IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURTI-II

CP(IB) 686 MB 2023
Under section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF

Bank of Baroda
Zonal Stressed Asset Recovery Branch, Meber Chambers, Ground Floor, Dr. Sunderlal Behl Marg, Ballard Estate, Mumbai 400001.

… Financial Creditors

V/s.

Mis Arch Pharamalabs Limited
3rd Floor, Titanic Building, Chandivali Farm Road, Nr. HDFC Bank, Andheri (East), Mumbai – 400072.

… Corporate Debtors

Order delivered on :- 15.05.2024

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Financial Creditor : Sr. Adv. Ravi Kadam a/w
Malhar Zatakia and Vinod Nagula

For the Corporate Debtor : Sr. Adv. Chetan Kapadia a/w Rohit Gupta

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Bank of Baroda (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Mis Arch Pharamalabs Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 134,99,00,000/-.

The submissions by the Financial Creditor:-

2. The present Petition under Section 7 oflnsolvency and Bankruptcy Code, 2016 is being filed against *Mis* Arch Pharrnalabs Limited **("Corporate Debtor")** for the various credit facilities granted to it by Bank of Baroda (erstwhile Vijaya Bank).

3. The Applicant states that the Corporate Debtor is a Company incorporated under the Companies Act, 1956 and is engaged in manufacturing of active pharmaceutical ingredients, intermediaries and Contract Research and Manufacturing Services (CRAMS) segment. The Corporate Debtor has been availing credit facilities for carrying on its business from many banks and financial institutions including the Applicant.

4. Sometime in November 2008, at the request of the Corporate Debtor, the Corporate Debtor was sanctioned a Structured Mezzanine Corporate Facility (SMCF)-I of Rs. 2.83 crore by the Applicant vide its Sanction Letter.

5. Thereafter, the Corporate Debtor again approached the Applicant for obtaining Term Loan to the tune of Rs. 50.0 crore. Pursuant thereto, the Applicant vide its Sanction Letter dated 8th October 2011 sanctioned a Medium-Term Loan (MTL) to the Corporate Debtor.

6. Thereafter, at the request of the Defendant No. I, the Applicant vide its Sanction Letter dated 8th October 2011 sanctioned a Medium-Term Loan (MTL) to the Corporate Debtor of Rs.50 crores. Pursuant to the above, the Corporate Debtor in order to secure the said credit facilities, through Board Resolution dated 11th October 2011 the Corporate Debtor executed the following documents in favour of the Applicant:

   i. Demand Promissory Note dated 12th October 2011;

   ii. Undertaking dated 12th October 2011;

   iii. Letter dated 11th October 2011 confirming that the borrowing is within the resolution passed by the shareholders of Corporate Debtor;

   iv. Articles of Agreement dated 12th October 2011;

   v. Letter of Guarantee of Mr. Ajit Karnath, Mr. Manoj T Jain dated 10th October 2011 and Mr. Rajendra P Kaimal dated 12th October 2011

7. Further, at the request of the Corporate Debtor, the Applicant

sanctioned a Structured Mezzanine Corporate Facility (SMCF)-II of Rs.2.83 crore by the Applicant vide its Sanction Letter dated 24th July 2012.

8. The Corporate Debtor started defaulting in the repayment of the above term loan since 12th April 2013 (date of default). Thereafter, the Corporate Debtor through its Directors, had issued certain cheques towards discharge of its liabilities under the aforesaid Credit Facilities. However, the said cheques were dishonored upon presentment by the Applicant. Therefore, the Applicant on 6th May 2013 issued Notice under Section 138 of the Negotiable Instrument Act, 1881 to the Corporate Debtor and its Directors. Subsequently, Criminal Complaint under Section 138 of Negotiable Instrument Act was filed before Metropolitan Magistrate, 28th Court, Esplanade, Mumbai. The same is pending as on date.

9. The Corporate Debtor had then approached the consortium of Lenders for restructuring of its dues. Considering the said request of the Corporate Debtor, vide Letter of Approval dated 24th October 2013, the account of the Corporate Debtor was restructured under the CDR mechanism. The facilities of the Applicant were restructured as under:

Sr. no.	**Facility**	Amount (Rs. in crore)
1.	Working Capital Tenn Loan (WCTL) *(by restructuring existing Short-Term Loan post carving out of OCD) – WCTL - 3 as*	42.84 (restructured)

	per CDR package	
2.	Term Loan *(by restructuring existing SMCF.s) - TL - 3 as per CDR package*	4.53 (restructured)
3.	Funded Interest Tenn Loan - I (FITL-1) - New *(to be created by way of fanding of interest in arrears on the TL and STL till the cut-off date) - FITL - 3 as per CDR package*	1.67 (fresh)
4.	Funded Interest Tenn Loan - 2 (FITL-2) - New *(to be created by way of fonding of interest in arrears on the TL / WCTL from the cut-off date i.e. 01.04.2013 till 31.03.2015) - FITL- 4 as per CDR package*	9.95 (fresh)
5.	Optionally Convertible Debenture (OCD)	7.17
	Total	**66.16**

10. Pursuant to the above restructuring, the Corporate Debtor executed the following documents in favour of its Lenders:

    i. Master Restructuring Agreement dated 27[111] December 2013

ii. Security Trustee Agreement dated 27"' August 2014

11. Subsequently, vide Letter dated 27th January 2016, the Corporate Debtor filed reference under Section 15 (1) of the Sick Industrial Companies {Special Provisions) Act, 1985. Further, sometime in 2018, the Applicant filed an Original Application for recovery of Rs. 89,63,12,137/- before the Hon'ble Debt Recovery Tribunal - II, Delhi and the same is pending for adjudication as on date.

12. The Corporate Debtor has been acknowledging the dues of the Lenders including the Applicant in its yearly Annual Reports. In the last available Annual Report for the Financial Year 2019-2020 of the Corporate Debtor, the Corporate Debtor has acknowledged the debt of the Lenders to the tune of Rs. 3,602.78 crore, with Applicant's principal dues being Rs. 67.21 crore. The Corporate Debtor is continuing to default in payment of the outstanding dues of the Applicant and as on date, a total of Rs. 134.99 crore is due and payable by the Corporate Debtor to the Applicant. Therefore, the Applicant is filing the present Petition.

Reply filed by the Corporate Debtor:-

13. At the outset, the respondent has categorically denied the contents of the Petition in its entirety. The alleged debt mentioned in the Petition is also categorically denied. the claim of the Petitioner is not maintainable under the Insolvency and Bankruptcy Code, 2016 ("Code"). No contention, allegation, or averment of the Petitioner should be deemed admitted by the Respondent due to a lack of specific denial or traverse, unless expressly admitted herein.

14. Under a scheme of Amalgamation approved by Central Government,

Dena bank and Vijaya Bank have been amalgamated with Petitioner w.e.f from 1st April 2019. The erstwhile Vijaya Bank had filed Original Application No.568 of 2018 against the Respondent before Debts Recovery Tribunal, New Delhi seeking a declaration relating to default/date of default and the quantum of debt. Having subjected itself to the adjudicatory mechanism under the Recovery of Debts and Bankruptcy Act, 1993 (**'RDB Act'**), the Petitioner is forbidden from seeking this Hon'ble Tribunal's adjudication over the same acts/actions/facts/claims which are being adjudicated by the Hon'ble DRT, Delhi. It is submitted that the act of the alleged Petitioner of filing parallel proceedings constitutes needless multiplicity of proceedings which ought not to be entertained by this Tribunal. It is further stated that the issue of maintainability of the claim of Vijaya Bank has been raised by the Respondent in the above Original Application on the ground of limitation and the same is pending hearing before the Hon'ble Tribunal.

