NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 69 of 2023 & I.A. No. 274, 275 of 2023

(Arising out of the Order dated 18.11.2022 passed by the National Company Law Tribunal, Mumbai Bench-II in CP (IB) No. 4535 (MB)/2019)

IN THE MATTER OF:

Canara Bank
Having its registered office at:
112, JC Road Banglore, Branch : 1st Floor, A Wing,
Canara Bank Building
C-14, 'G' Block, Bandra Kulra
Complex, Bandra (East), Mumbai.
Maharashtra – 400051.
Email: cb5310@canarabank.com **…Appellant**

Versus

GTL Limited
Having Registered Office at:
Global Vision Electronic Sadan No. II
MIDC, TIC, Industrial Area, Mahape,
Navi Mumbai, Maharashtra- 400710
Email: arvindv@gtllimited.com **…Respondent**

Present

For Appellant: Mr. Abhijeet Sinha, Raunak Dhillon, Madhav Kanoria, Srideega Bhattarcharya, Neha Shivhare, Isha Malik, Adv.

For Respondent: Mr. Abhinav Vasisht, Sr. Adv. with Mr. Rohan Rajadhyaksha, Mr. Apporva Agarwal, Prasad Lotlikar, Ms. Neha Mathen, Ms. Akshita Sachdeva, Atharv Gupta, Adv.

J U D G E M E N T

(25.10.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by Canara Bank who is Appellant herein under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**Code**') against the Impugned Order dated 18.11.2022 passed by National Company Law Tribunal Mumbai Bench-II ('**Adjudicating Authority'**) in CP (IB) No. 4535 (MB)/2019, whereby the Adjudicating Authority has dismissed the application filed by the appellant under Section 7 of the Code.

GTL Limited, the Corporate Debtor against whom Section 7 application was filed by the Appellant, is the Respondent ('Respondent').

2. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

3. The Appellant submitted that he is the Financial Creditor who lent money to the Corporate Debtor. The Appellant further submitted that there was a consortium of banks who gave different financial facilities to the Corporate Debtor.

4. It is the case of the Appellant that there is a clear case of debt and default and acknowledgement by the Corporate Debtor and therefore the Adjudicating Authority erred in denying the application of the Appellant filed under Section 7 of the Code. It is the case of the Appellant that as per the insolvency scheme,

the Adjudicating Authority role is limited in determining debt and default of more than stipulated threshold limit, thereafter, the Adjudicating Authority is expected to order for Corporate Insolvency Resolution Process ('**CIRP**') against the Corporate Debtor. The Appellant reiterated that the Respondent's debt and default are confirmed as can be seen from several acknowledgments.

5. The Appellant emphasized that according to their commercial wisdom, it would be realistic to seek resolution of the Corporate Debtor under the Code and the same was communicated to Lenders that the Appellant was not to sign Inter Creditor Agreement ('**ICA**'). The Appellant stated that he issued notice dated 10.07.2018 to the Respondent recalling the entire financial assistance granted to the Respondent and demanded payment of Rs. 534.76 Crores (Approx.).

6. The Appellant filed Section 7 application vide CP No. 3586 of 2018 which was dismissed by the Adjudicating Authority on 26.11.2019 based on the judgment of Hon'ble Supreme Court of India dated 02.04.2019 in matter of ***Dharani Sugar and Chemical Ltd. v. Union of India and Ors.*** *[(2019) 5 SCC 480]***.** The Appellant filed fresh Section 7 application on 06.12.2019 in C.P. No. 4535 of 2019 for outstanding amount of Rs. 534,76,33,736.81 before the Adjudicating Authority which was dismissed vide Impugned Order dated 18.11.2022.

7. The Appellant assailed the conduct of the Respondent for taking several frivolous grounds including that the application of the Appellant under section 7

of the Code has been rejected earlier and by doctrine of res-judicata the same could not have been filed. The Appellant reiterated that the section 7 application was dismissed in view of decision on RBI Circular dated 12.02.2018 titled as 'Resolution of Stressed Assets- Revised Framework' which was held as ultra vires under Section 35 AA of Banking Regulations Act, 1949 and this had nothing to do with the Appellant's right to file Section 7 application.

8. The Appellant pleaded that the Adjudicating Authority has erred in following the ratio of ***Vidarbha Industries Power Ltd. vs. Axis Bank Ltd.*** *[(2022) 8 SCC 841]* in rejecting his application under his Section 7. The Appellant gave details of the facts based on ***Vidarbha Industries (Supra)*** vis-à-vis present case and stated that ***Vidarbha Industries (Supra)*** could not have been applicable here on viability and feasibility of the Corporate Debtor, which is entirely different. The Appellant further stated that ***Vidarbha Industries (Supra)*** was on its own facts and did not overrule the ***Innoventive Industries Ltd. v. ICICI Bank and Anr,*** *(2018) 1 SCC 407]* which is still a good law regarding admission of Section 7 application once the criteria of debt and default is met, which is undisputed fact here.

9. The Appellant further assailed the Impugned Order passed by the Adjudicating Authority completely ignoring the various acknowledgments of defaults by the Corporate Debtor in its financial statement, books of accounts, affidavit in reply and Written Submissions filed before the Adjudicating

Authority, where the Corporate Debtor clearly admitted the debt and default but stated that he is under financial stress consequent to initiation of CDR and SDR.

10. The Appellant pointed out that the ***Innoventive Industries Ltd. (Supra)*** is a landmark judgment on debt and default and has been followed in most of the cases and the Hon'ble Supreme Court of India has again reiterated in the matter of ***ES Krishnamurthy v. M/s Bharath Hi Tech Builders*** *[(2022) 3 SCC 161]*, that debt and default are only pre-requisites as in Appellant's application in this case under Section 7 of the Code

11. The Appellant further cited the judgment of this Appellate Tribunal titled as ***Rajesh Kedia v. Phoenix ARC Private Limited,*** *Company Appeal (AT) (Insolvency) No. 996 of 2021* and the judgment passed by Hon'ble Supreme Court of India in the matter of ***Arun Kumar Jagatramka v. Jindal Steel & Power Ltd,*** *Civil Appeal No. 9664 of 2019* in support of his arguments.

12. The Appellant submitted that the reliance on the ***Vidarbha Industries (Supra)*** by the Adjudicating Authority is illegal in light of the order passed by the Hon'ble Supreme Court of India in ***Axis Bank Limited v. Vidarbha Industries Power Limited Review Petition*** *[*(Civil) No. 1043 of 2022 in Civil Appeal No. 4633 of 2021 ("**Vidarbha Review Order**")], where the same judges of the Hon'ble Supreme Court of India who gave the original judgment of ***Vidarbha Industries (Supra),*** clearly stipulated that

'it is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case'.

(Emphasis Supplied)

13. The Appellant reiterated that in the present appeal, conduct of the Respondent has been grossly unfair and questionable and has been defaulting its payment continuously despite of the best possible assistance provided by the lenders including the Appellant through various mechanism including the CDR.

14. The Appellant submitted that the Corporate Debtor is loss making entity and can be seen from its Financial Statements and is having negative networth and not in a position at all is making the payments. The Appellant emphasized that there is no chance of revival of the Respondent and under these circumstances only option left is seeking resolution of the Corporate Debtor where new management can infuse funds and bring desired changes which ultimately would be beneficial to all stakeholder including the Corporate Debtor itself, the lenders including the Appellant and other stakeholders.

15. The Appellant castigated Impugned Order which despite noting few facts of the Appellant under submissions, has relied solely on the judgment of ***Vidarbha Industries (Supra)*** and gave the ruling in one single para 11 of the Impugned Order dated 18.11.2022 which show clearly non application of mind by the Adjudicating Authority. The Appellant stated that the Adjudicating

Authority has not given any rational in denying the Appellant's right to initiate the CIRP against the Corporate Debtor except mentioning judgment of ***Vidarbha Industries (Supra).***

16. The consortium of lenders including the Appellant, at the request of the Corporate Debtor had sanctioned Working Capital facilities (both fund based and non-fund based) to the Corporate Debtor. The Appellant had sanctioned Short Term Corporate Loan of Rs 200 Crores, amongst the existing Non Fund Based limit of Rs 200 Crores, to meet general corporate requirements of the Corporate Debtor for a period of 13 months from the date of first draw down during 2010. In 2011 the Appellant permitted continuation of Short -Term Corporate Loan for a further period of six months i.e., till 30.01.2012. Further, a Sanction letter dated 30.06.2010 was issued by the Appellant renewing existing Work Capital limits of Rs. 62.00 crores (Fund based - Rs. 12.00 crores and non-fund based-Rs. 50.00 crores). An amount of Rs. 249.85 crores was outstanding towards the Appellant as on 01.07.2011.

17. The Appellant submitted that these facilities were secured by way of Mortgage and hypothecation of assets and the charge was duly filed with the concerned Registrar of Companies.

18. The Appellant stated that around 2011, the Respondent was in financial distress and applied for restructuring of its debt under the CDR Mechanism and was referred to the Corporate Debt Restructuring Forum and the final

restructuring package was approved by the CDR-Empowered Group at their meeting held on 29.11.2011 and the CDR Cell issued a letter of approval for restructuring of account under the CDR mechanism on 23.12.2011. Under the restructuring package, an amount of Rs. 199.57 Crores was restructured for Canara Bank and the Appellant and other lenders entered into a Master Restructuring Agreement dated 31.12.2011 and other related agreements to give effect to the restructuring.

19. It is the case of the Appellant that the Respondent defaulted in complying with the CDR Package and failed to meet its repayment obligations which led to their account slipping into NPA on 29.09.2014 as per the RBI Guidelines/ IRAC norms. Further, on account of failure of CDR, the date of NPA was predated to 31.12.2011 by the Statutory Auditors, i.e., from the CDR Reference Date, since the CDR had failed consequent to which, the terms and conditions with respect to pricing and repayment schedule as per the pre-CDR Period had been restored.

