

● CORPORATE DEBT

SC verdict on financial creditors' rights opens a Pandora's box

Apex court stresses that NCLT has discretionary powers to allow or reject insolvency petitions

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In a recent order, the Supreme Court refused to entertain a review petition filed against the judgment rendered in *Vidharbha Industries Power vs Axis Bank*.

Vidharbha Industries could not repay its dues to Axis Bank because the Maharashtra government did not pay it ₹1,730 crore, as directed by the Appellate Tribunal for Electricity (APTEL). The apex court ruled that if there was an instance of a debt and default, the National Company Law Tribunal (NCLT) is not necessarily bound to admit an insolvency petition under Section 7 of the Insolvency and Bankruptcy Code (see the article 'May' does not mean 'shall', says SC in *Gavel* dated July 18, 2022).

The decision has sparked a de-

bate over whether the rights of financial creditors stand diluted as the Supreme Court clarifies that the NCLT has the discretionary powers to allow or reject their petitions.

The Supreme Court observed that had the legislative intent been that Section 7(5)(a) of the IBC should be a mandatory provision, the legislature would have used the word 'shall' and not 'may'. A similar provision for operational creditors specifically used the word 'shall', indicating it was mandatory.

As for an application filed by a financial creditor, the Supreme Court was clear that, if facts and circumstances warrant, the adjudicating authority can indeed keep the application in abeyance or even reject it.

The Supreme Court has clarified in the review petition filed against the decision in *Vidharbha Industries* that the decision is



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based on the facts and circumstances of that case.

However, experts feel that Vidharbha Industries has opened a Pandora's box and given unscrupulous corporate debtors an option to seek stay on proceedings. Now, financial creditors would be required to convince the adjudicating authority to favourably exer-

cise the discretionary powers under Section 7(5)(a) of the IBC. Therefore, the mere pendency of an acknowledged financial debt may no longer be sufficient to have an insolvency petition filed by the financial creditors admitted under Section 7. Further, the option of keeping a financial creditor's insolvency petition in abeyance at

the pre-admission stage is antithetical to the object of the IBC, which aims to preserve and maximise the value of the corporate debtor.

The only relief for financial creditors is that the Supreme Court has left it open to them to file insolvency petitions afresh should the dues of the corporate debtor remain unpaid. Yet, there could be cases where the value of the corporate debtor has diminished considerably before the financial creditor approaches the adjudicating authority once again.

It is, therefore, felt that the decision in *Vidharbha Industries* could have set out checks and balances and the indicative circumstances under which the NCLT can put a financial creditor's insolvency petition in abeyance or even reject it.

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