15. It is further stated that the Petitioner is engaged in the practice of forum shopping by with the intent to exert pressure and create obstacles in the Respondent's ongoing restructuring plan. It is further stated that the Petitioner has intentionally filed the present Petition, strategically using the Code as a recovery tool and this Tribunal as a recovery forum. Without prejudice to the above, it is submitted that the Petition deserves to be dismissed *in limine* on the following preliminary amongst other grounds, which are taken without prejudice to one another and in the alternate to each other.

16. Mr. Akhilesh Kumar, who has filed the Petition on behalf of the Petitioner is not Authorised by the Petitioner to file it. The Power of Attorney annexed to the Petition is given by Vijaya Bank to Mr.

Akhilesh Kumar before its amalgamation with the Petitioner. On amalgamation of erstwhile Vijaya Bank with the present Petitioner, the board of Vijaya Bank stood dissolved. Therefore, the Power of Attorney relied upon by the Petitioner is not a valid document for the filing of the Petition. Therefore, the Petition has not been filed by an Authorised representative of the Petitioner under rule 2(6) of NCLT rules read in conjunction with section 432 and 176 of the Companies Act 1956.

17. Furthermore, even if the issue of amalgamation set aside, the Power of Attorney granted by Vijaya Bank (which no longer exists after amalgamation in 2019) did not authorize Mr. Akhilesh Kumar to initiate the Corporate Insolvency Resolution Process against the Respondent. In fact, the said Power of Attorney is a general power of attorney, providing general powers to Vijaya Bank's employees long before the promulgation of the Code in 2016. The authorization required under the Insolvency and Bankruptcy Code can only be granted after the enactment of the Code. Proper and specific authorization forms the foundation of all proceedings under the Code. An invalid authorization undermines the basis of the Petition, and this cannot be rectified under the Code. Therefore, the Power of Attorney cannot be considered valid for filing the Petition.

18. Besides, the Petition is not maintainable as the claim of the Petitioner is also time-barred under Section 238 of the Code, read with Article 137 of the Limitation Act, 1963. The Petitioner could not file the present petition under the Code as it was filed beyond the three-year period from the alleged date of default, i.e., 30th September 2012.

19. The Petitioner has based its purported claim under three loans to the

Respondent: -

i. Structured Mezzanine Corporate Finance Facilities (hereinafter referred to as "**SMCF-I")** for Rs 2.83 crores on 14.11.2008;

ii. Medium Term Loan (hereinafter referred to as "MTL") for Rs 50 crores on 08.10.2011;

iii. Structured Mezzanine Corporate Finance Facilities (hereinafter referred to as "**SMCF-II")** for Rs 2.83 crores on 24.07.2012.

iv. The first date default, if any, in the account in the Medium-Term Loan (hereinafter referred to as "MTL") for Rs 50 crores took place **in September 2012**, therefore, the limitation of 3 years from such date of default ended on **30th September 2015**. Therefore, the Petition is barred under the Code. Without prejudice to the above, even if we go by the contention of the Petitioner that the account of the Respondent became a Non- Performing Asset on 12th June 2013, which would mean that the account was in default on 12th March 2013, still the claim of the Petitioner is barred by limitation.

20. It is further stated that the lenders of the Respondent agreed for restructuring of the Respondent under the CDR system in April 2013. However, the scheme could not be successfully implemented due to restrictions placed on the Respondent by the Hon'ble High Court regarding the creation of security on fixed and movable assets, as some of the lenders were not participating in the CDR scheme. The

Master Restructuring Agreement was also not executed by some of the lenders.

21. As there was no restructuring of the Respondent's account and no default under the CDR scheme, the date of default, if any, in this case remained 12th March 2013 and calculating the three-year period from the date of default, which is 12th March 2013, the limitation for filing the Petition against the Respondent expired on 12th March 2016. The Petitioner filed the Petition on 25th February 2023, rendering it hopelessly time-barred under the period prescribed of the Limitation Act, 1963.

22. It is further stated that the Petitioner has relied on the reference made by the Respondent to BIFR under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) on 21st January 2016, as well as the letter issued by the Board for Industrial and Financial Reconstruction (BIFR) dated 9th August 2016. It is noteworthy that this reference was not maintainable and was not accepted by the lenders since one of the lenders, IndusInd Bank, had assigned its debt to Pegasus ARC Pvt Ltd prior to the filing of the reference. Thus, according to Section 15(1) of the SICA, the reference was not maintainable. Therefore, it becomes evident that the reference initiated by the Respondent held no bearing in the year 2016, as proceedings pursued by other lenders against the Respondent continued. Consequently, the Petitioner cannot lay claim to any advantage resulting from the reference made under the SICA Act to extend the time limits prescribed by the Code. Therefore, the present Petition cannot be entertained by this Hon'ble Tribunal.

23. It is further stated that the Respondent had not acknowledged any

liability or debt of the Petitioner in the year 2016.

24. Even if it is considered, without conceding, that the Petitioner benefits from the reference made by the Respondent on 27th January 2016, it's important to note that upon the enactment of the IBC on 1st December 2016, the SICA was repealed, and all matters pending before the BIFR were deemed to have abated. As a result, the limitation period for the Petitioner's claim expired on 16th January 2017. In any case, the Petitioner's legal recourse against the Respondent, particularly in the context of pursuing the Petition under the Code lapsed in January 2017. Consequently, there is no basis for considering the Petition filed in 2023 as maintainable before this Hon'ble Tribunal.

25. Further, it is stated that the Petitioners have annexed the Balance Sheet of the Respondent for the year 2019-2020. There is no acknowledgment of the debt by the Respondent in the Balance Sheet, which could be used by the Petitioner to extend the limitation under Section 18 of the Limitation Act, 1963. The Respondent does not admit the debt of the Petitioner and is unaware of any documents acknowledging the Petitioner's claim.

26. Since there are no documents annexed to prove the default under the aforesaid facilities and the Statement of Accounts are not supported by the Bankers Books Evidence Act, 1961, therefore such claim of the Petitioner cannot be relied upon or taken into consideration for want of appropriate and proper documents under the Code. Further, The Petitioner has failed to provide bifurcation of amounts with respect to each facility as required for the purpose of deciding the date of default and the amount due under each facility whereas the Form under

section 7 of the Petition requires a proper computation of date and days of default under each facility.

27. The Petitioner has relied upon the following documents namely, (i) Articles of Agreement (ii) Letter of Guarantee (iii) Master Restructuring Agreement (iv) Security Trustee Agreement for its alleged claim of Rs.50 crores. The aforesaid documents were executed in Delhi. The Petitioner has apparently brought these documents into the State of Maharashtra for the purposes of filing the present Petition against the Respondent. As per the requirement under section 19 of the Maharashtra Stamp Act, 1958, these documents or copies thereof (as the case may be) are required to be stamped in accordance with the Bombay Stamp Act, 1958. In the absence of such payment, such documents cannot be looked into by this Tribunal. The stamp duty payable on the aforesaid documents in the State of Maharashtra is more than the stamp duty paid on the documents in New Delhi. Therefore, the said documents are required to be impounded in accordance with the provisions of the Bombay Stamp Act. The liability to pay the duty is on the Petitioner as the document has been brought into the State of Maharashtra without the consent of the Respondent. By virtue of Sections 18, 19, 33 and 34 of the Bombay Stamp Act, 1958, this Tribunal cannot act upon any documents which are not sufficiently stamped as per the provisions of the Act and is bound to impound the said documents and send the same to the appropriate authority who is required to deal with the same in accordance with Sections 37 and 39 of the Bombay Stamp Act 1958.