20. The Appellant stated that the respondent has acknowledged availing the financial facilities and execution of documents from time to time and as well as the liabilities, The Respondent has by way of its acknowledgment of debt and security has confirmed the availing of facilities, execution of security documents and balance outstanding in respect of the facilities availed. The Respondent acknowledged the debt vide the Acknowledgment of Debt and Security dated 07.04.2017 enclosing acknowledgments dated 31.03.2017 for debt and security

in respect of OCC account, Funded Interest Term Loan Account and Term Loan Account. Copies of the Acknowledgment of Debt and security have been admitted by the Respondent in its Annual Report for the financial year 2017-2018 and the debt is recorded in the Report of Information Utility (NeSL) dated 5.12.2019 the default on part of the Respondent has also been acknowledged and identified in the report of CRILC on 04.12.2019.

21. The appellant stated that from the Statements of Account of the Respondent from 31.12.2011 to 30.11.2019, it can be seen that there have been regular withdrawals and the deposits which establishes that there exists a debt and the same has not been duly paid which is in accordance with Bankers Book of Evidence Act, 1891.

22. The Appellant brought out at the meeting of the Joint Lenders' Forum ("**JLF**") held on 09.02.2018, the Respondent informed that he is unable to pay the financial facilities but requested that for a one-time settlement ("**OTS**") hence JLF decided that Lenders would exit from CDR with immediate effect and the Corporate Debtor would submit fresh proposal of OTS. The appellant stated that the Corporate Debtor submitted few OTS proposals which could not be accomplished on account of failure by the Corporate Debtor.

23. The Appellant elaborated that the Respondent submitted a resolution plan during the lenders meeting dated 22.03.2018 wherein the Respondent offered Rs.739 Crores by way of liquidating its assets which entailed a recovery of only

14% of the outstanding debt and even this amount offered was substantially reduced in light of Aircel's insolvency proceedings, therefore the lenders noted that "there is no option left to the lender to approach NCLT for resolution".

24. The Appellant submitted that on 04.04.2018 another OTS proposal was offered by the Respondent for an amount of Rs. 1638 Crores. The Appellant submitted that on 02.06.2018, the he wrote a letter to the Respondent stating that there were no developments pursuant to meeting held on 22.03.2018 qua the settlement offer and highlighted reasons as to why the Settlement Proposal was not attractive. The Appellant also advised that it might be prudent to initiate the CIRP under the Code.

25. The Appellant submitted that on 27.06.2018, at a JLF meeting, the Corporate Debtor stated that a bid had been received for GTL Infrastructure Ltd., a company promoted by the Corporate Debtor, from a consortium of Edelweiss ARC ('**EARC**') and Bank of America for Rs. 2400 Crores, and if materialised, it would increase value for the Corporate Debtor and requested the lenders to consider the OTS for Rs 1638 Crores, however lenders rejected the OTS proposal and further decided issue recall notices by 10.07.2018 and to invoke guarantee available with lenders.

26. The Appellant stated that accordingly he issued the Recall Notice dated 10.07.2018 to the Respondent thereby recalling the various credit facilities and called upon the Respondent to pay Rs. 444.33 crores as on 09.07.2018 which

was replied by the Corporate Debtor replied on 16.07.2018 acknowledging its debts, however requested the Appellant to reconsider its Settlement Proposal of Rs. 1638 Crores.

27. The Appellant stated that in the meeting of JLF held on 06.09.2018, it was unanimously agreed that an application will be filed before the Adjudicating Authority and the lenders requested the Appellant to file the Section 7 application and authorised the Appellant in this regard.

28. The lenders convened a JLF on 19.06.2019, the Corporate Debtor offered a further reduced OTS proposal of Rs. 894 Crores. The Appellant stated that w.r.t. signing of Inter Creditor Agreement ('**ICA**'), the appellant clearly informed the other lenders in the meeting that he is not signing the ICA.

29. The Appellant stated that on account of the continued defaults by the Respondent , the Appellant issued recall notice and filed fresh company petition under Section 7 of the Code. On 06.12.2019, vide Company Petition bearing CP No. 4535 of 2019 before the Adjudicating Authority seeking initiation of CIRP against the Respondent for a default of Rs.534,76,33,736.81 and date of default was indicated as 29.09.2014. The Appellant elaborated that the debt owed by the Respondent to the Appellant comprised of the Open Cash Credit ('**OCC**') Rs. 91,69,79,167/-; Funded Interest Term Loan (FITL) 74,46,85,710/-; and Term Loan ('**TL**') Rs. 368,59,68,859.81/-.

30. The Appellant stated that the Respondent approached the Hon'ble Bombay High Court by way of Writ Petition No. 223 of 2020 for seeking direction to the Appellant to withdraw and cancel the recall notice dated 10.07.2018 and letters dated 04.06.2019, 27.06.2019 and 12.12.2019, but the Hon'ble Bombay High Court disposed writ noting that the Appellant could not be forced to enter into the ICA and that nobody, much less a bank, can be compelled to accept a settlement or a resolution plan.

31. The Appellant stated that the Respondent challenged the judgement of the Bombay High Court, however, the Hon'ble Supreme Court dismissed the SLP (Civil) No. 5667 of 2020 by way of order dated 06.12.2021, concurring with the Hon'ble Bombay High Court's observations and held that the High Court was justified in rejecting the claim made by the Respondent and the Appellant could not be compelled to sign the ICA. The Appellant stated that the orders passed by the Hon'ble Bombay High Court and the Hon'ble Supreme Court were duly brought on record before the Adjudicating Authority by the Appellant by way of Additional Affidavit dates 22.03.2022. The Appellant submitted that the Adjudicating Authority dismissed his application under Section 7 of the Code on the basis of ***Vidarbha Industries (Supra)*** and passed the Impugned Judgement ignoring these judgment of Bombay High Court and Hon'ble Supreme Court of India.

32. It is the case of the Appellant that the Adjudicating Authority has erred in dismissing the Section 7 application vide the Impugned Order despite the clear binding precedent laid down by the Hon'ble Supreme Court in ***Innoventive Industries Ltd. (Supra)*** (which is an earlier decision of a coequal Branch of the Hon'ble Supreme Court) and the Adjudicating Authority was duty-bound to admit the Section 7 application, however, the Adjudicating Authority wrongly exercised it's discretion on the strength of ratio of ***Vidarbha Industries (Supra)*** in the present case where the existence of debt and Default had been established including by way of admission by the Respondent.

33. The Appellant stated that the Adjudicating Authority failed to note that the Corporate Debtor has not denied or disputed the debt and default and has also acknowledged the existence of debt and default in various documents.

34. The Appellant stated that it is a creditor's prerogative to exercise its right available under the Code and election of action under SARFAESI Act, 2022 by majority lenders, does not prevent any lender from proceeding under the Code and cannot be a ground to reject a Section 7 application.

35. The Appellant stated that there is currently no settlement with the Appellant who has only exercised its statutory right under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 ("**SARFAESI**"). The Appellant submitted that the Respondent during the course of arguments has sought to place reliance on the Affidavit filed by the

Respondent on 27.9.2024 in respect of an Additional OTS dated 12.1.2024 submitted to the secured lenders for Rs. 375 Crores and based on this Affidavit, the Respondent had sought to allege that the Appellant had realised the proceeds of sale of immovable properties of the Respondent under the SARFAESI Act, 2002 and such realisation was as per the terms of the Additional OTS. It is the case of the Appellant that the Appellant has not accepted the Additional OTS and the same has been communicated by the Appellant to the Respondent vide email dated 28.2.2024.

36. The Appellant further submitted that the execution of Escrow Agreement on 3.2.2024 between the Respondent and IDBI Bank (Lead Bank) in respect of the deposit and withdrawal of 'Upfront and OTS Amount' does not imply that the Appellant has accepted the Negotiated Settlement Proposal as the Escrow Agreement. The Appellant elaborated the various clauses of Escrow Agreement to highlight that this does not bind the Appellant to accept the OTs of the Respondent. The Appellant brought to our notice the following clauses to buttress his point :-

(i) No CDR Lender shall have any right to seek withdrawal of the OTS Amount without approving the OTS and acceptance of the OTS of such CDR Lender by the Borrower (Clause 3.1.2(a)(iv)).

(ii) Escrow Agreement itself envisages rejection of the OTS Proposal and distribution to be decided on a mutual basis pursuant to such rejection (Clause 3.1.2(a)(iv)).

(iii) Deposit of Upfront Amount of Rs. 50 Crores cannot be construed as acceptance of the OTS Proposal (Clause 3.1.1(a))

37. As regard allegation of the Respondent that the Appellant has accepted the proceed of sale of immovable property of the Respondent and therefore has accepted the OTS of the Respondent and the Appellant submitted that the realisation of Rs. 8,65,61,285 on 15.3.2024 by the Appellant was pursuant to notice of Sale dated 20.01.2024 under Section 20(4) of the SARFAESI Act which was as per Lender's independent action under SARFAESI. The Appellant reiterated that it is a creditor's prerogative to initiate insolvency proceedings which is sought to be exercised by the Appellant herein by seeking initiation of CIRP against the Respondent as supported by catena of judgments including ***S. Ravindranathan vs. Sundaram BNP Paribas***, *T.A. No. 40 of 2021 in Company Appeal (AT) (Ins) No. 1087 of 2020* (para 21); ***Punjab National Bank vs. Vindhya Cereals Ltd.,*** *Company Appeal (AT) (Insolvency) No. 854 of 2019* (para 9) and ***State Bank of India vs. Abhijeet Ferrotech Limited,*** *Company Appeal (AT) (Insolvency) No.690 of 2023* (para 27,33).

