 days to 180 days, the `Lenders`, ought to determine, to implement the fulfilment of the `Resolution Plan`, and in the absence of the same, the original 30

days will not get extended to 180 days, in the considered opinion of this 'Tribunal'.

128. It is the version of the 1st Respondent / Bank that, 'no Resolution Plan', as visualised, in terms of the Reserve Bank of India's directions, was received from the 'Corporate Debtor' / 'GVK Power (Goindwal Sahib) Ltd.', despite in the 'Joint Lenders Forum Meeting', on 02.07.2019, 15.11.2019 and 21.01.2020, deliberations had taken place, on these aspects.

129. It must be borne in mind that the 'Inter Creditor Agreement', is meant to take care of the interest of all the 'Lenders', among themselves, coupled with the Corporate Debtor, dehors the fact that the 'Corporate Debtor' / 'GVK Power (Goindwal Sahib) Ltd.', was not a privy and party to any of the 'Clauses' of the said 'Agreement'.

130. Dealing with the aspect of the 'Priority Lenders' Claim, were fulfilled, at this juncture, it is relevantly pointed out that 'no valuable payment', was effected to the '1st Respondent / Bank / Financial / Petitioner', and other 'Senior Lenders'.

131. There is no simmering doubt that the 'Existence of Financial Debt' (vide Section 5(8) of the I & B Code, 2016), is over and above the threshold limit of more than Rs.1 Crore (as per Section 4 (1) of the Code).

132. In the present case, the 'Corporate Debtor' has not furnished any material evidence to suggest that, it will be in a position to 'repay the amounts', owed to the 'Lenders'. It cannot be forgotten that no endeavour was made to accomplish a 'Resolution Plan', although many deliberations and meetings, had taken place. Besides these, the 'Corporate Debtor', inspite of request made by the 'Lenders', had not opted to 'Improve' and 'Revise', the 'One Time Proposal', which is an unfavourable circumstance, as opined by this 'Tribunal'.

133. At this juncture, this 'Tribunal', worth recalls and recollects the Judgment of the Hon'ble Supreme Court dated 12.07.2022, in Vidarbha Industries Power Ltd. v. Axis Bank Limited (vide Civil Appeal No. 4633 of 2021), whereby and whereunder, at Paragraphs 86 and 87, it is observed, as under:

86. ``Even though Section 7 (5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of

discretion in a particular manner, discretion would have to be exercised in that manner.

87. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition.’’

NCLT Rules, 2016:

134. The definition of Rule 2 (10) of the NCLT Rules, 2016, means ‘certified by Tribunal’, in relation to a copy of a document, certified to be a true copy issued by the Registry or of a Bench of the Tribunal under its hand and seal and as provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872).

135. Rule 154 (1) of the NCLT Rules, 2016, ‘Rectification of ‘Order’, enjoins that, ‘any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising, from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on application of any party by way of rectification’.

136. Rule 154 (2) of the NCLT Rules, 2016, provides that. ‘an application under sub-rule (1) may be made in Form No. NCLT-9 within

two years from the date of the final order for rectification of the final order not being an interlocutory order’.

137. As far as the present case is concerned, this ‘Tribunal’, keeping in mind of the fact that the ‘Defaults’, had taken place in the year 2017, the huge ‘Public Monies’, are entangled, and the main Company Petition in CP(IB) No. 43 / 7 / HDB / 2020, was preferred, before the ‘Adjudicating Authority’ / ‘Tribunal’, on 20.12.2019, with a view to prevent, diminishing ‘Value of the Assets of the Corporate Debtor’, to protect the ‘Creditors’ interests’, and considering the totality of the integral facts and circumstances of the case on hand, in a conspectus manner, comes to a resultant conclusion that the view, arrived at by the ‘Adjudicating Authority’ / ‘Tribunal’, by exercising its ‘Judicial Discretion’, ofcourse, in admitting the ‘Section 7 Application’, in CP(IB) No. 43 / 7 / HDB / 2020 (Filed by the 1st Respondent / Bank / Financial Creditor), does not suffer from any ‘Material Irregularity’, or ‘Patent Illegality’, in the ‘eye of Law’. Accordingly, the ‘Appeal’ fails.

Result:

In fine, in the light of the detailed upshot and foregoing reasons, ascribed by this ‘Tribunal’, the instant Comp. App (AT) (CH) (INS.) No.

385 of 2022, is dismissed. No costs. The connected pending 'Interlocutory Applications', if any, are closed.

Before parting with the case, this 'Tribunal', pertinently points out that the 'Certified Copy' of the '1st Respondent / Bank / Financial Creditor', reflects the 'Correct Date of Moratorium', i.e., '10.10.2022', and not the 'Appellants' copy and therefore, the 'Office of the Registry' of the 'Adjudicating Authority' / 'Tribunal', shall act with utmost care, caution and circumspection, in issuing the 'Certified Copy' of any 'Order' of the 'Tribunal', and to avoid, any accidental slip or omission or creeping in of an inadvertent error, in the near future.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

24/04/2023

SR / TM