28. It is further stated that Form 1 should be accompanied by the required documents and records as specified in the Insolvency and

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Petitioner has relied on the Statement of Accounts to support its case against the Respondent. However, these Statements of Accounts, annexed as Exhibit S, lack certification by the Petitioner and are in complete disarray and are not in accordance with the bankers Book Evidence Act, 1891.

29. It is further stated that the Respondent had faced some financial difficulties in the year 2012-2013 due to which it had approached the Corporate Debt Restructuring Forum ("CDR") through the lead bank i.e. ICICI Bank Ltd. for restructuring its debts. Majority of lenders agreed for the restructuring and found the project of the Respondent, viable and sustainable and approved the CDR scheme sanctioned under the aegis of the Reserve Bank of India. However, the additional funding by the Lenders did not take place for the reason that securities were not perfected *inter alia* due to orders passed in pending court proceedings filed against the Respondent by the lenders not participating in the CDR scheme. Eventually the CDR scheme could not be implemented for the Respondent.

30. The Respondent herein, however, made constant efforts to settle and restructure its liability with lenders and further made sustained efforts to ensure that the business went on despite no funds being available for its working capital. In the meanwhile, various creditors initiated winding up proceedings under the provisions of the Companies Act, 1956, before the Hon'ble Bombay High Court, by filing Company Petitions against the Respondent. One of the Creditors who initiated proceedings was Kotak Mahindra Bank Ltd (KMBL).

31. It is further stated that between the years 2013 and 2016, a substantial

acquisition of the debt of the Respondent was made by JMFARC. JM Financial Asset Reconstruction Company Ltd. acquired the debt of the Respondents constituting approx. 65% of the secured loans of Banks and FIs on 31st March, 2016. It is further submitting that JMFARC was also ready and willing to grant further financial assistance to the Respondent to overcome the financial difficulties faced by it.

32. Under a Restructuring Plan, JMFARC had also sanctioned and disbursed funds for Working capital to the Respondent. It is further stated that the Respondent was given new lease of life by JMFARC and hence the operating activities were increased by the Respondent.

33. The Respondent has taken enormous efforts to revive itself which is evident from the settlements it has reached with few creditors and are in the process of paying in a structured manner. In fact, the creditors so far have supported the Respondent by agreeing to the settlement proposal and accepting mutually agreed repayment structure proposed by the Respondent. It is earnestly submitted that, any obstruction in the aforesaid restructuring plan which has been entered into by the Respondent with JMFARC, who holds 98% of the total Debt of the Respondent as of today, will again create a precarious situation for the Respondent whereby the demand of the pending dues by all its creditors, workers, statutory dues and other payments, will again lead to a total financial collapse of the Respondent on account of the Petitioner who is trying to sabotage the restructuring plan by using IBC as a recovery tool.

34. It is further stated that the alleged claim made by the Petitioner is grossly misconceived and is liable to be dismissed at the very outset.

The claim is such, which involves seriously disputed questions of fact and law. the Petition has been filed by Petitioner only to create a pressure upon the Respondent. It is equally trite that the adjudication of such claim is required to be done only by way of filing of a suit and cannot be done in a summary proceeding by an Application u/s. 7 of the Code such as the present one.

35. It is stated that the Tribunal while deciding the present Application filed u/s. 7 of the Code has been burdened with a responsibility in so far as determining the occurrence of default in accordance with the provisions of law and, therefore, merely because the Petitioner claims of there being default, does not ipso facto entitle the Tribunal to admit the present Petition. In fact, the term default ought to be construed in larger sense, after taking into consideration the various definition of default as provided under various laws including the Code and only upon necessary examination and due determination of default can a Petition u/s. 7 be admitted. The Tribunal ought to take into consideration the hardship the Respondent and its shareholders and Directors have to undergo, in case the determination of default is not duly adjudicated upon by the Tribunal. The said fact coupled with the fact that the hardship caused to the Respondent owing to the illegal and wrongful acts and deeds of the Petitioner.

36. In the event, it has been submitted that Petition suffers from various defects and is completely bad in law and therefore, ought to be rejected at the outset under the provisions of the Code as read with the Rules.

FINDINGS

37. We have heard the Counsel for the parties and have gone through the records.

38. During the course of the arguments the Ld. Counsel for the Petitioner has argued that there is no dispute with regard to the fact that the Corporate Debtor availed credit facility from the Petitioner in the year between 2008 and 2011 against execution of documents and under the said facilities last payment was made by the Corporate Debtor in the term loan account on 12.03.2013 and thereafter, there has been a continuous default since 12.04.2013, the date of default. Thus, according to the counsel for the Petitioner, the factum of debt and default stands established on record.

39. The Ld. Counsel for the Petitioner has further argued that the petition is well within the period of limitation. In this regard, the Ld. Counsel for the Petitioner has referred to several documents whereby the Corporate Debtor acknowledged its liability to pay the debt to the Financial Creditor from time to time and the same are master restructuring agreement, security trustee agreement dated 27.08.2014 etc. It has also been pointed by the Ld. Counsel for the Petitioner that the period during which BIFR proceedings remained pending that is from 29.01.2016 to 26.07.2016 shall also be excluded while calculating the limitation.

40. The Ld. Counsel for the Petitioner has further contended that the Corporate Debtor has been acknowledging the debt towards the lenders in the annual reports for the Year 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020. Apart from that the Corporate Debtor executed and filed consent terms dated 28.11.2017 with DRT-

II, Mumbai. The Ld. Counsel for the Petitioner has further contended that in the light of Hon'ble Supreme Court judgment passed in sue-moto Writ Petition No. 3/ 2020, the period from 15.03.2020 till 28.02.2022 is also liable to be excluded for the purposes of limitation and therefore, the petition is well within the period of limitation.

41. Ld. Counsel for the Petitioner has further argued that at the admission stage, provision of section 12A are not relevant and therefore, at this stage, merely because the other financial creditors holding more than 90% of the debt of the Corporate Debtor are against the initiation of CIRP, the instant application under Section 7 filed by the Petitioner bank cannot be scuttled.

42. On the other hand, the Counsel for the Respondent has argued that the Company is barred by the law of limitation. According to the Counsel for the Corporate Debtor the date of default has been claimed to be 12.04.2013 whereas the Company Petition has been filed on 25.02.2023. Counsel for the Corporate Debtor has further argued that the Petitioner has miserably failed to produce any document constituting a valid acknowledgement of the debt by Respondent on the basis of which the period of limitation can be deemed to have been extended. The Petitioner has further miserably failed to establish a chain of link to prove the so-called acknowledgments of debt to establish that the Petition is within time.

43. The Counsel for the Corporate Debtor has further argued that the Master Restructuring Agreement executed by the Corporate Debtor on 26.12.2013 cannot be considered as an acknowledgment of debt. Even if it is taken into consideration, it would extend the limitation

only 25.12.2016. As regard the Security Trustee Agreement dated 27.08.2014, it has been submitted by the Counsel for the Corporate Debtor submitted that it does not constitute acknowledgment as through this document no acknowledgment has been made nor any promise to pay was made by the Corporate Debtor. The document only create security interest in favour of the lenders pursuant to the Master Restructuring Agreement. Therefore, this document cannot be taken into account for extending the period of limitation.