38. The Appellant assailed the conduct of the Respondent in pleading that election of SARFAESI route by majority of lenders is indicative of commercial

wisdom and a relevant factor. The Appellant also criticised the Adjudicating Authority's finding that initiation of CIRP would be counter- productive is a gross abuse of process and an arbitrary exercise of discretion by the Adjudicating Authority and not in line with the Hon'ble Supreme Court's judgment in ***Vidarbha Industries (Supra)***. The Appellant stated that the Adjudicating Authority is not empowered to substitute its own findings for commercial wisdom of lenders after constitution of Committee of Creditors, and much less before its constitution.

39. The Appellant stated that the Lender's right to not to sign ICA had already been settled by the Hon'ble Supreme Court in its judgment dated 6.12.2021 upholding the judgment passed by the Hon'ble Bombay High Court in the Writ Petition No. 223 of 2020 in which the Hon'ble High Court had observed that that public sector financial institutions/banks could not be compelled to accept the settlement of Resolution Plan of Corporate Debtor and no bank can be forced to sign ICA.

40. It is the case of the Appellant that even if the Appellant was a part of the ICA, the statutory right under Section 7 of the Code cannot be curtailed or made subservient to any ICA and such an arrangement does not curtail the Appellant's the rights to enforce its rights against the Respondent in its individual capacity.

41. The Appellant negated the Respondent's reliance on the judgment of the Hon'ble Supreme Court in ***Central Board of Dawoodi Bohara Community vs.***

State of Maharashtra and Anr., [*2005 SCC (Cri) 546]* to state that since Vidarbha has made reference to ***Innoventive Industries (Supra)***, ***Vidarbha Industries (Supra)*** cannot be termed as per incuriam and in this connection the Appellant stated that this is not true position as the Hon'ble Supreme Court in ***Dawoodi Bohra (Supra)*** was also of the view that 'Per incuriam means a decision rendered by ignorance of a previous binding decision such as the decision of its own or of a court of coordinate or higher jurisdiction....' which is consistent with the view taken by the Hon'ble Supreme Court judgments in Bafna and National Insurance Company Limited (which is a Constitutional Bench).

42. The Appellant assailed the Impugned Order, where the Adjudicating Authority rejected the Section 7 application filed by the Appellant on a misinterpretation of Hon'ble Supreme Court's judgment in the matter of ***Vidarbha Industries (Supra)*** by holding that had CIRP been initiated, the CoC in exercise of its commercial wisdom would have withdrawn the petition and that initiation of insolvency proceedings, contrary to the decision of the majority of the secured creditors would be counter-productive, especially if most of the assets are secured, as such assets would neither be available for resolution nor for liquidation. The Appellant argued that the Adjudicating Authority came to such sweeping conclusion despite being conscious of the worsening financial health of the Respondent and noting that the account of the Respondent was

under the framework of CDR and had become NPA and the Respondent had reduced the offers made under various OTS proposals as the valuation of business had gone down and therefore, the lenders collectively authorised the Appellant to file an application under Section 7 of the Code.

43. The Appellant conceded that subsequently, the other lenders had exercised the alternatives under SARFAESI Act, 2002 and entered into the ICA, however, the same was not acceptable to the Appellant as the Appellant always believed in the objective of resolution of a Corporate Debtor under the Code, which would be more beneficial for all stakeholders.

44. The Appellant stated that the Adjudicating Authority could not differentiate the objectives of the IBC vis-à-vis SARFAESI Act, which are meant for different purpose. The Appellant submitted that the interest of a promoter is separate from the interests of a Corporate Debtor and the intent and focus of the IBC is for revival and survival of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation and the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests as was held by the Hon'ble High Court of Delhi in ***Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors.,*** *LPA 37 OF 2021*. On the other hand, the objective of SARFAESI is recovery of the debt which is a creditor's prerogative to exercise its right available under the Code and election of SARFAESI Act by majority lenders, does not prevent any

lender from proceeding under IBC. The Appellant submitted that even if the Appellant had chosen to proceed under SARFAESI, it would not have prevented the Appellant from filing an application under Section 7 of the Code and in this regard, cited judgment of this Appellate Tribunal in the matter of ***S. Ravindranathan (Supra)*** where it was categorically held that there is no impediment for an 'Applicant' to prefer an Application under Section 7 of the I&B Code, 2016 when already the proceedings under SARFAESI Act, 2002 are pending**.** Similarly, this Appellate Tribunal in the case of ***Karan Goeal Vs. M/s Pashupati Jewellers & Ors.,*** *[Comp. App. (AT) (Ins) No. 1021/2019]* decided on 01.10.2019 held that merely because suit has been filed by the Financial Creditor and pending, cannot be ground to reject the application under Section 7 of the Code which was also followed in Punjab National Bank vs. Vindhya Cereals Ltd., Company Appeal (AT) (Insolvency) No. 854 of 2019.

45. The Appellant empathetically reiterated that the Appellant's right is not bound by ICA had already been settled by the Hon'ble Supreme Court in its judgment dated 6.12.2021 upholding the judgment passed by the Hon'ble Bombay High Court in the Writ Petition No. 223 of 2020 in which the Hon'ble High Court had observed that that public sector financial institutions/ banks could not be compelled to accept the settlement of Resolution Plan of debtor and to sign ICA. The Appellant regretted that despite this clear position, the Adjudicating Authority incorrectly held that the Appellant seems to be in

violation of RBI's Guidelines by not signing of ICA and observing that it seems mandatory. The Appellant stated that such finding in contrary to position upheld by the Hon'ble Supreme Court's judgment.

46. Concluding his remarks, the Appellant strongly urged this Appellate tribunal to dismiss the Impugned Order to protect huge money involved of the lenders and to protect financial interest of the public at large.

47. Per contra, the Respondent denied all the averments made by the Appellant treating these as misleading and malicious.

48. At the outset, the Respondent stated that the Adjudicating Authority has gone through all the facts and the law into consideration before passing the Impugned Order which is legal, rational and comprehensive.

49. The Respondent negated the plea of the Appellant that the Adjudicating Authority has wrongly relied upon the judgment of ***Vidarbha Industries (Supra)*** treating as *per-incuriam.* The Respondent submitted that in the grounds of the Appeal the Appellant has not brought out the rational as to how the Adjudicating Authority erred in placing the reliance of ***Vidarbha Industries (Supra)*** while dismissing the Section 7 application to the Appellant herein. The only plea of the Appellant is that the ***Vidarbha Industries (Supra)*** is per-incuriam and on the other hand the ratio of ***Innoventive (Supra)*** is only applicable in case of Section 7 applications.

50. The Respondent submitted that the Hon'ble Supreme Court in ***Vidarbha Industries (Supra)*** judgment in Para 48 as clearly discussed earlier judgment including ***Innoventive (Supra).*** Thus, the ***Vidarbha Industries (Supra)*** was very conscious judgment and a path peaking judgment in order to support the revival of the Corporate Debtor.

51. The Respondent defended the Impugned Order and which is based on ***Vidarbha Industries (Supra)*** and elaborated that the ***Vidarbha Industries (Supra)*** categorically stated that in Section 7(5)(a) of the Code the legislative intent is very clear in using the word "may" in contrast to the word "shall" which used in identical Section relating to operational creditors as contained in Section 7(5)(a) of the Code and as such this is entirely the discretion of the Adjudicating Authority to accept the Section 7 application or otherwise.

52. The Respondent stated that the Impugned Order reliance on the decision of ***Vidarbha Industries (Supra)*** was legal and correct. The Respondent stated that in the judgment dated 22.09.2022 passed by the Hon'ble Supreme Court in the review petition filed against the Vidarbha Industries *judgement (**Axis Bank Ltd. v. Vidarbha Industries Ltd.** Review Petition No. 1043/2022 in CA No. 4633/2021)* ***(Vidarbha Industries Review Order)*** was on different as the ground for review of the judgement in Vidarbha Industries was the non consideration by the Court of another judgement of the Hon'ble Supreme Court in ES Krishnamurthy (supra) and this review petition was categorically dismissed

since the court noted that the question of whether Section 7(5) of the Code was mandatory or discretionary was not in issue in ***ES Krishnamurthy's*** case or any of the judgements relied on by the review applicant and that instead, ES Krishnamurthy dealt with the question of whether the Adjudicating Authority could foist a settlement on unwilling parties.

53. The Respondent also denied that the reliance by the Appellant on the decision of this Tribunal's order in ***TA Genco Ltd. (supra)*** (against which the appeal was dismissed simpliciter vide order dated 11.11.2022 of the Hon'ble Supreme Court) as the facts in that case were entirely in a different context.

54. The Respondent gave the background of the Corporate Debtor, which was also promoter of GTL Infrastructure Ltd. and are involved in business of independent telecom network services provider with a range of offering primary network operations and maintenance besides network planning, design and development contracts. The Respondent submitted that in this connection, he availed various financial facility from the Lenders including the Appellant. The Respondent gave details of such credit facilities availed by him and submitted that he took loan of Rs. 1400 Crores from Standard Chartered Bank (Mauritius) Ltd. ("NCD Lender") as well as an External Commercial Borrowings facility of USD 150 Million [equivalent to INR 750 crores (@Rs.50 to an USD as of December 2011)] from 10 Banks / Financial Institutions ("ECB Lenders"), the aggregate secured and unsecured exposure of the Respondent was Rs. 5314

Crores. The Respondent stated that the Appellant holds mere 4.47% share by value in secured interest of assets of the Respondent.

55. The Respondent conceded that in the year 2010, the Respondent came under financial distress due to several and extraneous factors beyond its control and therefore, he approached Lenders for sanctioning CDR and the Lenders issued letter of approval of CDR on 23.12.2011. The Respondent pleaded that in accordance with CDR, the Respondent continued to make payments in respect of the restructured debt and made various payments towards interest, principal, security sale and equity conversion close to Rs. 1643 Crores to its lenders till 2014. During the period 2015 till 2022, the Respondent has paid Rs. 1142 Crores, with which the Respondent has paid aggregate Rs. 2785 Crores as interest and principal repayment and equity conversion to various lenders.

