IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT – II

IA/677/2020

&

C.P.(IB)-4541(MB)/2019

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016.)

In the matter of

Canara Bank

Having Registered Office at: 112, JC Road Bangalore.

Branch: 1st Floor, A Wing, Canara Bank Building C-14, 'G' Block, Bandra-Kurla Complex, Bandra (East), Mumbai, Maharashtra- 400051.

……Financial Creditor/Applicant

Vs

GTL Infrastructure Limited

Having Registered Office at: 3rd Floor, Global Vision Electronic Sadan No. II MIDC, TTC, Industrial Area, Mahape Navi Mumbai, Maharashtra -400710.

…….Corporate Debtor/Respondent

Order delivered on: 18.11.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Financial Creditor : Counsel, *Mr. Rohit Gupta*

For the Corporate Debtor : Senior Counsel, *Mr. Vikram Nankani*

Counsel, *Mr. Rohan Rajadhyaksha*

ORDER

Per- Justice P.N. Deshmukh (Retd.), Member Judicial

1. The present **Company Petition (IB)-4541(MB)/2019** is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') on 06.12.2019, by Canara Bank (for brevity 'Financial Creditor') through its Authorised Person, *Mr. Amrit Ghosh*, who has been duly authorised vide Power of Attorney dated 01.06.1999 for initiating Corporate Insolvency Resolution Process (CIRP) against GTL Infrastructure Limited (for brevity 'Corporate Debtor') for default in repaying an amount of **₹646,38,06,271.00** (Indian Rupees Six Hundred Forty Six Crores Thirty Eight Lakhs Six Thousand Two Hundred Seventy One only), as on 01.07.2011.

Simultaneously, the Respondent filed IA/677/2020 on 21.02.2020, seeking to dismiss the CP(IB)/4541(MB)/2019 for

lack of authorisation in favour of the authorised signatory of the Petitioner.

2. On perusal of the IA/677/2020 and CP(IB)-4541(MB)/2019, it reveals that the amount outstanding pertains to loans sanctioned and disbursed to two entities namely GTL Infrastructure Limited and Chennai Network Infrastructure Limited. Further, by way of a scheme of amalgamation sanctioned by this Tribunal on 22.12.2017, Chennai Network Infrastructure Limited was merged into GTL Infrastructure Limited and all its debts, liabilities and obligations are now transferred to the Corporate Debtor. Further, the Corporate Debtor failed to pay the dues. The Lenders of the Corporate Debtor decided to refer the debt of Corporate Debtor to the CDR Cell for Corporate Debt Restructuring (CDR) in 2011. During CDR, the Corporate Debtor repaid INR 6,469 crores to the Lenders but on account of continuing adverse circumstances in the telecom industry, the debt of the Corporate Debtor remained unsustainable. In these circumstances, the Lenders of the Corporate Debtor in Joint Lender's meeting (held on 20.09.2016) decided to implement Strategic Debt Restructuring (SDR) in respect of the Corporate Debtor. Under the SDR, the debt of the Corporate Debtor and CNIL was converted into equity to the extent of approximately INR 4,500 Crores. As per the conversion, the lenders of Corporate Debtor hold 63.16% equity shareholding in the Corporate Debtor. In terms of clause 3(xiii) of the SDR Guidelines, the lenders were

required to find a new investor to transfer their respective shareholdings and control in the Corporate Debtor. However, while the sale process was underway, there was a significant loss in tenancies due to the bankruptcies or closure of Aircel, Reliance Communications and Tata Teleservices. As a result, the lenders were unable to identify a new buyer for their shareholding. Pursuant to the JLF meeting dated 13.07.2018, Union Bank of India circulated a note amongst all the lenders regarding sale of the debt to EARC Consortium. The note of the Union Bank of India recorded that the merits of the sale of the debt to the EARC Consortium as well as the fact that the Corporate Debtor had been servicing the financial obligations under the SDR regularly without any default. The said note also noted that the SDR process had to be abandoned due to the Revised Framework for Resolution of Stressed Assets dated 12.02.2018 issued by RBI, wherein the existing schemes of debt resolution including the SDR were withdrawn. This resulted in 79.34% of the total debt of the Corporate Debtor being assigned to the EARC Consortium. However, by a letter dated June 27, 2018, the Petitioner declared that the account of the Corporate Debtor was classified as NPA w.e.f. July 1, 2011 and called upon to pay an amount of INR 264.46 Crores and further INR 540.35 Crores on 23.08.2018.