44. Ld. Counsel for the Corporate Debtor has further argued that the Petitioner's reliance on the annual report for the year 2015-16 is wholly erroneous as the said annual report cannot be treated as acknowledgment of debt on the part of the Corporate Debtor. In this regard, it has been pointed out by the Counsel for the Corporate Debtor that in the annual report for the year 2015-16, the Corporate Debtor has not acknowledged any debt payable to the Petitioner nor the name of the petitioner is figuring anywhere in the said document as a Financial Creditor and, therefore, the annual report for the year 2015-16 could not be taken into consideration as an acknowledgment of debt on the part of the Corporate Debtor. The Counsel for the Corporate Debtor has further argued that the Petitioner has further relied on the annual reports for the year 2016-17, 2017-18 and 2018-19. However, in these annual reports also, the Corporate Debtor has not acknowledged any liability towards the Petitioner in specific and definite terms even though in the annual report for the year 2019-20 the Corporate Debtor has acknowledged its liability towards the lenders to the tune of Rs.3602.78 crores. According to the ld. Counsel for the Corporate Debtor, collective acknowledgement towards all the lenders is of no use to the Applicant as the same was issued in the

year 2020 after a period of four years when the limitation had expired in December 2016. Therefore, according to the Counsel for the Corporate Debtors, looking at the case from any angle, ex-facie, the Petition is palpably barred by time.

45. Ld. Counsel for the Corporate Debtor has further argued that the present Petition is nothing but a gross abuse of the process of law as well as the provisions of the IB Code, which has been filed for recovery of the outstanding dues. According to the Counsel for the Corporate Debtor, the IB Code, 2016 is not a recovery mechanism legislation. Rather the same aims at resolution of the distressed Corporate Debtors. In this regard, the Counsel for the Corporate Debtor has further pointed out that JMFARC is presently holding 90 percent of the debt of the Corporate Debtor. The said entity has filed a separate intervention Application seeking and supporting the dismissal of the present proceedings.

46. Ld. Counsel for the Corporate Debtor has argued that the JMFARC has been tirelessly working towards the resolution of the entire debt of the Corporate Debtor. The Counsel for the Corporate Debtor has further contended that even the Petition is admitted, the CIRP will be bound to be withdrawn considering the fact that the presently JMFARC is holding more than 90 percent share of the debt owed by the Corporate Debtor and would be having that much voting share in the event of CoC being constituted, therefore, the admission of the present Petition would be an exercise in futility and sheer weightage of time.

47. We have weighed the contention raised by the counsel for the parties and have also carefully gone through the records.

48. The primary objection raised by the Ld. Counsel for the Corporate Debtor is with regard to the issue of limitation. As per the case of the Petitioner, initially the Corporate Debtor was extended structured mezzanine corporate facility of 2.83 Crores vide sanctioned letter dated 14.11.2008. Thereafter, vide sanctioned letter dated 08.10.2011 medium term loan of 50 Crore was sanctioned against execution of various documents like Demand Promissory Note, undertaking, letter of guarantee etc. Thereafter, again vide sanctioned letter dated 24.07.2012 structured mezzanine corporate facility of 2.83 Crore was sanctioned. As per the Petitioner, the Corporate Debtor defaulted in repayment of the outstanding dues and on the request of the Corporate Debtor the account was restructured under Corporate Debt Restructuring (CDR) mechanism vide sanctioned letter dated 19.10.2013. Pursuant to the restructuring, the Corporate Debtor executed Master Restructuring Agreement dated 27.12.2013 and Security Trustee Agreement dated 27.08.2014. As the Corporate Debtor again failed to meet the commitments under the approved restructuring, its account was classified as NPA w.e.f. 12.06.2013 accordingly, the petitioner has claimed the date of default as 12.04.2013.

49. Though the petition was filed on 25.02.2023, the Ld. Counsel for the Petitioner has relied upon certain acknowledgements made by the Corporate Debtor from time to time by which the period of limitation stood extended from time to time and if the said acknowledgements are taken into account, the petition is liable to be held to have been filed within the period of limitation.

50. The first acknowledgement was made by the Corporate Debtor when the Master Restructuring Agreement was executed on 27.12.2013

which is signed by all the Financial Creditors including Vijaya Bank, an entity which merged with the Petitioner bank subsequently. In the schedule 1 & schedule 2 attached with the agreement, the name of the bank and the outstanding dues under each category has been expressly mentioned and the total liability on account all the loan facility agreements towards Vijaya Bank is stated to be Rs.56.20 Crores. Therefore, this constitutes a valid acknowledgement.

51. The second acknowledgement was made by the Corporate Debtor when it executed Security Trustee Agreement on 27.08.2014. In this document also, the name of all the financial creditors of the corporate debtor has been expressly mentioned and the name of Vijaya Bank figures in the schedule-1 attached with the agreement at Sr. No. 33. Therefore, this also constitutes a valid acknowledgement which had the effect of extending the period of limitation upto 26.08.2017.

52. It is also not a disputed fact that a BIFR reference was made by the corporate debtor under section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 on 29.01.2016 and the said reference was decided on 26.07.2016. It can also not be disputed that the period of 177 days from 29.01.2016 to 26.07.2016, being moratorium period under the aforesaid Act is liable to be deleted while calculating the period of limitation. If the said period is excluded, the limitation would be deemed to have been extended upto 23.02.2018.

53. The next acknowledgement on the part of the Corporate Debtor is claimed to have been made on 30.09.2016 when the Annual Report for the financial year 2015-16 was signed by the Corporate Debtor whereby the debt was acknowledged on consolidated basis. We have perused the Annual Report for the year 2015-16 filed with the

rejoinder as Exhibit-F whereby the defaulted amount due towards the financial institutions, banks and debenture holders has been stated to be to the extent of Rs. 658 Crores. It has been argued on behalf of the corporate debtor that this cannot be considered as an acknowledgement as the name of the petitioner bank or that of Vijaya Bank is not mentioned anywhere in this Annual Report. However, we consider this argument as specious. It is not the case of the corporate debtor that prior to 30.09.2016, when the Annual Report was finalized, the debt of Vijaya Bank had been paid. Rather, it is evident from record that ever since the loan was declared NPA in the year 2013, no amount was repaid. In this context, a reference can, be made to the law laid down in ***Lahore Enamelling and Stamping Company Limited vs. A. K. Bhalla and others AIR 1958 P & H 341*** whereby it was held that debts due to creditors not mentioned by name but included in the item relating to "Loans (Unsecured)" or as due to "Sundry Creditors" mentioned in the balance sheet amount to acknowledgment within the provisions of Section 19 of the Indian Limitation Act so as to extend the period of limitation w.e.f. the date of the signing of acknowledgment. In this very case, there is a reference to another case titled as ***Jones vs. Bellegrove Properties Limited 1949 (1) All ER 948 (W)*** whereby it was held that if the plaintiff had lent a sum of 1807 Pounds to the defendant company in which he was a shareholder and at the general meeting of the company, in 1946, the plaintiff was handed by a director the accounts of the company, signed by the accountants and two directors, which included the balance sheet for the years 1939 to 1945, in each of which was the entry "Sundry Creditors 7638 Pounds". It was held by the King's Bench Division that parol evidence was admissible to show that the sum mentioned in the entry included the debt to the

plaintiff and the entry constituted to the acknowledgment of the debt due to the plaintiff within the meaning of the Limitation Act, 1939. In these circumstances, it can be safely held that the debt acknowledged in the Annual Report for the year 2015-16 included the debt of Vijaya Bank as well even if the name of the bank is not specifically mentioned in the annual report. Moreover, it is not the case of the Corporate Debtor that any part of the debt was repaid prior to the annual report in question. Therefore, the acknowledgment of debt made in this annual report as also the subsequent annual reports, should be treated as legal and valid acknowledgment despite the fact that the name of the bank is not mentioned specifically in the said reports though the total figure of the liability is mentioned.