56. The Respondent stated that despite all his sincere efforts, the Respondent could not meet its obligation towards CDR and therefore, the Lenders and the Respondent decided that restructuring the debt was no more viable and a one-time negotiated settlement involving sale of the various assets, investments and businesses of the Respondent was the only feasible option, accordingly, various One Time Settlement ("OTS") Proposals were submitted by the Respondent from time to time, first OTS proposal being submitted in 2014 and the last being submitted in 2022. However, none of the proposals fructified due to various reasons including delay in approvals by all lenders in a time bound manner and

consequently the value of OTS proposals kept diminishing due to passage of time and continued issues in the telecom sector.

57. The Respondent brought out the RBI issued the Prudential Framework for Resolution of Stressed Assets which inter alia provided for lenders to enter into an ICA which provided that any decision agreed by lenders representing 75% by value of total outstanding credit facilities and 60% of lenders by number shall be binding upon all the lenders. The Respondent submitted that in this regulatory background, at the Lender's meetings held on 05.07.2019 and 06.07.2019, the Lenders and the Respondent discussed a further revised form of the settlement proposal that was offered by Respondent. After deliberations on the said settlement proposal and the distribution proposed to the various categories of lenders, the said Lenders (except the Appellant) opined that since the Respondent was in an engineering, procurement and construction ('**EPC**') business, there was hardly any underlying asset that could be realized under any other mode of recovery and hence a OTS would be a better option and all the Lenders of the Respondent with the exception of the Appellant agreed to sign the ICA representing 91.82% by value and 93.75% by number of the debts of the Respondent.

58. The Respondent assailed the conduct of the Appellant who despite the fact that 91.82% in value of the CDR Lenders had signed the ICA, the Appellant proceeded to file the second insolvency petition dated 06.12.2019

against the Respondent before the Adjudicating Authority. The Respondent stated that due to such mala fide approach of the Appellant, the Respondent filed Writ Petition No. 223 of 2020 before the Hon'ble Bombay High Court, inter-alia seeking a declaration that the Prudential Framework issued by the RBI were mandatory on the Appellant in view of the decision of the majority of the Lenders to sign the ICA but vide judgment dated 03.02.2020, the Hon'ble Bombay High Court dismissed Writ Petition No. 223 of 2020 and held that the issue of maintainability of the above Petition ought to be raised before and decided by the Adjudicating Authority.

59. The Respondent then filed Special Leave Petition No. 5667 of 2020 before the Hon'ble Supreme Court of India against the judgment dated 03.02.2020 passed by the Hon'ble Bombay High Court, however, vide its Order dated 06.12.2021 the Hon'ble Court dismissed the SLP for the reasons recorded in the Order.

60. The Respondent brought out that during the JLF meeting held on 15.04.2021, 88% of the Lenders by value had voted in favour of transferring the Respondent's account to the National Asset Reconstruction Company Limited ("**NARCL**") and taken further steps towanks transferring the Respondent's account to NARCL and due diligence was being done by NARCL.

61. The Respondent stated that the Lenders have realized the following amounts:

a. During January 1, 2022 to January 17, 2022, Lenders have sold 1,85,99,435 number of shares pledged by the promoters and recovered value aggregating to INR 38.42 crores.

b. Between 2020 and 2022, the Respondent received emails from IDBI Bank's representative, informing the Respondent that funds to the tune of Rs. 119.90 crores (which was initially deposited by the Respondent) were remitted from the TRA/No Lien accounts to the Lenders, including the Appellant.

c. Lenders realized close to INR 501.68 crores by selling equity of GTL Infrastructure Limited ("**GIL**") and shares held by Promoter.

d. Lenders have sold immovable properties, which has resulted in monetization of approximately Rs. 120.55 Crores.

e. Accordingly in terms of the above, the Lenders have already realized close to Rs. 780.55 Crores.

62. The Respondent stated that Rs. 185 Crores is estimated to be realized by the lenders by sale of 7 immovable properties of the Respondent. The Respondent submitted that further estimated recovery (net of taxes) is approximately Rs. 180 Crores (on account of sale of OME business) and claim aggregating to Rs. 590 Crores (in Arbitration against Maharashtra State Electricity Distribution Company Limited and GIL).

63. The Respondent strongly pleaded that the initiation of CIRP would not serve any purpose of resolution or value maximization under the Code as

recovery actions that had already been taken by the Lenders outside the Code, there was nothing left to "revive" per se and initiation of CIRP despite these circumstances, it would lead to significant loss in time and loss in value.

64. The Respondent defended the Impugned Order, where the Adjudicating Authority had rightly exercised its discretion and applied its mind to all relevant factors including: the feasibility of initiation of CIRP, the viability of the corporate debtor under the existing management and actions already pursued by the majority of Lenders representing more than 90% including signing ICA.

65. The Respondent pleaded that the objective of the Code is for resolution of the Corporate Debtor and not to kill the Corporate Debtor and in view of this, in case the Adjudicating Authority is satisfied that the Corporate Debtor is likely to survive and remain viable then the other alternative should be explored like CDR/SDR/ OTS and should not put the Corporate Debtor on the path of CIRP and/ or liquidation at the latest stage. The Respondent also denied the averments made by the Appellant that the role of the Adjudicating Authority is limited to determine the debt and default and once these criteria are met the Adjudicating Authority ought to have admitted Section 7 application. The Respondent further elaborated that if this approach is adopted the whole process of the Code will become a mechanical exercise without judicial application of mind and therefore, ***Vidarbha Industries (Supra)*** clarified the correct legal position that it

is for the Adjudicating Authority to ascertain viability and sustainability of the Corporate Debtor as in long term this approach would benefit everyone.

66. The Respondent submitted several events have taken place during the pendency of the present appeal filed by the Appellant on 29.12.2022, challenging the Impugned Order dated 18.11.2022 i.e., on 12.01.2024 – Respondent submitted its final revised offer of Rs. 375 Crores to the lenders, which included a cash payment of Rs. 268.07 Crores, an estimated recovery of Rs. 106.93 Crores from the auction for the balance 5 immovable properties of Respondent and a pass through of the proceedings in pending arbitration proceeds (post legal expenses) in the proportion of 75:25 (i.e., 75% to the lenders and 25% to the Respondent) ("**Final OTS**"). The Respondent submitted that on 20.01.2024 – IDBI Bank Ltd. (as lead Lender) communicated the secured lenders' in-principle agreement to accept the Respondent's Final OTS and also set out specific steps for processing of the Final OTS including: a) deposit by Respondent of INR 50 crore as agreed upfront amount in an escrow account; b) sale of Respondent's balance 5 immovable properties under SARFAESI proceedings and distribution of proceeds among the secured lenders. This was accepted by Respondent on 20.01.2024. The Respondent stated that on 03.02.2024 an Escrow Agreement was executed between the Respondent, IDBI Trusteeship Services Limited (as the Security Trustee) and IDBI Bank Limited (as Monitoring Institution and as Escrow Bank), setting out

inter alia the terms of deposit of the Final OTS amount of INR 375 crores by the Respondent in an Escrow Account for the benefit of all CDR secured lenders (including the Appellant).

67. The Respondent stated that on 15.03.2024 – in terms of the Final OTS, 4 out of the balance 5 immovable properties of Respondent were sold, for Rs. 101 Crores and the proceeds were distributed amount all secured lenders and the Appellant also received its share of Rs. 8.65 Crores. The Respondent stated that IDBI Bank communicated to the Respondent on 21.03.2024 that the secured lenders were entitled to recover a total amount of Rs. 274.78 Crores from the amounts being deposited by the Respondent in the Escrow Account, taking into account the amounts already recovered by the lenders from the sale of properties in SARFAESI proceedings and the Appellant was entitled to receive INR 23.54 crores out of the amounts in the Escrow Account. It is the case of the Respondent that between 25.01.2024 to 06.08.2024 the Respondent deposited Rs. 274.78 Crores in the Escrow Account which was the entire amount required to be deposited by Respondent in terms of the Final OTS.

68. The Respondent empathetically submitted that the Final OTS of Rs. 375 Crores has already been satisfied by Respondent through sale of the Respondent's properties and deposited in the Escrow Account, accepted and acted upon by the secured lenders and assailed the Appellant for raising objections to the Final OTS. The Respondent stated that in law, the original

debt owed to the Appellant stood substituted by the terms of the Final OTS and finally settled as Appellant has received money. The Respondent stated that considerable money have already been recovered by the secured lenders from sale of 9 out of 10 of Respondent's immovable properties, sale of shares, sale of equity of GTL Infrastructure Ltd. held by Respondent's lenders and various amounts have also debited/appropriated by the lenders from the Respondent's TRA account pursuant to deposits made by Respondent.

69. The Respondent also refuted the claims of the Appellant that ***Vidarbha Industries (Supra)*** is not a substantial law and is limited to its own fact and rather ***Innoventive Industries Ltd. (Supra)*** is the only good law in deciding cases of debt and default. The Respondent submitted that this position is not correct and ***Vidarbha Industries (Supra)*** is a correct and latest law which is pronounced after judgment of ***Innoventive Industries Ltd. (Supra)*** .

70. The Respondent submitted that judgment in ***Innoventive Industries Ltd. (Supra)*** rendered at the time when the IBC was in nascent stage and laid down of law relating to IBC and subsequently large number of litigations have helped IBC to evolve itself and came to correct path for benefit of all stakeholders including the borrowers and the lenders along with other stakeholders and in this background ***Vidarbha Industries (Supra)*** is a path breaking judgment which allows the Corporate Debtor to flourish and continue as going concern

and only the errant and unscrupulous companies are to be sent to the CIRP, which is not the case with the Respondent.