The Petitioner thereafter, filed C.P. No. 3604(MB)/2018 under Section 7 of the IBC seeking initiation of the CIRP against the Corporate Debtor. The said petition was filed by the Petitioner purportedly relying upon the Revised Framework for Resolution

of Stressed Assets issued by the RBI relaying on the alleged obligation on banks to initiate CIRP in case of default. The said petition was dismissed by this Tribunal in view of the Hon'ble Supreme Court judgement dated 02.04.2019 in ***Dharani sugars & Chemicals Ltd. Vs Union of India (2019) 5 SCC 480***.

Furthermore, the Petitioner filed another Petition under Section 7 of IBC, 2016, which is before us for our perusal wherein the Petitioner prays for initiation CIRP against the Corporate Debtor. The Financial Creditor has submitted that the Corporate Debtor has been availing financial facilities from the Financial creditor since around past ten years. At the request of the Corporate Debtor, various financial facilities were sanctioned to the Corporate Debtor. The said facilities were secured by Mortgage and hypothecation of assets and the charge was duly filed with the concerned Registrar of Companies. The Corporate Debtor has mortgaged its properties by way of Indenture of Mortgage. Further, the Corporate Debtor has acknowledged that such financial facilities were availed and confirms the execution of Documents and liabilities from time to time. The Corporate Debtor by its Acknowledgement of Debt and security dated 02.07.2016 has confirmed the availing of facilities, execution of security documents and balance outstanding in respect of the facilities availed. In continuation of the said Acknowledgement of Debt and Security, the Corporate Debtor has admitted its liabilities in its Annual Report for the year 2017-2018. Owing to financial stress faced by the Corporate Debtor, the account of the Corporate

Debtor was restructured under the Scheme of CDR and SDR during the period of 2011 and 2016 respectively. On the account of Corporate Debtor's failure to comply with the SDR Package, the account of Corporate Debtor slipped into NPA on 27.03.2018. The Financial Creditor vide Recall Notice dated 23.08.2018 addressed to the Corporate Debtor recalled the entire advances and called upon the Corporate Debtor to make the outstanding payments, but the Corporate Debtor failed to do so. Hence, the Corporate Debtor filed the present Company Petition.

3. In relation to this, the Respondent has filed an IA/677/2020 to dismiss the said petition on the limited ground that the said petition is filed by one Amrit Ghose, who is purportedly authorised to file the same on behalf of the Petitioner vide a Power of Attorney dated 01.06.1999. The Respondent submits that the said power of attorney is a general power of attorney which does not authorize the said Amrit Ghose to file a petition under the IBC, 2016 or a petition against Respondent. The Respondent relied on the fact that the said power of attorney is dated 01.06.1999, which makes it *ex facie* evident that the said power of attorney could never have been used to authorized anyone to file any proceedings under the IBC as the IBC itself came into force only in December 2016. Further in relation to his contention, the Respondent relied in the matter of **Palogix Infrastructure Private Limited Vs. ICICI Bank Limited**, wherein, Hon'ble NCLAT has held that-

"36. As per Section 7 of the 'I&B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 8b 6 (Part I) of Form No. 1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

37. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

38. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'."

Further in view of the above judicial precedent, the Respondent submits that it is unequivocally clear that any proceedings under the IBC to initiate the CIRP in respect of a corporate debtor can be filed only if the authorised signatory of the petitioner is empowered by a board resolution passed by such petitioner specifying the institution of such proceedings under the IBC and the above Petition has been instituted by *(i) a power of*

attorney holder; (ii) a person not specifically authorised on behalf of the Petitioner to file an Application under the IBC; (iii) by a person who is 'generally' authorised to act on behalf of the petitioner but not authorised to file an Application under the IBC against the Respondent. In view of the same, the Respondent prayed to dismiss the present petition.

