



# INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

## IBC Case Law Capsule

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**VIDARBHA INDUSTRIES POWER LTD. Vs. AXIS BANK LTD.**

**CIVIL APPEAL NUMBER 4633 OF 2021**

**DATE OF SUPREME COURT JUDGMENT: JULY 12, 2022**

**Power of NCLT to initiate CIRP under Section 7(5)(a) is not mandatory but discretionary.**

### Facts of the Case: -

In this case, the Appellant Corporate Debtor (CD) i.e., Vidarbha Industries Power Ltd (VIPL) had defaulted on loan from Axis Bank Limited (Financial Creditor). CD pleaded that the default was on account of dispute relating to the price of the electricity which was to be settled by Maharashtra Electricity Regulatory Commission (MERC) and upon which CD was expecting to receive a substantial amount of ₹1,730 crore which would enable it to pay off the debt. The CD also submitted that it had won a case in the Appellate Tribunal for Electricity (APTEL) challenging the disallowance of the actual fuel cost for the financial years 2014-15 and 2015-16. The appeal against the APTEL order is still pending in the Apex Court. The CD was, for the time being, short of funds but, it was submitted that implementation of the orders of the APTEL would enable CD to clear all its outstanding liabilities. However, the NCLT had admitted the CIRP application filed by Axis Bank Limited i.e., the FC against which appeal was rejected by the NCLAT.

This appeal in front of the Apex Court under Section 62 of the IBC was preferred by the CD against the order of NCLAT whereby the Tribunal refused to stay the proceedings initiated by Axis Bank Limited against the Appellant for initiation of the CIRP under Section 7 of the IBC. Both NCLAT and NCLT proceeded on the premise that an application must necessarily be entertained under Section 7(5)(a) of the Code if a debt existed and the CD was in default of payment of debt. They found Section 7(5) (a) of the Code to be mandatory for the Adjudicating Authority (AA).

The main question to be determined in front of the Apex Court was whether Section 7(5)(a) of the IBC is a mandatory or a discretionary provision.



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## Supreme Court's Observations: -

The Bench relied on the Supreme Court's observations in *Swiss Ribbons Private Limited and Anr. Vs. Union of India* which said that timely resolution of a Corporate Debtor, who is in the red, by an effective legal framework and process, would go a long way to support the development of the credit market. "There can be no doubt that a CD who is in the red should be resolved expeditiously, following the timelines in the Code and no extraneous matter should come in the way. However, the court remarked, the viability and overall financial health of the CD are not extraneous matters," said the Court.

On the judgement of NCLAT, the Apex Court said, it erred in holding that the NCLT was only required to see whether there had been a debt and the CD had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the FC the right to apply for initiation of CIRP. Legislature has, in its wisdom, chosen to use the expression "may" in Section 7(5)(a) of the Code. Ordinarily the word "may" be directory. The expression 'may admit' confers discretion to admit. The use of the word "shall" postulate a mandatory requirement. Had it been the legislative intent that Section 7(5)(a) of the Code should be a mandatory provision, Legislature would have used the word 'shall' as it has used in Section 9(5) which is an almost identical Section with respect to an Operational Creditor and not the word 'may'. There is no ambiguity in Section 7(5)(a). 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. "Even though Section 7(5)(a) may confer discretionary power on the NCLT, such discretionary power cannot be exercised arbitrarily or capriciously," emphasized the Court.

## Order: -

The impugned order dated January 29, 2021, passed by NCLT and the impugned order dated March 02, 2021, passed by the NCLAT dismissing the appeal of the Appellant were set aside. NCLT was directed to reconsider the application of the Appellant for stay of further proceedings on merits in accordance with law.

**Case Review: -** The appeal was allowed.