71. The Respondent submitted that the decision of ***Vidarbha Industries (Supra),*** is squarely applicable to the instant case. The ratio in the aforesaid judgment clearly provides the Adjudicating Authority discretion to admit Section 7 application, despite the existence of a financial debt and default. The Respondent stated that the Hon'ble Supreme Court has clearly held that the Adjudicating Authority has discretion under Section 7 of the Code and it ought to exercise this discretion in situations where an entity is not really "in the red" especially where there is concrete evidence of monies being due to it as a result of decrees, awards and pending arbitrations along with other relevant factors, such as steady revenue stream need to be considered.

72. The Respondent submitted that the Adjudicating Authority in para 11 gave reasoning of the judgment, as earlier the pleadings were complete and only for brevity purpose, the Adjudicating Authority has restricted its rationale in Para 11 and rather has given its clear reasoning in para 11. The Respondent assailed the conduct of the Appellant for generating unnecessary controversy on such trivial and hyper technical grounds.

73. The Respondent submitted that the CDR failed not because of the Respondent but due to the circumstances beyond control of Respondent. The Respondent stated that these events led to non implementation of CDR and

therefore the debt became multifold putting extreme hardship and unbearable financial distress on the Respondent.

74. The Respondent submitted that the Appellant has not appreciated that in the event that the debts of all the lenders are not assigned to the NARCL, the NARCL would not be in a position to restructure the entire debts owed by the Respondent, which would defeat the very purpose of the entire process of sale of the debt of the Respondent to the NARCL due to adamant approach by the Appellant.

75. The Respondent reiterated in view of these clear facts, the Appeal devoid of any merit should be dismissed with exemplary cost. The Respondent submitted that alternatively, this Appellate Tribunal may consider to remand the matter to Adjudicating Authority for fresh consideration after hearing both the sides. The Respondent stated that he would like to bring out to the notice of the Adjudicating Authority the financial statements, facts like various arbitrations award in his favour which the Respondent has claimed w.r.t. to its viability and sustainability as well as its ability to settle outstanding debts of the Lenders.

Findings

76. Since, we have already noted the facts of the case, during pleadings of the Appellant and the Respondent, we will not reiterate the same once again.

77. Following issues emerges in the present appeal :-

(i) Whether there was a debt and default which could trigger Section 7 application filed by the Appellant.

(ii) (a) Whether, ratio of ***Vidarbha Industries (Supra)*** was applicable in the present case based on which the Adjudicating Authority rejected the application of the Appellant filed under Section 7 of the Code.

(b) Whether, there was judicious application of mind by the Adjudicating Authority as evident in the Impugned Order while rejecting the application of the Appellant under Section 7 of the Code.

(iii) Whether the Adjudicating Authority ignored the acknowledgements of debt and default by the Respondent in its various statements, books of accounts, affidavit in reply and Written Submissions filed before the Adjudicating Authority .

(iv) Whether, the Appellant was duty bound to agree with majority of the lenders to sign to ICA and also to assign to debt to NARCL.

Since, all these issues are inter-related, inter-connected and inter-dependent, we shall deal with these issues in conjoint manner in subsequent discussions.

78. Issue No. (i) Whether there was a debt and default which could trigger Section 7 application filed by the Appellant.

- We note that the Appellant filed the application under Section 7 of the Code in CP (IB) No. 4535/(MB)/ 2019 for initiation of CIRP against the

Respondent and in Para IV of Section 7 Application, total amount has been shown as default Rs. 534,76,33,736.81 and date of default has been shown as 29.09.2019. Suitable details and documents have been attached to these defaults by the Appellant in his application under Section 7 of the Code.

- We have already noted that due to financial distress. the lenders and the Respondent agreed for CDR and the portion pertaining to the Appellant for this CDR package was Rs. 199.57 Crores. We note that the CDR failed and the account of Respondent became NPA on 29.09.2019 and the statutory auditors predated NPA date w.e.f. 31.12.2011 i.e., w.r.t., commencement of CDR invocation year i.e., from 2011 as the terms & conditions with respect to pricing and repayment schedule as per Pre-CDR has been restored.
- We also note that the suitable correspondence was made by the lenders including the Appellant to the Respondent for serving its financial liability and finally the loan recall notice was also issued by the Appellant.
- The various financial statements were brought to our notice which clearly demonstrate the acknowledgments of default by the Respondent in its financial statement including the annual statements for the Financial Year 2017 -2018.

- We note that the Impugned Order consist of 11 Paras and the contentions/ pleadings of the parties were discussed in paras No. 1 to 10 and finally in solitary Para 11 after some analysis like signing of ICA by more than 90% of secured lenders, commercial wisdom of CoC, Section 7 application of the Appellant has been rejected in view of the ***Vidarbha Industries (Supra).***
- Even during the pleading, the Respondent did not dispute the debts and the acknowledgments made in its annual Financial Statements. The Respondent however explained the defaults on several grounds including the external factors beyond its control which caused financial distress to the Respondent and also accepted that there have been some irregularities in payments.
- In our order dated 30.09.2024, liberty was granted to the Appellant and Respondent to file Written Submissions subsequent to which the Respondent has filed the Written Submissions vide Diary No. 88388 dated 07.10.2024. From the Written Submission, we note that the following points have been raised by the Respondent under 3 headings :-

> *"(I) The present appeal is liable to be dismissed since during the pendency of the present appeal, the Appellant along with all secured lenders of Respondent have accepted and acted upon the Final OTS which stands implemented.*

(II) The Appellant's attempts to unilaterally resile from the terms of the Final OTS are clear evidence of the fact that the Appellant's petition is being pursued solely for recovery which is impermissible under the scheme of the IBC.

(III) Without prejudice to the contentions above, the judgment of the Hon'ble Supreme Court in Vidarbha Industries continues to be good law as on date and the Ld. NCLT had rightly exercised its discretion in para 11 of the Impugned Order in rejecting Appellant's petition"

(Emphasis Supplied)

- From above issues and the details given by the Respondent, we do not find any submissions regarding denial of debt and default. Similarly, we do not find any denial on the part of the Respondent regarding its acknowledgements in its financial statements.
- In view of above, we hold that there was outstanding debt and there was a clear default on the part of the Respondent in meeting its obligation which entitles the Appellant to take suitable remedy as per the Code and therefore, he correctly filed the Application under Section 7 of the Code.
- We do not find any explicit discussions regarding debt and default and any detailed analysis regarding acknowledgments of defaults by the Respondent in the Impugned Order. From the various documents

submitted before us including the various Financial Statements of the Respondent, we find that there has been clear debt and default and acknowledgement by the Respondent. In view of these discussions, the debt and default is established in favour of the Appellant.

79. Issue No. (ii) (a) Whether, ratio of *Vidarbha Industries (Supra)* was applicable in the present case based on which the Adjudicating Authority rejected the application of the Appellant filed under Section 7 of the Code.

(b) Whether, there was judicious application of mind by the Adjudicating Authority as evident in the Impugned Order while rejecting the application of the Appellant under Section 7 of the Code.

- We note that the Impugned Order is entirely based on the ratio of ***Vidarbha Industries (Supra)*** and therefore it would be desirable to look into the ratio and the relevant facts, ***Vidarbha Industries (Supra)*** which reads as under :-

> *" 24. Mr Jaideep Gupta, Senior Advocate appearing on behalf of the appellant submitted that the appellant had applied for stay of the proceedings before NCLT, Mumbai in extraordinary circumstances, where the appellant had not been able to pay the dues of the respondent, only because an appeal filed by MERC, being Appeal No. 372 of 2017, against an Order dated 3-11-2016 [Vidarbha Industries*

Power Ltd. v. Maharashtra Electricity Regulatory Commission, 2016 SCC OnLine Aptel 137] passed by APTEL in favour of the appellant, was pending in this Court. Since the aforesaid appeal is pending in this Court, the appellant is unable to realise a sum of Rs 1730 crores, which is due and payable to the appellant, in terms of the order of APTEL.

37. Mr Mehta argued that the application under Section 7 IBC was filed by the respondent financial creditor before NCLT, Mumbai on 15-1-2020. The debt due from the appellant to the respondent financial creditor was approximately Rs 553 crores. The total debt owed by the appellant to the consortium of lenders of which the respondent financial creditor is the lead bank was approximately Rs 2727 crores.

59. There can be no doubt that a corporate debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the corporate debtor are not extraneous matters.

60. The adjudicating authority (NCLT) found the dispute of the corporate debtor with the electricity regulator or the recipient of electricity would be extraneous to the matters involved in the petition. Disputes with the electricity regulator or the recipient of electricity may not be of much relevance. The question is whether an award of APTEL in favour of the corporate debtor, can completely be

disregarded by the adjudicating authority (NCLT), when it is claimed that, in terms of the award, a sum of Rs 1730 crores, that is, an amount far exceeding the claim of the financial creditor, is realisable by the corporate debtor. The answer, in our view, is necessarily in the negative.

75. Significantly, the legislature has in its wisdom used the word "may" in Section 7(5)(a) IBC in respect of an application for CIRP initiated by a financial creditor against a corporate debtor but has used the expression "shall" in the otherwise almost identical provision of Section 9(5) IBC relating to the initiation of CIRP by an operational creditor.

76. The fact that the legislature used "may" in Section 7(5)(a) IBC but a different word, that is, "shall" in the otherwise almost identical provision of Section 9(5)(a) shows that "may" and "shall" in the two provisions are intended to convey a different meaning. It is apparent that the legislature intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice have been delivered to the corporate debtor by the operational creditor and no notice of dispute has been received by the

operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

81. The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalise solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) IBC, therefore, confers discretionary power on the adjudicating authority (NCLT) to admit an application of a financial creditor under Section 7 IBC for initiation of CIRP.

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) 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."