4. In addition to this, the Corporate Debtor has filed a separate reply and has submitted that they have made best efforts to request the lenders to restructure the debt to sustainable levels. The Corporate Debtor has submitted seven resolution plans from time to time. However, the Petitioner arbitrarily rejected all the plans without even assigning any reasoning. In fact, while the process for sale to an ARC was under consideration, vide its letter dated 27.04.2018, the Corporate Debtor submitted the first Resolution Plan wherein the Corporate Debtor provided for payment of 100% of the outstanding debt to its lenders. Furthermore, the Corporate Debtor has raised various contentions before this Tribunal in the light of Hon'ble Supreme Court's judgement in case of **Vidarbha Industries Power Ltd. Vs. Axis Bank [2022 SCC Online 841].** The Corporate Debtor submits that the present Petition ought to be dismissed on the following grounds:

   i. Incorrect and illegal declaration of default by the Petitioner (a) without due regards to the actual facts and circumstances; (b) based on an unsustainable interpretation of the applicable laws and regulations; (c)

with complete disregard to matters which were subjudice before the Hon'ble High Courts and the Hon'ble Supreme Court (including status quo orders); and (d) contrary to the acts of majority of the lenders.

ii. The Petitioner has acted fraudulently and maliciously in filing the Petition as it admittedly has no intent to find resolution for the Corporate Debtor and hence liable to be dismissed in terms of Section 65 of the IBC.

iii. The well-established objects of the IBC are (a) maximization of value; and (b) resolution of the Corporate Debtor. In the peculiar facts of the present case, maximization of value and resolution is possible only outside IBC. In light of the Hon'ble Supreme Court's judgment in ***Vidarbha Industries Power Ltd. v. Axis Bank [2022 SCC Online SC 841]*** this Hon'ble Tribunal is bound to exercise its discretion to consider these relevant factors while admitting or rejecting a petition.

Further, the Corporate Debtor has submitted that the obligation to sell the equity to new promoter was of the lenders / banks and not Corporate Debtor *(clause No. 3 (xiii) of SDR Guidelines).* The Corporate Debtor never prevented the lenders from finding a new investor – and on the contrary, the Corporate Debtor provided every possible assistance. The Corporate Debtor has further submitted that the failure of lenders to sell the shares held by them in the Corporate Debtor before the expiry of the standstill period cannot and does not amount to a default/EOD or a breach by Corporate Debtor under any law or contractual provision between the Petitioner and the Corporate Debt. Moreover, the Petitioner has incorrectly equated a requirement of RBI to retrospectively provision for the debt in its books w.e.f. July

1, 2011 as a default on the part of the Corporate Debtor. Since the lenders failed to complete the transfer to a new investor under the SDR Guidelines, the provisioning relaxation provided during that period was withdrawn. Since the Corporate Debtor's account was restructured once before, the RBI imposes stringent provisioning requirements as a matter of caution and hence the retrospective provisioning. However, simply because an account is classified as an NPA, it does not ipso facto amount to a default, which is linked to failure to make payments when due.

5. The Corporate Debtor has further taken a contention that the present petition is liable to be dismissed in terms of Section 65 of the IBC and the present Petition has been filed by the Petitioner with malicious intent for purpose other than resolution of insolvency:

i. The Petitioner recalled the financial facilities on the basis that SDR had 'failed'. However, the Petitioner conveniently overlooked the fact that at that stage the Corporate Debtor had not defaulted in any of its obligations under the SDR. It was the lenders who had failed to find a new investor and transfer the management and shareholding of the Corporate Debtor to such new investor. Thus, the Petitioner sought to punish the Corporate Debtor for its own failure.

ii. By the Notice dated August 23, 2018, the Petitioner sought repayment of the entire outstanding dues under the original financial facilities allegedly amounting to INR 540.35 crores even though the Petitioner continued to hold equity shares of the Corporate Debtor which were allotted against the debt of INR 271.47 crores (as stated in the Note

circulated by Union Bank of India). In other words, the Petitioner deliberately and maliciously refused to give credit to the Corporate Debtor for the amounts voluntarily converted by the Petitioner from debt to equity in the SDR process.