54. The Petitioner has further relied upon the Annual Report for the year 2016-17 which also similarly constitutes acknowledgment of debt on the part of the Corporate Debtor. In this Annual Report also, the total outstanding dues towards financial institutions, Banks etc. has been acknowledged to be outstanding to the tune of Rs.919.26 Crores on consolidated basis. Therefore, this also constitutes valid acknowledgment.

55. The Financial Creditor has further relied upon the consent terms executed by the Corporate Debtor with JM Financial Asset Reconstruction Company on 28.11.2017. However, this cannot be treated as a valid acknowledgement of the outstanding dues of Vijaya Bank as the name of the said bank does not figure anywhere in the consent terms.

56. The Financial Creditor has also relied upon the Annual Report for

the year 2017-18 annexed with the rejoinder as Exhibit-F whereby also the debt has been acknowledged by the corporate debtor on consolidated basis as on 07.09.2018. In this Annual Report, the consolidated outstanding dues towards banks and financial institutions swelled to Rs.100.29 Crores.

57. In addition to this, the Financial creditor has also relied upon the Annual Report for the year 2018-19, also annexed with the rejoinder, wherein too the debt towards the banks and financial institutions have been acknowledged on consolidated basis. The Financial Creditor has further relied upon the Annual Report for 2019-20 whereby also the Corporate Debtor has acknowledged its liability towards the banks and financial institutions on consolidated basis.

58. In the light of the aforesaid acknowledgement made by the Corporate Debtor from time to time, it cannot be said that the petition is barred by time. Here it can also not be forgotten that as per the order of the Hon'ble Supreme Court passed in sue-moto Writ Petition No.3/2020, the period from 15.03.2020 till 28.02.2022 is liable to be excluded from reckoning while calculating the limitation period.

59. It has further been argued by the counsel for the Corporate Debtor that the 90% of the lenders are resisting the admission of the present company petition. In this regard, the Ld. Counsel for the Corporate Debtor has pointed out that JMFARC presently holds 98% of the consolidated financial debt of the Corporate Debtor. In the year 2016-17 and 2017-18 the respondent gradually restarted operations at 4 out of its 7 manufacturing sites where it is receiving good response from the domestic and overseas customers. JMFARC along with the Corporate Debtor approach the petitioner for restructuring of the loan

but the petitioner rejected the proposal even though the petitioner is only an unsecured creditor and its debt ranks much lower to the debt of JMFARC. The Ld. Counsel for the Corporate Debtor has further argued that the present petition has been filed with a malicious intent by a minority unsecured creditor holding less than 2% of the debt which is nothing but to derail and jeopardise the overall restructuring of the debt of the Corporate Debtor which is presently over Rs. 3000 Crores. The Ld. Counsel for the Corporate Debtor has further argued that the proceeding under section 7 of the Code cannot be used as a recovery mechanism and the petitioner, by filing the present petition, is simply seeking to recover its outstanding dues from the Corporate Debtor which has just begun its recovery and revival with the help of its largest lender i.e. JMFARC and the process of revival cannot be allowed to be scuttled at the instance of lender holding less than 2% of the total debt of the Corporate Debtor. In support of his contention the Ld. Counsel for the Corporate Debtor has placed reliance upon SS Engineers Vs. HPCL 2022 SSC online SC 1385 whereby it was held that NCLT, exercising power under section 7 or 9 of IBC, is not a debt collection forum and it is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claim by an Operational Creditor. On this very point counsel for the Corporate Debtor has further relied upon ***Sesh Nath Singh Vs. Baidybati Sheoraphuli Co-operative Bank Limited*** whereby it is held that an Adjudicating Authority under IBC is not a substitute forum for collection of debt in the sense it cannot reopen debt which are barred by law or debts, recovery of which has become time barred.

60. We have considered the aforesaid contention raised by the Ld.

Counsel for the Corporate Debtor. However, in our considered view, the rights of a Financial Creditor having outstanding dues of about Rs. 130 Crores cannot be jettisoned and foreclosed at the very outset just because one entity called JMFARC has acquired or holds more than 90% of the debt owed by the Corporate Debtor. There is no such provision in the IBC and, therefore, a comparatively bigger lender cannot be allowed to arm-twist the other lenders to usurp their rights. So far as the case law laid down in ***SS Engineers vs. HPCL (Supra)*** relied upon by the Counsel for the Corporate Debtor is concerned, the same is not applicable to the instant case as the cited case was a case u/s 9 of the Code, 2016 and there was a pre-existing dispute between the parties due to which the admission of the Petition was declined and besides the Corporate Debtor was a solvent Company whereas it is not so in the instant case. Similarly, the reliance upon ***Sesh Nath Singh vs. Baidyabati Sheoraphuli Co-operative Bank Limited (Supra)*** is also misplaced which deals with primarily condonation of delay u/s 5 and section 14 of the Limitation Act, 1936. As discussed and held in the foregoing part of this order, the present Petition is well within the period of limitation.

61. Another argument has been raised on behalf of the corporate debtor that since the corporate debtor is on its way to recovery an revival consequent upon re-structuring of its debt by JMFARC, it should not be allowed to be pushed into insolvency necessarily as it would derail the corporate debtor's revival completely. It has also been argued that in the law laid down by the Hon'ble Supreme Court in the Vidarbha Industries Limited Vs. Axis Bank Limited, the viability of the corporate debtor must be gauged properly before initiating insolvency proceedings.

62. Even these contentions raised on behalf of the corporate debtor does not seem to be tenable. In the context of the corporate debtor, there does not appear to be any circumstances on the basis of which the law laid down in the Vidarbha Industries Case (Supra) could be attracted to this case. Here the corporate debtor has admittedly not paid any money to the petitioner since the year 2013 out of the outstanding dues of Rs. 130 Crores. There is no other circumstance which could indicate that the corporate debtor would be able to repay its debt running into more than Rs. 3000 Crores any time in near future. Therefore, the contention that the corporate debtor does not deserves to be pushed into insolvency is wholly erroneous.

63. Similarly, the argument raised on behalf of the Corporate Debtor that even if the petition is admitted, it would be in exercise in futility also seems fallacious. This argument has been raised on the premise that since JMFARC holds more than 90% of the debt of the corporate debtor, the petition would be bound to be withdrawn at the instance of JMFARC. Even this contention raised on behalf of the Corporate debtor seems to be totally untenable. Prima-facie, under Section 12A read with the relevant Regulations, only an applicant, who files a Petition under section 7 or 9, is entitled to withdraw. Therefore, to presume at the stage that the petition, even if admitted, would be compulsively withdrawn at the instance of JMFARC would not be appropriate.