(Emphasis Supplied)

- From above, it is seen that there was a clear award approved by APTEL in favour of the ***Vidarbha Industries (Supra)*** of Rs. 1730 Crores pending before the Hon'ble Supreme Court of India which was much more than the amount claimed by the Financial Creditor i.e., Axis Bank of Rs. 553.28 Crores. In view of this scenario, the Hon'ble Supreme Court of India held that it was discretion of the Adjudicating Authority, since the word "may" has been used in Section 7 and thus the Adjudicating Authority should have given a chance to the Corporate Debtor to continue rather than admitting Section 7 application.
- In the present case, the total outstanding of all lenders was thousands of crores and debt claims of Appellant was itself Rs.534.76 Crores, whereas, the Respondent proposed the final OTS of Rs. 375 to satisfy all secured lenders including the Appellant. We note that the Final OTS including cash payment of Rs. 268.07 Crores, as estimated recovery of Rs. 106.93 Crores from auction of 5 immovable properties and pass through all the proceedings in pending arbitration (post legal expenses) in proportion of (75:25) i.e., 75% to Lenders and 25% to Respondent. We note from the submissions of the Respondent that 4 out of 5 immovable properties were sold @ Rs. 101 Crores and money has been distributed amongst lenders and the Appellant has recovered Rs. 8.65 Crores.

- These facts do no satisfy ratio of Vidarbha Industries (Supra) where the APTEL Arbitration award in Vidarbha (Corporate Debtor) was Rs. 1730 Crores i.e., three times more than the claims of Financial Creditor i.e., Axis Bank outstanding dues Rs. 553.28 Crores and case was at final stage of hearing before the Hon'ble Supreme Court of India.
- Here is the case where the Respondent was obligated to pay thousands of crores of rupees to all the secured lender including the Appellant. In is undisputed fact that the Respondent would not pay secured lenders and defaulters. The Respondent approached the Secured Lenders for CDR, which was also approved by the Secured Lenders and later the approval of CDR was issued on 23.12.2011. We further note that the Respondent defaulted to meet its repayment obligations to even this CDR and account of Respondent became NPA on 31.12.2011.
- We note that on 22.03.2018, the Respondent submitted a Resolution Plan of Rs. 739 Crores by way of liquidation of its assets which tantamount to meagre 14% of outstanding debts and hence same was rejected by secured lenders.
- The Respondent also gave several OTS proposals which were found unaccepted to lenders. The Respondent gave OTS of Rs. 1638 Crores on 04.04.2018, which was contingent on recovery from pending arbitration cases and was based on structure of an unsecured bonds of tenor of 5

years. We also note that the JLF in their meeting held on 27.06.2018 rejected this settlement proposal being low and contingent on several future events like Arbitration Award and Long tenor of five years and therefore, decided that Secured Lenders will recall credit facility from the Respondent by 10.07.2018 and accordingly the Appellant issued recall notice to the Respondent on 10.07.2018.

- We note that on request of the Respondent, JLF meeting was held on 19.06.2019, where the Respondent offered yet another lower value OTS of Rs. 894 Crores, which was also rejected by the Lenders Interestingly, we observed that while rejecting the OTS of Rs. 894 Crores of the Respondent, the Lenders also discussed whether to approached the Adjudicating Authority for CIRP or go for ICA. The Appellant emphatically pleaded before us that in the same meeting, the Appellant informed the other secured lenders thus the Appellant is not in a position to sign ICA as he has already filed his Section 7 application before the Adjudicating Authority.
- During hearing before us, in the present appeal, the Respondent gave final revised OTS of Rs. 375 Crores, including, cash portion, further Arbitration Awards expected to come in favour of the Respondent.
- We wonder as how these facts of dynamic and much lower OTS than the earlier CDR proposal with conditions and futuristic in approach can meet

even the criteria and ratio of ***Vidarbha Industries (Supra)***. In ***Vidarbha Industries (Supra)*** the Arbitration Award which came in favour of the Corporate Debtor was thrice more than the claims of Financial Creditor, hence it has all possibility of revival and survival. The present case is based on various events and revised OTS can not be covered in ***Vidarbha Industries (Supra)*** ratio.

- We further note that the ***Vidarbha Industries (Supra)*** ratio was further discussed by the Hon'ble Supreme Court of India in the matter of ***Axis Bank Limited v. Vidarbha Industries Power Limited Review Petition*** *[*(Civil) No. 1043 of 2022 in Civil Appeal No. 4633 of 2021 ("**Vidarbha Review Order**")] and the relevant portion reads as under :-

> *"**3.** In para 31, extracted hereinabove, to which reference has been made by the learned Solicitor General of India, this Court observed that 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) 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.*
>
> ***4.** The question of whether Section 7 sub-section (5) was mandatory or discretionary was not in issue in any of the judgments cited on behalf of the review applicant. What was*

in issue in Krishnamurthy case [E.S. Krishnamurthy v. Bharath Hi-Tecch Builders (P) Ltd., (2022) 3 SCC 161 : (2022) 2 SCC (Civ) 129] was whether the adjudicating authority could foist a settlement on unwilling parties. That issue was answered in the negative.

***6.** The elucidation in para 90 and other paragraphs [of the judgment under review] [Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 : (2022) 4 SCC (Civ) 329] were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.*

***7.** To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."*

(Emphasis Supplied)

- We observe that this judgment was delivered by the same Hon'ble Judges who gave original Vidarbha Industries (Supra) judgment and it has been made clear that ratio was given in the context of the facts of the case on hand.
- The Hon'ble Supreme Court of India in the matter of ***Innoventive Industries Ltd. (Supra)*** brought out relevant ratio as contained in following paras :-

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. ...

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)

- We note that ***Innoventive Industries Ltd. (Supra)*** clearly stipulated that once debt and default is established, the logical decision of the Adjudicating Authority ought to admit Section 7 application.
- We would also like to record other facts of the present case to examine whether the ratio of ***Vidarbha Industries (Supra)*** is applicable in the facts of the present case or otherwise. We note that as per Annual Report of the Respondent for the year 2017-18, the Respondent had incurred

losses of Rs. 827.41 Crores and negative networth of Rs. 6412.44 Crores (Pg 179 of appeal book). This does not infuse rosy picture regarding viability of the Respondent.

- We consciously note that CDR failed due to default of the Respondent in meeting its agreed obligations. As such we feel that the Adjudicating Authority should have gone into details and should have analysed all facts and figures before rejecting the application of the Appellant under Section 7 of the Code and should have taken all figures, based on numerators as well as denominators, into consideration to have meaningful analysis in context. It would have been desirable for the Adjudicating Authority to go into details as what was the total outstanding claims all the lenders especially the Appellant who filed Section 7 application pre CDR as well as post CDR and what was the total payments made thereon. This would have given a clear picture in terms of total payment made by the Respondent on account of principals, interest and other ancillary charges like penal interest, if any, happened due to non payment on part of the Respondent to the Lenders including the Appellant. The Adjudicating Authority has not gone into any of these details, as such we are not in position to support the Impugned Order rejecting Section 7 application of the Appellant only on the ground of ***Vidarbha Industries (Supra)***.

- We also observed that rational of ***Vidarbha Industries (Supra)*** was strictly in context of outstanding debts v/s likely recovering in favour of ***Vidarbha Industries (Supra)*** as Corporate Debtor. The ratio is quite clear that the Corporate Debtor has more than fair chances of revival. We consciously note that ***Vidarbha Industries (Supra)*** was not on issue like signing of ICA by 90% of Lenders or perceived commercial wisdom of CoC even before the CIRP was initiated and CoC was formed. Hence, by no way, ***Vidarbha Industries (Supra)*** protect the Impugned Order passed by the Adjudicating Authority.
- Thus, in view of all above detailed analysis herein above, we are of the view that the Adjudicating Authority has not applied the ratio of ***Vidarbha Industries (Supra)*** correctly in the present case while rejecting the application of the Appellant filed under Section 7 of the Code.

80. <u>Issue No. (iii) Whether the Adjudicating Authority ignored the acknowledgements of debt and default by the Respondent in its various statements, books of accounts, affidavit in reply and Written Submissions filed before the Adjudicating Authority .</u>

- The following have been brought out during pleadings to our notice regarding acknowledgements of debts and defaults by the Respondent.

  (i) On 04.04.2018, the Respondent admitted his default by submitting OTS proposal. Similarly, in JLF Meeting held on 19.06.2019, GTL

offered a reduced OTS proposal of Rs. 894 Crores and thereby admitting the default and similarly on 07.04.2022 the Respondent reply admitted that due to worsening financial conditions there have been repayment issue. All these makes position clear.

(ii) As regarding default the same has been reflected in annual report of the Corporate Debtor for the financial year 2017-2018 where the admitted default in repayment in rupee term loan has been reflected.

(iii) We also note that the GTL has further admitted its default in payment of facilities which led to CDR as evident from GTL affidavit in reply to Section 7 petition before the Adjudicating Authority.

(iv) Similarly, we note that the record of default of the account of GTL classify as "doubtful restructured" and has been recorded in CRILC report dated 04.12.2019.

(v) Furthermore, default has been acknowledged and identified in the report of information utility, national e-services limited dated 05.12.2019.

- Thus, we note that there are several acknowledgements of debt and default on the part of the Corporate Debtor.

- In view of above, we hold that there is a clear debt and default **backed by several acknowledgements by** the Respondent which entitled the Appellant to file application under Section 7 of the Code before the Adjudicating Authority.

81. <u>Issue (iv) Whether, the Appellant was duty bound to agree with majority of the lenders to sign ICA and also to assign to debt to NARCL.</u>

- We have also noted that the Appellant has not agreed to assign its debts to NARCL along with few other lenders and not signed ICA, against which the Respondent had approached the Hon'ble Bombay High Court in WP No. 223 of 2020, which was dismissed vide order dated 03.02.2020 .
- At this stage, we would like to take into consideration the relevant portion of relevant paras of the Judgment of the Hon'ble Bombay High Court, which was filed both by the GTL (the Respondent herein) and GTL Infrastructure Ltd. (Respondent in the Company Appeal (AT) (Ins.) No. 68 of 2023 (also in appeal before us and order reserved) (GTL is promoter company of GTL Infrastructure Ltd.). The relevant part of the judgment reads as under:-
- ***GTL Infrastructure Limited vs. Canara Bank*** …… in Writ Petition No. 1893 of 2019 and ***GTL Limited vs. Union of India*** ---- in Writ Petition No. 223 of 2020

"2. These two petitions were heard together and as they involve similar questions and issues, they are disposed of by this common judgment.