iii. The Petitioner filed the first petition before the Hon'ble NCLT on the ground that it was obligated to file as per the RBI Norm and hence it was not in a position to consider the assignment or any restructuring. When the concerned RBI Circular was set aside by the Supreme Court, the so called obligation to initiate CIRP was no longer applicable. Nevertheless, the Petitioner filed the second Petition which demonstrates that IBC was the sole and only objective of the Petitioner.

iv. The Petitioner participated in the process of assignment of the Corporate Debtor's debt to the ARC Consortium right from January, 2018 until June 2018. It was as per the request of the Petitioner that the cash component of the sale consideration in the said transaction was increased from 50% to 51%. On June 27 2018, the Petitioner suddenly and arbitrarily sought to recover the so-called dues on the basis of a totally concocted default. However, even at this stage the Petitioner never objected to the assignment of debt to the EARC Consortium. Even on July 13, 2018 when the lenders accepted the bid offer of the EARC Consortium, the Petitioner did not object. It is only on August 3, 2018 that the Petitioner suddenly and arbitrarily objected to the assignment in the guise of seeking clarifications from Union Bank of India on the assignment of debt to the EARC Consortium.

v. Even though more than 79% (by value of debt) of the lenders of the Corporate Debtor not only agreed but actually transferred the debt of the Corporate Debtor to EARC Consortium, the Petitioner which had participated all along arbitrarily insisted on going against the vast

majority in the JLF and insisted on filing insolvency proceedings.

vi. As set out hereinafter, the CIRP of the Corporate Debtor would lead to massive value erosion. Yet, the Petitioner is keen to initiate the CIRP against the Corporate Debtor indicating malice on part of the Petitioner.

vii. Even though Petitioner (in view of the correspondence with lenders) is fully aware of the fact that Corporate Debtor's agreements with its Operators are liable to termination in case Corporate Debtor is admitted to IBC, has filed the present IBC Petition. From this, it is very clear that the Petitioner has filed the present IC Petition against Corporate Debtor with a mala fide intention of utilizing provisions of IBC for recovery of debt, which is impermissible as held by the Hon'ble NCLT, Bengaluru Bench in ***Co-operative Rabobank U.A. vs. Coffee Day Global Ltd.***-Order dated March 29, 2022 passed in C.P.(IB)No.19/BB/2021 (Paras 27 to 29). It is submitted that Learned Counsel appearing for the Petitioner has plainly submitted that they do not want to provide any further opportunities for revival or resolution of the Corporate Debtor.

viii. This follows the spirit of the law laid down by Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd.*** wherein at para 28 it has been held that maximizing value is underlying objective of the IBC and the objective is to put the corporate debtor back on its feet and not mere recovery of debt.

The Respondent also relied on the rulings of the Hon'ble National Company Law Appellate Tribunal in the matters of ***Praveen Kumar Mundra v. CIL Securities Limited (2019 SCC Online NCLAT 334)*** and ***Navin Raheja v. Shilpa Jain & Ors.***

(2020 SCC Online NCLAT 46) wherein it was held that if a corporate insolvency resolution process is initiated fraudulently or with malicious intent for any purpose other than the resolution of the insolvency, the same is liable to be dismissed.

6. The Counsel for the Corporate Debtor while arguing has submitted that the Corporate Debtor is a viable going concern and is in a complete position to service the sustainable debt. Further, it was argued that the Corporate Debtor has monthly revenues of INR 120 Crores (net of GST). The financial position of the Corporate Debtor is reasonably healthy and the same is demonstrable from the fact that between 2011 and August 2018, the Corporate Debtor has repaid an amount of INR 16,915 Crores. Further submitted that the bank balance of the Corporate Debtor as on July 31, 2022 was INR 394.14 Crores and the EBITDA of the Corporate Debtor as on March 31, 2022 was INR 233.49 Crores.

The Counsel for the Corporate Debtor has also submitted that the petitioner has claimed an amount of approx. INR 646.38 crores in the present petition. But, as per the Corporate Debtor, the debt of the Petitioner stands at INR 212,50,78,149 (Rupees Two Hundred and Twelve Crores Fifty Lakhs Seventy-Eight Thousand One Hundred and Forty-Nine Only) amounting to 6.56% of the total debt of the Corporate Debtor. After relying on this, the Counsel further argued that the current financial position which reflects healthy cash flows of the Corporate

Debtor's business as on March 31, 2022. The Petitioner's debt can be repaid without undergoing the CIRP.