64. It has also been argued on behalf of the Corporate Debtor that the Petition has not been filed by a duly authorized person and, therefore, is liable to be dismissed on this ground alone. However, even this contention is not correct. In this regard, a reference can be made to the Power of Attorney Exhibit-A which was executed in favour of

Shri Akhilesh Kumar Jain on 06.03.2008 by the then Vijaya Bank which subsequently merged with the Financial Creditor as per clause 11 of the said Power of Attorney, Shri Akhilesh Kumar Jain was authorized to institute all suits and other legal proceedings relating to the business of the bank in any civil or criminal court of judicature in or outside India and generally to do all such acts, deeds and things as he shall think expedient. It is, therefore, evident from the Power of Attorney that Shri Akhilesh Kumar Jain was authorized and competent to file the present Petition. Simply because the then Vijaya Bank merged with the Financial Creditor would not mean that the said Power of Attorney became extinct.

65. No other pointes have been raised on behalf of the corporate debtor.

66. As an upshot of the forgoing discussion, we are of the considered view that the Petitioner has been able to establish the factum of financial debt and its default having been committed by the corporate debtor and further that the Petition has been filed well within the period of limitation. Therefore, we deem it to be a fit case for admission u/s 7 of the IB Code, 2016. Accordingly, the present Petition is admitted in the following terms:

ORDER

a. **The above Company Petition No. (IB) -686 (MB)/2023 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Mis Arch Pharamalabs Limited.**

b. This Bench hereby appoints Mr. Sanjay Garg, Registration No: IBBI/IPA001/IP-P-

01865/2019-2020/12919 as the Interim Resolution Professional email :- Rp.Sanjaygarg@gmail.com, address; 193 Agroha Kunj Sector-13, Rohini, New Delhi 110085, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

k. The name of the Respondent nos. 2 and 3 shall stand deleted from the array of parties.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-	**Sd/-**
ANIL RAJ CHELLAN **MEMBER (TECHNICAL)**	**KULDIP KUMAR KAREER** **MEMBER (JUDICIAL)**

ANKIT

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT- II

INTERVENTION PETITION No. 26 OF 2024

IN

C.P. (IB) - 686 (MB)/2023

IN THE MATTER OF

Bank of Baroda

… Financial Creditor

V/s

Arch Pharmalabs Limited.

…Corporate Debtor

AND

JM Financial Asset Reconstruction Company Limited,

…Intervener/ Applicant

Order delivered: - 15.05.2024

Coram:

Anil Raj Chellan	**Kuldip Kumar Kareer**
Hon'ble Member (Technical)	**Hon'ble Member (Judicial)**

Appearances

For the Applicant **:** Ld. Senior Counsel, Mr. Prateek Seksaria a/w Kalyani Wagle

ORDER

Per: Coram

1. The present Intervention Petition no. 26 of 2024 has been filed by JM Financial Asset Reconstruction Company Limited ("JMFARC") under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016 seeking, *inter-alia,* following reliefs:

   - To allow this Intervention Application and permit the Intervener/ Applicant to intervene in the captioned Company Petition numbered as C.P. (IB)- 686 (MB)/2023 as a necessary party;
   - Present Intervener/ Applicant be heard before any order is passed in the captioned Company Petition numbered as C.P. (IB)- 686 (MB)/2023;

2. The Applicant submits that the Intervener/ Applicant is one of the financial creditors to the Corporate Debtor wherein the credit exposure is exceeding Rs. 9500 crores.

3. The Financial Creditor i.e. Bank of Baroda, has filed the present Company Petition for initiating corporate insolvency resolution process ("CIRP") against the Corporate Debtor.

4. The Corporate Debtor was granted various financial aids, including term loans and working capital facilities from the Financial Creditor and 49 other lenders under various loan and security documents. In the year 2013, the loan accounts of the Corporate Debtor were classified as Non- Performing Assets by the **aforesaid** lenders. Responding to the Corporate Debtor's initiative to enhance its operations, a corporate debt restructuring package ("CDR") was proposed in 2013 and was given effect to vide the Master Restructuring Agreement dated December 27, 2013 ("MRA"). However, the aforesaid restructuring failed.

5. Thereafter, the Intervener/ Applicant, acting in its capacity as trustee of various trusts, acquired the financial assets of the Corporate Debtor from 40 lenders representing about 97% debt of the Corporate Debtor, together with all the underlying security interest and all rights, titles and interests therein by way of executing various assignment agreements. Subsequently, the debt of the Corporate Debtor was restructured by the Intervener/ Applicant vide the Restructuring Agreement dated December 4, 2017 ("Restructuring Agreement").

6. Accordingly, the dues of the Corporate Debtor were restructured at Rs. 1400 crores vide the said Restructuring Agreement. Further, the Intervener/

Applicant acting in its capacity as lender also granted additional facility of Rs. 200 crores twice vide Additional Facility Agreements dated December 4, 2017 and May 27, 2021. By virtue of the above, the Intervener/ Applicant holds 100% of first charge and 100% of second charge on the secured assets of the Corporate Debtor.

7. The Applicant submits that they have an exposure of over Rs. 9500 crores in the Corporate Debtor, whereas the claim of Bank of Baroda is miniscule as compared to the Intervener/ Applicant herein. Moreover, Bank of Baroda is only an unsecured creditor for the majority of its debt and is a subservient charge holder for a small portion of its debt; whereas, the Intervener/ Applicant, being the 100% first charge and second charge holder on the secured assets of the Corporate Debtor, will be adversely affected, in case orders are passed in the present Company Petition without the Intervener/ Applicant being heard.

8. The Applicant submits that the Corporate Debtor specializes in manufacturing and sale of Intermediates and APIs, operating as one of the India's leading standalone API Companies. With a focus on high growth, complex chemistry and superior margin therapies, it maintains 7 manufacturing units spread across Maharashtra, Telangana and Haryana. The Company's supplies are to its customers in the United States and European Union employing over 1000 employees. The Corporate Debtor is

currently expanding its order book from local and export sales to benefit all stakeholders.

9. The Corporate Debtor has a large manufacturing set up with a potential to maximize its capacity. Further, the Corporate Debtor is into manufacturing of various life-saving drugs which are used locally and globally. Thus, passing of any orders by the Adjudicating Authority, without the Intervener/ Applicant being heard, would put the huge efforts made by the Intervener/ Applicant into jeopardy.

10. The Applicant, being the major financial creditor, has assessed the viability of the Corporate Debtor and rendered support in order continue to its business operations and to ensure successful recovery from the business of the Corporate Debtor. In case orders are passed in the present Company Petition, without the Intervener/ Applicant being heard, it shall jeopardize the efforts taken by the Intervener/ Applicant to revive the Corporate Debtor and the same shall have extremely negative impact on the business operations of the Corporate Debtor.

11. The Applicant submits that the Intervener/ Applicant is the largest financial creditor of the Corporate Debtor having about 97% exposure in the debt of the Corporate Debtor. Accordingly, the Intervener/ Applicant is entitled to be heard before any order of admission of the Corporate Debtor into CIRP is passed by the Adjudicating Authority, as the same will have an immediate

and direct impact on the efforts of the Intervener/ Applicant to revive the operations of the Corporate Debtor.

12. The Intervener/ Applicant, thus, states that it will be the most affected party if any order for admission of the Corporate Debtor into CIRP is passed in the captioned Company Petition without the Intervener/ Applicant being heard. Hence, in the interest of justice, equity and good conscience, the Intervener/ Applicant is praying for an opportunity of being heard in the said Company Petition.