4. The relief claimed in the writ petition is that this Court should issue a writ of mandamus or any other appropriate writ, order or direction, directing respondent Nos.1 to 6 to forthwith comply with paragraph 6.4 of the Master Circular dated 1st July, 2015 issued by the Reserve Bank of India (RBI).

45. ....The petitioner is impugning the actions/omissions of respondent Nos.1 to 6 on the grounds set out in the petition. In ground B, reliance is placed upon para 6.4 of the IRAC guidelines, which reads as under :-

"6.4 Procedure for sale of Bank's/ FI's financial assets to ARC including valuation and pricing aspects.....

(d) (i) .....

(ii) In the case of consortium/ multiple banking arrangements, if 75% (by value) of the banks/ FIs decide to accept the offer, the remaining banks/ FIs will be obligated to accept the offer" (Emphasis supplied).

***59.** The reference to these directives, according to respondent No. 1, enables them to file the application under the IBC. Therefore, filing of that application is justified. It is contended that the Reserve Bank of India, after the Supreme Court judgment dated 12th February, 2018, issued a new*

circular dated 7th June, 2019 on Prudential Framework for Resolution of Stressed Assets. Pursuant to the new circular, the lenders, including respondent No. 1, are free to choose to initiate legal proceeding for insolvency or recovery in accordance with the provisions of new circular. It is stated that all the contentions of the petitioner in this writ petition are obsolete and the petitioner has no grounds to seek any relief under the circular of the Reserve Bank of India. Under the circulars of the Reserve Bank of India, including IRAC guidelines, the Reserve Bank of India issued directions to the banks and financials for the purpose of managing their stressed assets and the borrowers of such banks and financial institutions have no say in such matters.

***60.** It is, therefore, submitted that respondent No. 1 is a financial creditor and the proceedings initiated by respondent before the National Company Law Tribunal (for short, "NCLT") be continued in the interest of justice and that of all stakeholders, including the petitioner. Further, the proceedings under the IBC are not recovery action, but to prepare the resolution plan in the best financial interest of all stakeholders under the supervision of the NCLT. In these circumstances, the prayer is to reject the petition.*

*62. On these pleadings, the petition has been instituted and there is one **more petition filed, namely, Writ Petition (L) No.223 of 2020.** In that petition, **the petitioner is stated to be GTL Limited** and it invokes the jurisdiction of this Court under **Article 226** of the Constitution of India **for claiming***

the relief/direction against respondent No.7 to that petition (Canara Bank) to forthwith withdraw and cancel the Recall Notice dated 10th July, 2018, *copy of which is at Exhibit 'R' to the petition, letter dated 4th June, 2019, copy of which is at Exhibit 'BB', letter dated 27th June, 2019, copy of which is at Exhibit-II and the letter dated 12nd December, 2019, copy of which is at Exhibit 'VV' to the petition.*

65…. It is then alleged that the lenders' meetings were held to discuss the proposals, but respondent No.7 informed that it has already approached the NCLT. Since there was no agreement to settle the dues, eventually, the seventh respondent has decided to pursue the Recall Notice. It is in these circumstances that the Recall Notice is challenged on various grounds….

67. It is on the above materials that we have heard Mr.Kamdar, learned senior counsel appearing on behalf of the petitioner in Writ Petition No.1893 of 2019 and Mr.Navroz Seervai, learned senior counsel appearing on behalf of the petitioner in other petition.

69. These arguments are adopted by Mr.Seervai and he has also emphasised that the Canara Bank is bent upon on liquidating or winding up the petitioner. ….

It is, ***therefore, contended by Mr.Seervai that the bank must be directed to execute an inter-creditor agreement and that is mandatory. If the Resolution of Stressed Assets has to be done, then, the signing of the agreement by all***

the creditors is necessary. For these reasons, he would submit that the writ petition be allowed.

73. In the first petition, the prayer is to issue such a writ directing respondent Nos.1 to 6 to forthwith comply with 1 AIR 2013 SC 1812 paragraph 6.4 of the Master Circular dated 1 st July, 2015 issued by the Reserve Bank of India.

74…. The primary responsibility for making adequate provisions for any diminution in the value of loan assets, investment or other assets is that of the bank managements and its statutory auditors. There has to be a inspecting officer of the Reserve Bank of India whose assessment furnished to the bank will assist it and statutory auditors in taking a decision with regard to making adequate and necessary provisions in terms of prudential guidelines. The prudential norms, the classification of assets would then enable the provisioning. Now, the argument of the learned senior counsel is based on para 6.4 of this circular. This para sets out the procedure for sale of banks/financial institutions' financial assets to Securitisation Company and Reconstruction Company, including valuation and pricing aspects. This paragraph reads as under :-

"6.4 Procedure for sale of banks'/FIs' financial assets to SC/RC, including valuation and pricing aspects

(a) The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) allows acquisition of financial assets …

(b) Banks/FIs, which propose to sell to SC/RC their financial assets should ensure that the sale is conducted in a prudent manner in accordance with a policy approved by the Board. The Board shall lay down policies and guidelines covering, inter alia, i. Financial assets to be sold;

...(d) (i) Each bank/FI will make its own assessment of the value offered by the SC/RC for the financial asset and decide whether to accept or reject the offer.

(ii) In the case of consortium/multiple banking arrangements, if 75% (by value) of the banks/FIs decide to accept the offer, the remaining banks/FIs will be obligated to accept the offer....

75. Mr. Kamdar would submit by relying upon clause (d)(ii) of this paragraph that the writ be issued. However, he omits from his arguments other clauses of para 6.4. The clauses would reveal that the financial institutions and banks can acquire financial assets. This can be done by taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act"). This provides for sale of financial assets on 'without recourse' basis. This means the credit risk associated with the financial assets being transferred to the creditors. This is subject to unrealised part of the asset reverting to the seller bank/financial institution. The banks are directed to ensure that the effect of the sale of the financial assets should be such that the asset is taken off the books of the

bank/financial institution and after the sale, there should not be any known liability devolving on the bank/financial institution. Thereafter, how the sale is to be conducted in a prudent manner, in accordance with the policy approved by the Board and what policy and guidelines the Board should lay down is set out in clause (b) of para 6.4. ...

*76. The entire set of guidelines denote that this is an advise, caution and guidance provided on sale of financial assets to Securitisation Company (SC) and Reconstruction Company (RC). ...**a procedure has to be followed and in the case of consortium/multiple banking arrangements, if 75% (by value) of the banks/financial institutions decide to accept the offer, the remaining banks/financial institutions will be obligated to accept the offer. However, this is preceded by an assessment of each bank/ financial institution of the value offered by the Securitisation Company/Reconstruction Company for the financial asset and decide whether to accept or reject the offer.** Further, there cannot be a transfer to this Securitisation Company/ Reconstruction Company at a contingent price, whereby, in the event of shortfall in the realization by the Securitisation Company/Reconstruction Company, the banks/financial institutions would have to bear a part of the shortfall. Finally, if the auction process is used for sale of non-performing assets to Securitisation Companies/ Reconstruction Companies, that should be more transparent*

and complying with what is laid down in para 6.4 clause (d)(iv).

77. Mr.Kamdar, therefore, is not correct in arguing that this circular ought to be followed and must be directed to be followed by respondent Nos.1 to 6, even if that is containing a caution, advise and guidance. It is common ground that the petitioner says that these guidelines/norms should be applied and there is no choice not to abide by it. The argument is that since more than 75% (by value) of the lenders of the petitioner have assigned all their rights, title and interest in the financial facilities granted by them to the petitioner in favour of respondent No.7 by executing assignment agreements, by virtue of the IRAC guidelines, all other lenders of the petitioner are obligated to accept the offer of respondent No.7 for assignment of their respective rights, title and interest in the financial facilities granted to the petitioner. To our mind, this understanding of the senior counsel is flawed and erroneous simply because there is an obligation only when the guidance is adhered to and all precautions are taken before the assignment arrangement for sale. ***Once these are guidelines and they cannot be elevated or placed at the level of a binding rule, regulation and statute, then, we cannot accept the arguments of Mr. Kamdar.*** *Assuming that these are fulfilled, as projected by the petitioner, still the decision to be taken requires balancing and weighing of several factors.* ***There is a risk which has to be taken and ultimately the policy must be***

applied on case-to-case basis. We cannot direct respondent Nos.1 to 6, who are financial institutions/banks, to agree to the demand of the petitioner. If these are policy matters and dealing with fiscal and financial issues, then, the discretion of the banks/financial institutions cannot be taken away by issuing a command or writ *contrary to the expressed terms and conditions of the policy. The* ***policy document must be read as a whole and nothing should be read, as is attempted, in isolation or out of context. In these circumstances, we do not think that the petitioner can claim the writ****.* ***In fact, in the grounds of this petition, respondent No.1 is targeted and it is stated that its actions are mala fide and arbitrary. It is seeking to recover monies from the petitioner under the original financial documents*** *after a part of the respondent No.1's debt has been converted into equity under the SDR Scheme. Now, we cannot attribute mala fides and arbitrariness so easily and casually in financial matters to a public sector bank. That bank is the custodian of public funds. It holds them in trust for the public.* ***It is not expected to surrender and sacrifice its interests, particularly legal rights merely because the*** *petitioner desires that it should join in total restructuring of the debt of the petitioner or total waiver.* ***We must bear in mind that before us is a debtor who owes thousands of crores to these financial institutions and banks and it is dictating to them to accept the proposal of settlement or restructuring of its debt.*** *The proposal has to be evaluated*

and considered in the backdrop of its long term implications and consequences. ***If the bank adopts such a course, then, we cannot direct the bank to act contrary to the same. That would mean calling upon the bank not to act for public good and in public interest.***

79. We do not think that the grounds raised in this petition, consistent with which Mr.Kamdar raised the arguments, enable us to issue the writ as prayed for.