Moreover, the Counsel for the Corporate Debtor has submitted that the Corporate Debtor is in the business of providing passive telecom infrastructure (like mobile towers and associated infrastructure) to the telecom operators like Reliance Jio, Airtel, BSNL etc. Therefore, one of the largest assets of the Corporate Debtor are the contracts with the telecom operators which ensure continued business operations and flow of revenue for the Corporate Debtor. Such contracts are long term contracts with lock-in periods of 10-15 years for the telecom operators. Notably, under these contracts, the telecom operators have a termination clause linked to insolvency of the Corporate Debtor. For sake of brevity and illustratively clause from a Master Service Agreement between Corporate Debtor and BSNL dated February 11, 2008 is reproduced below:

> *"25.0 Termination*
>
> *25.1 Either Party can terminate the Agreement any Service Order without incurring liability*
>
> *1. With immediate effect in the case of insolvency or bankruptcy or appointment of receivership proceedings against the other party or Infrastructure Provider going into liquidation or ordered to be wound up by competent authority."*

Thus, if the CIRP is initiated in respect of the Corporate Debtor, the same will not only shake the confidence of telecom operators (who are customers) in the ability of the Corporate

Debtor to provide continued services under the existing contracts but also likely to lead to the telecom operators terminating the said contracts without having to pay any exit penalty whatsoever to the Corporate Debtor. In either case, the operations of the Corporate Debtor will suffer a huge setback and cause further stress to the Corporate Debtor's financial position. It is in these circumstances that, in order that Corporate Debtor's value is preserved and it is kept as a going concern, which in turn would serve the object of IBC that the Hon'ble Tribunal need to exercise its discretion of not admitting the present application.

7. The Corporate Debtor has also raised a preliminary objection to this Petition and has submitted that the as a part of the SDR, INR 4501.17 crores of debt was converted into equity, resulting in the lenders (mostly PSU lenders) holding 63.16% of the share capital. The market price of the said equity was INR 780 cores as per closing of BSE and NSE on July, 2022. The said value can be further improved if debt is restructured at sustainable level. This equity would become NIL in case CIRP is admitted, as evident from precedents of CIRP of telecom companies such as Aircel and R.Com. Further it is submitted that the lenders converted debt into equity as part of the CDR and SDR schemes on the assumption that the haircuts availed during these restructurings could be recovered through equity upside. This has been expressly acknowledged by the lenders themselves and in fact was the basis of the assignment of the debt to the EARC

Consortium. Therefore, these are not ordinary equity holders who can be made to forsake all amounts as per the provisions of the IBC. Further, the closing price of share of the Corporate Debtor on October 10, 2022 on BSE and NSE is INR 1.41 and INR 1.40 respectively and the lenders would receive approximately INR 760 - 765 Crores in case of sale in open market as on date.

Further, the Corporate Debtor has claims aggregating to INR 13393.83 crores against Aircel entities. INR 800 Cr. to INR 900 Cr. has been directed to be paid to the Corporate Debtor by this Tribunal towards payment of ground rent and security charges for the CIRP. The matter is currently in appeal pending before the NCLAT / SC. The ratio of ***Vidarbha Industries*** is squarely applicable to the present case. Further, Corporate Debtor has to recover following amounts in pending arbitrations against: Tata Teleservices Ltd. - INR 49.84 crores; ATC - INR 20.38 crores and BSNL - INR 351 crores. In relation to this, the Corporate Debtor has further submitted that if the Corporate Debtor succeeds in the above arbitrations, the amounts received would be sufficient to pay the debt of the Petitioner. To the contrary, if the CIRP is initiated against the Corporate Debtor, in all likelihood, the resolution professional would be unable to manage the above arbitrations and litigations and the Corporate Debtor would be unable to recover the huge outstanding receivables.