Reply by Corporate Debtor:–

13. The Corporate Debtor submits that the primary objective of restructuring the Corporate Debtor's debt is to put the company back on its feet and ensure its continued business operations. As on date, the restructuring process has been completed, as is being the implemented with support of JMFARC.

14. The Corporate Debtor submits that the Financial Creditor would, at best, has share amounting to not more than 2% of the overall debt, totalling Rs. 134.99 crores, whereas JMFARSC's total claimed debt exceeds 9,500 crores.

15. The Corporate Debtor submits that even if the Company Petition is admitted, it is highly likely that the corporate insolvency resolution process (CIRP) would be withdrawn, as JMFARC with a vote share greater than 90%, would support the petition's withdrawal. Consequently, admitting the present Company Petition would be a useless/empty formality, as ultimately it would be withdrawn upon the constitution of the CoC.

16. The Corporate Debtor submits that the Financial Creditor is an unsecured creditor with a small portion secured by a subservient charge. However, JMFARC holds a 100% first charge and a 100% second charge on the secured assets of the Corporate Debtor. Therefore, even if the Corporate Debtor is subjected to the corporate insolvency resolution process/liquidation process, the Financial creditor will not be able to recover its debts, considering the superiority of JMFARC's secured debt and their share in debt.

17. The Corporate Debtor puts forth the judgment of the Hon'ble Supreme Court of India in **Vidharba Industries Power Limited v/s Axis Bank Limited (citation:)**, in which it was held that it is not necessary for an Adjudicating Authority to admit a Petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, even if it is found that there was an existence of debt and default in repayment of such debt. Further, it has been observed that the Adjudicating Authority is empowered to exercise its discretion as provided in Section 7(5)(a) of the code, as the Legislature has used the expression **"may"** in the provision.

18. The Corporate Debtor submits that the initiation of a CIRP will not revive the Company but will disrupt its business operations and the entire purpose for which the present petition has been initiated will be far from achievable.

Reply by the Financial Creditor in brief :–

19. The Financial Creditor has not filed its reply but has been orally heard through its counsel. The contentions advanced by the learned Counsel for the Financial Creditor are summarised hereinbelow:

20. The Financial Creditor submits that the Intervention Petition is not maintainable, as the precedents cited by the Financial Creditor assert that an Intervention Petition at the stage of admitting a Section 7 petition is unnecessary. Consequently, JMARC has no right to be heard in the above-captioned Company Petition.

21. The Financial Creditor asserts that in this case the criteria for establishing the presence of both "Debt" and "Default," along with the acknowledgment from the Corporate Debtor regarding the debt, default, and indebtedness towards the Financial Creditor is established.

22. The Petitioner argues that the Intervention Application should be dismissed as non-maintainable by citing various judgments from the Hon'ble Supreme Court and Hon'ble NCLAT which are as under: -

- Company Appeal (AT) (Insolvency) No.44 of 2018 - DEB Kumar Majumdar & Ors. versus State Bank of India
- Company Appeal (AT) (Insolvency) No.51 of 2019 - IDBI Bank Ltd. v Odisha Slurry Pipeline Infrastructure Ltd

- Company Appeal (AT) (Insolvency) No.676 of 2019 - L&T Infrastructure Finance Company Ltd. versus Gwalior Bypass Project Ltd.
- Company Appeal (AT) (Insolvency) No.436-437 of 2019 - Damont Developers Pvt. Ltd. versus Bank of Baroda & Anr.
- Company Appeal (AT) (Insolvency) No.113 of 2021 - Vekas Kumar Garg versus DMI Finance Pvt. Ltd. & Anr.

These Judgments emphasize that, at the stage of admission of a petition under Section 7 or 9, only the Corporate Debtor and the Financial Creditor are necessary parties to be heard. Third Parties, including intervenors, have no right to be heard at this stage.

23. The Financial Creditor submits that the Intervenor seeks support for their Intervention Application (IA) from a judgment by the Hon'ble NCLAT in CFM Asset Reconstruction Pvt. Ltd. versus Saudi Basic Industries Corporation Ltd & Anr. However, it is pertinent that the said judgment was passed on case specific facts and the same is not applicable in the present matter.

24. Furthermore, the Intervenor cites the Hon'ble Supreme Court's judgment in ***Civil Appeal No. 4633 of 2021*** in the matter of ***Vidarbha Industries Power Ltd vs. Axis Bank Ltd.***, emphasizing the discretion of the Adjudicating Authority to admit a Section 7 application under the IBC. However, the context of the

judgment, where Vidarbha Industries was financially sound, differs from the current case where the Corporate Debtor has been struggling since 2013 undergoing through another debt restructuring process after a failed Corporate Debt Restructuring.

25. The Financial Creditor submits that the Intervenor also relied upon the Judgment of Hon'ble High Court of Bombay in Company Application No. 310,352 to 361 of 2003 in Company Petition No. 959 of 2002 in the matter of Bharat Petroleum Corporation versus National Organic Chemical Industries Ltd. But the reliance on the above judgments is also wholly misplaced, as the same is in relation to Section 557 of the Companies Act, 1956 while the present petition is under Section 7 of the IBC Code, 2016 where no such provision is available.

26. The Intervenor relied upon the Judgment of Honourable NCLAT in Company Appeal No. 51/2023 in the matter of Join Up Corporation versus Mr. R Sugumaran and other. The Financial Creditor contends that the Intervenor misinterpreted the judgment, as it only clarifies that only the Applicant initiating CIRP can withdraw the petition. Thus, the Judgment supports the Financial Creditors stance.

27. Given the cited judgments, the Intervention Application lacks merit, and the Financial Creditor requests the Tribunal to dismiss it with cost, while admitting the Company Petition.

Findings

28. We have heard the counsel for the parties and have gone through the records.

29. During the course of arguments, the learned counsel for the Applicant /intervener has argued that the intervention application is maintainable, and the case law relied upon by the counsel for the Respondent /Financial Creditor are not applicable being per in-curium. In this regard, the learned counsel for the Applicant has relied upon ***Bharat Petroleum Corporation Limited Vs National Organic Chemicals Limited 2003 SCC Online*** whereby Hon'ble High Court of Bombay has held that the interest of the creditors has to be considered even at the stage of the admission of the petition under section of 557 of the Companies Act. The learned counsel for the applicant has further relied upon ***Madhusudan Gordhandas Vs Madhu Woollen Industries Pvt Ltd. 1971 (3) SCC 635*** whereby it was held by the Hon'ble Supreme Court that if there is opposition to the making of winding up order by the creditors, the court will consider their wishes and may decline to pass a winding up order. On this very point, the learned counsel for the applicant has relied upon ***IDFC Bank Ltd. Vs Ruchi Soya Industries Ltd. 2017 SCC online Bombay 153 and Focus Advertising Pvt Ltd. Vs Ahura Blocks Pvt Ltd. 1974 online Bombay 109.***

30. The learned counsel for the applicant has further relied upon ***CFM Asset Reconstruction Pvt. Ltd. Vs Saudi Basic Industries Pvt Ltd 2022 SCC online***

NCLAT 442 whereby intervention at the instance of a Financial Creditor, who had exposure to the extent 90.19% debt owed by the Corporate Debtor, was permitted.