80. The grounds in the writ petition project a version of the petitioner based on which a relief in the nature of specific performance of contractual obligations is sought in this writ petition. If we make a reference to grounds (N), (O) and (P), then, it is evident that the petitioner say that it has fulfilled its part of promise or obligation and respondent Nos.1 to 6 have refused to comply with the guidelines despite the same. Now, what the reciprocal or corresponding obligations qua the dues of the lenders are and whether they are contractual or statutory in character would have to be established and proved. If these are contractual obligations, then, whether there is absolute refusal to perform the obligations or discharge the duties or that the duties and obligations allegedly attributed to the lenders have been performed only in part and not in full are matters, which would have to be established and proved by the petitioner either in substantive legal proceedings or in defence to the proceedings instituted against it by respondent No.7. ***To our mind, it would be highly risky and unsafe to rely on the***

version of the petitioner and issue the writ of mandamus as prayed.

*81. ...**The standstill clause available under the SDR expired on 19 th March, 2018. Therefore, by the Reserve Bank of India guidelines, the petitioner's accounts were classified as non-performing assets by the statutory auditors with retrospective effect from 1st July, 2011. This is on account of failure or non-compliance with the CDR and SDR packages.** The company has failed to meet its repayment obligations towards the Canara Bank and committed breaches and defaults under financial documents. That is why the Canara Bank called upon the petitioner to pay the dues by its reminder dated 27th June, 2018. There is no response to the same. That is how the bank was seeking to recover a sum of Rs.540.35 Crores under the Rupees Facility as on 23rd August, 2018.*

***84.** As a result of the above discussion, Writ Petition No. 1893 of 2019 fails. Rule is discharged...*

88. As far as the writ petition argued by Mr. Seervai is concerned, there, we find that the prayer is to direct respondent No. 7 to enter into a inter-creditor agreement. ...

89. ....** **We cannot, by a unilateral version of the petitioner, issue the writ. Ultimately nobody and much less a public sector financial institution/bank can be compelled to accept a settlement or resolution plan of the debtor. The bank has its own limitations, restrictions and desires to

abide by the norms which it terms as more prudent. In the circumstances, we do not think that the petitioner's version can be accepted as sacrosanct. The petitioner here also relies upon the minutes of the joint lenders' meeting. If only the Canara Bank is not joining the resolution plan, then, it cannot be compelled to join it by entering into the intercreditor agreement, all the more when it has approached the NCLT. *The allegations made against the Canara Bank by the petitioner can be substantiated in the appropriate proceedings or while defending the proceedings before the NCLT or other Forums. In the circumstances, we think that it would be highly unsafe to issue the writ as prayed in this petition. The petitioner can pursue its objections before the NCLT so also institute substantive proceedings and seek appropriate declaration and relief to compel the seventh respondent to execute the agreement.* ***We do not think that judgments in fiscal and financial matters involving huge debts can be so easily made in our limited powers. For the same reasons as are assigned while dismissing Writ Petition No. 1893 of 2019, even this writ petition fails. It is dismissed. Rule is discharged. There will be no order as to costs.***

(Emphasis Supplied)

- From above it becomes clear that the issue regarding assignment of debt and signing of ICA etc., were discussed by the Hon'ble Bombay

High Court in great detail as seen from above paragraphs on merits and the Writ Petition was dismissed accordingly.

- We note that the Hon'ble Bombay High Court have heard both the GTL Infrastructure Limited and GTL Limited in common order and one of the main issue was regarding mandatory applicability of paragraph 6.4 of the RBI Master Circular. The Hon'ble Bombay High Court categorically held that this is not mandatory and ultimately this is discretion vasting in the financial institutions. The Hon'ble Bombay High Court also held that RBI Guidelines only advise, caution and provide on sale of financial assets to ARC and cannot be held mandatory.
- The Hon'ble Bombay High Court also rejected the arguments of the Respondent herein that since more than 75% (by value) of the Lenders have assigned their debts to NARCL the Appellant herein is also duty bound to do so.
- The Hon'ble Bombay High Court also held that RBI Circular only Guidelines and these cannot be elevated or placed at the level of binding rule, regulations and statute.
- The Hon'ble Bombay High Court categorically stated that they cannot direct the Appellant herein who is the Financial Institution/ bank to the demand of the Petitioner as these are policy matter dealing with fiscal

and financial issues and therefore, discretion of banks cannot be taken away.

- The Hon'ble Bombay High Court had also held that they cannot attribute mala-fide and arbitrariness on the part of the Appellant in these matters who are custodian of public funds and they are not expected to sacrifice its interest particularly legal rights merely because the Respondent herein desired that the Appellant herein who joins in total restructuring debt of the Corporate Debtor.
- Incidentally, the Hon'ble Bombay High Court noted carefully that before them is a debtor (Respondent herein) who owes thousands of crores to these financial institutions and banks and is dictating to them to accept the prosed settlement or restructuring of debt. In this connection, the Hon'ble Bombay High Court held that if such directions which given to the banks (Appellant herein) it would mean calling upon the banks not to act for public good and in public interest.
- Thus, the reasoning and the ratio given by the Hon'ble Bombay High Court is absolutely explicit and does not leave any ground for any doubt regarding non mandatory nature of the RBI Guidelines as well as absolute right of the Appellant to pursue its legal remedies including initiation of Section 7 application before the Adjudicating Authority.

- We note that this was challenged by the Respondent before the Hon'ble Supreme Court of India in the matter of ***GTL Infrastructure Limited vs. Canara Bank and Ors.*** *[(2021) SCC OnLine SC 3366]* and the following are the relevant paragraphs of the judgment of the Hon'ble Supreme Court of India which reads as under :-

> ***"2.*** *This appeal arises out of Special Leave Petition (C) No. 5256 of 2020 preferred by GTL Infrastructure Limited challenging the judgment and order dated 03.02.2020 passed by the High Court of Judicature at Bombay in Writ Petition No. 1893 of 2019.*
>
> ***3.*** *The aforestated Writ Petition was filed by the appellant praying for following reliefs:*
>
> *"(a) Issue a Writ of Mandamus or any other appropriate writ, order or direction, directing Respondents Nos. 1 to 6 to forthwith comply with paragraph 6.4 of the Master Circular dated July 1, 2015 issued by the Reserve Bank on Prudential Norms on Income Recognition Assets Classification and Provisioning Pertaining to Advances and execute agreements assigning their respective debts in favour of Respondent No. 7;*
>
> *(b) pending the hearing and final disposal of the Petition, the Respondent Nos. 1 to 6 be restrained from taking any coercive steps against the Petitioner for recovery of their purported dues under the financial facilities granted by the Respondent Nos. 1 to 6 to the Petitioner including but not*

limited to filing or prosecuting any proceedings under the IBC and/or Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(c) grant and interim relief in terms of prayer clause (c);

(d) grant costs in favour of the Petitioner;"

11. *We have heard Dr. Abhishek Manu Singhvi, learned Senior Advocate in support of the appeal and Mr. Salman Khurshid, learned Senior Advocate in support of the Writ Petition.*

12. *We have also heard Mr. Harish Salve and Mr. Amit Sibal, learned Senior Advocates for Respondent Nos. 2, 3 and 4 in the Writ Petition; Mr. Neeraj Kishan Kaul, learned Senior Advocate for Edelweiss Asset Reconstruction Company Limited and Mr. Abhishek Singh, learned Advocate for Canara Bank.*

13. *Paragraph No. 6.4 (d)(i) itself makes the position quite clear that each bank/financial institution must make its own assessment of the value offered by the SC/RC for the financial asset and decide whether to accept or reject the offer.*

14. *The High Court was, therefore, right in holding that there would be no obligation upon the bank/FI in terms of paragraph 6.4 (d)(ii) as was contended on behalf of the appellant. Thus the High Court was absolutely right and justified in rejecting the claim made on behalf of the appellant.*

15. *We, therefore, see no reason to entertain this appeal, which is accordingly dismissed without any order as to costs.*

16. *For the same reasons, in our considered view, the writ petition also calls for no interference and is therefore, dismissed."*

(Emphasis Supplied)

- From above judgment of Hon'ble Supreme Court of India, we note that the Hon'ble Supreme Court of India has upheld the judgment of the Hon'ble Bombay High Court that there would be no obligation upon the bank/ financial institutions to accept settlement and each bank must make its own assessment of to accept or reject.
- In view of this settled position by the Hon'ble Bombay High Court as well as the Hon'ble Supreme Court of India, between the same parties on the same issue, we hold that the Appellant is not duty bound to agree with majority of the lenders to assign its debts to NARCL or sign the ICA which has been signed by majority (more than 90% by value) of the Lenders.
- It is clear that it is the commercial wisdom of the lender/ Financial Creditors/ Appellant herein is paramount in deciding to assign its debts or sign ICA or to pursue other remedies including filing under Section 7 of the Code or otherwise and there can't be any judicial intervention

on this aspect by the Adjudicating Authority or this Appellate Tribunal.

82. In view of above detailed observations, we are not in a position to support the Impugned Order dated 18.11.2022 passed by the Adjudicating Authority.

83. The Appeal is allowed and the Impugned Order is set aside and the case is remanded back to the Adjudicating Authority to hear the original petition of the Appellant a fresh, taking into consideration all the facts.

84. Both the parties are directed to be appear before the Adjudicating Authority on 11.11.2024. The Adjudicating Authority is also requested to dispose of the matter expeditiously within reasonable period of 8 weeks especially, keeping in that the original petition was filed in CP (IB) No. 4535/(MB)/2019 and is almost five years back.

85. In fine, the Appeal succeeds and the Impugned Order is set aside. No cost. IA, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

Sim