8. The Corporate Debtor has filed a separate written submission and relied on **Vidarbha Industries Power Limited**

Vs. Axis Bank Limited, wherein, Hon'ble Supreme Court has held that:

> *70. As argued by Mr. Gupta, had it been the legislative intent that Section 7(5)(a) of the IBC should be a mandatory provision, Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in Section 7(5) (a) of the IBC. Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction.*
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> *"76. Significantly, Legislature has in its wisdom used the word 'may' in Section 7(5) (a) of the 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) of the IBC relating to the initiation of CIRP by an Operational Creditor.*
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> *77. The fact that Legislature used 'may' in Section 7(5) (a) of the 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 Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7 (5)(a) of the IBC to be discretionary…."*
>
> *"78. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.*
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> *"80. …In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid."*

"82. 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 penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5) (a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP."

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

"91. We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC."

In view of the judgment in ***Vidharbha Industries (supra)***, the Corporate Debtor has submitted that the present Petition ought to be dismissed.

9. In response to this, the Petitioner/Financial Creditor has filed rejoinder and raised preliminary contention that the majority of lenders including the EARC Consortium, which is holding more than 75% of debt of Corporate Debtor have consented for filing IBC proceeding. In relation to this, the Corporate Debtor has submitted that the Petitioner's contention is wholly misconceived.

It is writ large on the present proceedings that no other lender has filed insolvency proceedings or come forward to support the initiation of insolvency proceedings by the Petitioner. In any event, the detailed submissions already set out hereinabove make it clear that the Corporate Debtor's case is that: (i) the so-called default on the basis of which the present petition is filed is misconceived and the petition has been filed maliciously for reasons other than resolution; (ii) initiation of insolvency proceedings would lead to significant value destruction and not value maximization; (iii) the Judgement in Vidarbha Industries is applicable to the present case.

10. From a plain reading of the Judgement in ***Vidarbha Industries Power Limited Vs. Axis Bank Limited***, we are of the opinion that it can be concluded that – *(a) existence of debt and default are not the only criteria in deciding an Application under Section 7 of the IBC; (b) this Tribunal has the discretion to reject an Application under Section 7 of the IBC even if the existence of debt and default is established; (c) such discretion has to be exercised taking into consideration the circumstances like viability of the corporate debtor under the existing management, feasibility of initiation of the CIRP and overall financial health of the Corporate Debtor. Further, if the outstanding receivables under the pending or concluded litigations are more than the debt claimed in the application under Section 7 of the IBC, such an application can also be rejected.*

11. After hearing both the parties and on perusal of the IA/677/2020 and CP(IB)4541(MB)/2019 including other material on record and the Judgement of Hon'ble Supreme Court in *Vidarbha Industries (Supra),* we are of the view that the Corporate Debtor has monthly revenues of INR 120 Crores (net of GST), which shows that the Corporate Debtor is a viable going concern. Further, the Corporate Debtor has repaid an amount of INR 16,915 Crores between 2011 to August, 2018, which clears that the position of the Corporate Debtor is reasonably healthy and is in a position to repay the sustainable debt. The Corporate Debtor has claims aggregating to INR 13,393.83 Crores against Aircel entities. Further, this Tribunal has directed to pay approx. INR 900 Crores to the Corporate Debtor, same has been pending on appeal. Moreover, the Corporate Debtor has to recover INR 49.84 Crores from Tata Teleservices Limited; INR 20.38 Crores from ATC and INR 351 from BSNL in pending arbitration proceeding. The amount received would be sufficient to pay the debt of the Petitioner.

The ratio of the Vidarbha Industries is squarely applicable to the present case as the business of the Corporate Debtor is sustainable and it is a viable going concern under its current management and the overall financial health of the Corporate Debtor is not bad enough to be admitted under CIRP. Moreover, the adjudicated and un-adjudicated claims of the Corporate Debtor are far more than the debt claimed in the present petition. So, in view of Judgement of the Hon'ble Supreme Court in

Vidarbha Industries Power Limited Vs. Axis Bank Limited, we are of the opinion that the present petition should be dismissed. Hence, the **CP(IB)/4541/2019** is ***dismissed***.

Since the Petition is dismissed, therefore this bench refrain to express any opinion on merit as to whether the Petitioner is properly authorized to file petition or not. In view of the same ***IA/677/2020*** is ***dismissed as infructuous***.

Sd/-

SHYAM BABU GAUTAM

(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH

(MEMBER JUDICIAL)