31. The Ld. Counsel for the applicant has further argued that intervention by a Financial Creditor having more than 90% debt of the Corporate Debtor deserves to be allowed as the interest of the majority stakeholders has to be kept in mind while considering initiation of insolvency proceedings which cannot be mechanically ordered. The Ld. Counsel for the applicant has further referred to ***Vidarbha Industries Ltd. Vs. Axis Bank Ltd. 2022(8) SCC 352*** whereby the Hon'ble Supreme Could held that exercise of jurisdiction under Section 7 by the Adjudicating Authority is discretionary and the Authority is not merely required to see whether there exists a debt and default but is also required to consider the viability and overall financial health of the Corporate Debtor. In this regard, it has further been argued by the Ld. Counsel for the applicant that the Corporate Debtor presently is at the stage of revival and the applicant has an exposure to the extent of Rs. 9500/- Crore to the Corporate Debtor and has sanctioned additional Rs. 400/- Crores in two tranches. On the contrary, the Corporate Debtor owes only Rs. 135 Crores to the Financial Creditor which is approximately 1.40% of the total debt of the Corporate Debtor. Therefore, the company cannot be pushed into insolvency at the behest of the Financial Creditor.

32. The Ld. Counsel of the applicant /intervener has further argued that even otherwise, the admission of the petition would be a futile exercise considering the fact that the applicant holds 97% of the debt and can always exercise its right to withdraw the application under Section 7 in terms of by invoking section 12A of the IB Code which permits withdrawal with the approval of 90% voting shares of the Committee of Creditors.

33. In the light of the above submissions, Ld. Counsel for the applicant/intervener has urged that the application is allowed, and the applicant may be impleaded as party and be also heard before any order in the petition under Section 7 filed by the Respondent/Financial Creditor is passed.

34. On the other hand, the Ld. counsel for the Respondent/Financial Creditor has argued that it is well settled that intervention at pre-admission stage is not maintainable. In support of his contentions, the Ld. Counsel for the Respondent has relied upon ***Deb Kumar Mujumdar Vs. State Bank of India Company Appeal (AT) (Ins.) No. 44/2018*** whereby it was held by the Hon'ble NCLAT that no person has a right to claim for hearing except the Corporate Debtor at the stage of application filed under Section 7 of the Code and no other financial creditor or operational creditor is required to be heard at that stage. The Ld. Counsel for the respondent has further relied upon ***Company Appeal (AT) (Ins.)676 of 2019 L&T Infrastructure Finance Company Ltd. Vs Gwalior Bypass Project Ltd.*** whereby also the similar view was taken while

holding that a member/shareholder has no right to intervene to oppose admission of application under section 7. The Ld. Counsel for the respondent has also relied upon ***Company Appeal (AT) (Ins.) 436-437/2019 Damont Developers Pvt Ltd. Vs Bank of Baroda and anr. as well as Company Appeal (AT) (ins) 113 of 2021 Vikas Kumar Garg Vs DMI Finance Private Limited and another.***

35. The Ld. Counsel for the Respondent further relied upon ***Company Appeal (AT) (Ins) 1231 of 2022 CFM Asset Reconstruction Private Limited Vs. Saudi Basic Industries Ltd Corporation Ltd and anr.*** whereby it was held that ordinarily, a financial creditor cannot be allowed to intervene in the proceeding under Section 9 but as an exception, a financial creditor can intervene if there are reasons and allegations which require consideration by the Adjudicating Authority.

36. As regard the contention raised by the Ld. Counsel for the applicant with regard to applicability of the law laid down by the Supreme Court in the matter of ***Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd (Supra)***, it has been contended by the Ld. counsel for the Respondent that in the context of the facts and circumstances of the present case, no parallel can be drawn as in the instant case there are no circumstances existing nor any such circumstances have been brought on record to show that the Corporate Debtor is financially sound enough to sustain itself.

37. The Ld. Counsel for the Respondent has further argued that the plea raised on behalf of the applicant with regard to the provisions of section 12A of the Code is also erroneous. According to the Ld. Counsel of the Respondent, even a cursory look at the provisions of Section 12A would reveal that only the applicant, who initiated the CIRP proceedings, is entitled to withdraw the proceedings subject of course to the approval of 90% member of the CoC.

38. We have thoughtfully considered the rival contention raised by the Ld. Counsel for the parties and have also carefully gone through the record.

39. In our considered view, at the stage of admission in a petition under Section 7 of the Code, ordinarily no intervention is permissible as has been held by the Hon'ble NCLAT in number of cases relied upon by the Ld. Counsel for the Respondent/ Financial Creditor. In ***CFM Asset Reconstruction Private Limited Vs. Saudi Basic Industries Corporation Ltd and Anr. (Supra)*** also, it has been clarified that as held by the Hon'ble Supreme Court, in exceptional circumstances, a Financial Creditor can be permitted to intervene in an application under Section 9 if there are reasons and allegations which require consideration. Moreover, the said case, in which permission to intervene was granted to a Financial Creditor, was a case filed under Section 9 and not under Section 7.

40. So far as the case law referred to and relied upon by the Ld. Counsel for the applicant in ***Madhusudan Gordhandas Vs Madhu Woollen Industries Pvt Ltd. (Supra), IDFC Bank Ltd. Vs Ruchi Soya Industries Ltd. (Supra), Focus***

Advertising Pvt Ltd. Vs Ahura Blocks Pvt Ltd. (Supra) are concerned, in our considered view, the same cannot be applied to the facts and circumstance of the present case on the ground that the same dealt with the situation of winding up under the Companies Act, 1956 or 2013. Here one cannot be oblivious of the fact that dynamics of Insolvency and Bankruptcy Code, 2016 are different which represent a paradigm shift from the earlier regime under the Companies Act. Therefore, whatever was relevant at pre-winding up stage in proceedings under the Companies Act cannot be said to germane at pre-admission stage of section 7. Besides, winding up of a company under the Companies Act cannot be equated its resolution under the IB Code, 2016.

41. So far as the applicability of the law laid down in '***Vidarbha Industries***' case is concerned, again in the context of the instant case, no special circumstances have been highlighted by the counsel for the applicant which could indicate that the Corporate Debtor has sufficient resources at its disposal to sustain itself financially and it can be perceived to pay off its liabilities to the creditors in the near future. Here one cannot be unmindful of the fact that admittedly the Corporate Debtor owes a sum of Rs. 130 Crores to the Respondent. Even if the same may be a meagre amount when compared with the outstanding dues of the intervener which are stated to be to the tune of Rs. 9500 Crores the intervener cannot be allowed to usurp the legitimate rights of the other financial creditors to pursue the remedies available under the law. In any case, an amount of Rs. 130 odd crores are also not a mean amount.

42. As regards the contention raised on behalf of the applicant that the admission of the application under Section 7 of the Code would be a futile exercise in the light of the fact that since the intervener holds more than 90% of the financial debts and the petition would be defeated under Section 12A of the Code, at this stage we can only say that prima facie, post admission, only the applicant who files the application, has the right to withdraw and after the formation of the CoC such withdrawal requires approval of 90% of the CoC members. Be that as it may, at this stage, we do not deem it appropriate to allow the intervention application merely on the assumption that the intervener holds more than 90% of the debt of the Corporate Debtor and at its behest, the Petition would be defeated u/s 12A of the Code, 2016. As stated earlier, a financial creditor holding more share in the total debt cannot be allowed to arm-twist the other creditors.

43. As a result of discussion, we find the intervention application to be devoid of any merit at this stage and the same is accordingly **dismissed** with no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)

ANKIT/JUGAL