IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-V

COMPANY PETITION NO. (IB)-686(ND)/2022

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF:

ADITYA BIRLA FINANCE LIMITED
Having its Registered Office at:-
Indian Rayon Compound, Veraval
Gujarat-362 266
Corporate Office at:-Ground Floor,
Eros Plaza, Eros Corporate Tower,
Nehru Place, New Delhi - 110 019

.... APPLICANT/FINANCIAL CREDITOR

Versus

SITI JIND DIGITAL MEDIA COMMUNICATIONS PRIVATE LIMITED
Address: F-1, J Block Market, Ashok Vihar,
Phase-I, North West Delhi, New Delhi-110052.
Email: Csandlegal@Siti.Esselgroup.Com

...RESPONDENT/CORPORATE DEBTOR

Order Pronounced on: 22.03.2024

CORAM

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT

For the Applicant : Mr. Saurav Agrawal, Ms. Debarshi Dutta, Ms. Manvi Adlakha, Ms. Anusha Sinha, Advs.

For the Respondent : Mr. Vishesh Kalra, Mr. Sourabh Tandon, Mr. Hardik Khatri, Advs.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is an application filed by M/s Aditya Birla Finance Limited (for brevity "Financial Creditor/Applicant") under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code/IBC") for initiating Corporate Insolvency Resolution Process "CIRP" against M/s Siti Jind Digital Media Communications Private Limited (for brevity "Corporate Debtor/Respondent") for the alleged default in repayment of loan of Rs. 5,00,00,000/- (Rupees Five Crores only).

2. The Corporate Debtor is a Company having its registered office at F-1, J Block Market, Ashok Vihar, Phase-I, North West Delhi, New Delhi-110052. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

3. Applicant submitted that the Financial Creditor addressed a Credit Arrangement Letter dated 7 February 2020 to the Corporate Debtor and the Corporate Debtor's co-borrower, Siti Networks Limited ("Co-borrower") offering to extend the requested Rupee Term Loan aggregating to INR 5,00,00,000 ("Term Loan/Facility") to the Corporate Debtor**.**

4. Applicant further submitted that a Facility Agreement dated 26 February 2020 was executed by and between the Financial Creditor and Corporate Debtor along with SNL as a Co-borrower wherein the Financial Creditor agreed to extend a Term Loan aggregating to INR 5,00,00,000 to the Corporate Debtor at an interest rate of 11% Per Annum.

5. Applicant submitted that the Loan Amount of Rs. 5 Crore was disbursed by the Financial Creditor to to the Corporate Debtor on dated 02.03.2020, 03.03.2020 and 03.06.2020 respectively.

6. Applicant further submitted that as per the agreed Equated Monthly Installment "EMI's", inserted in the Facility Agreement dated 26 February 2020, Corporate Debtor had to make a payment of an amount of Rs. 19,39,096/- as on 31.03.2022, however the Corporate Debtor defaulted in making the payment of said amount on 31.03.2022. However, the Corporate Debtor paid Rs. 15,00,000 on 29.04.2022 out of Rs. 19,39,096/, thus an amount of Rs. 4,39,096 remained in default even

then. Applicant further submitted that the Clause 19 of the Facility Agreement dated 26.02.2020 clearly mentioned that in case of an Event of Default, the Financial Creditor has the option to recall the loan. Once the loan is recalled, then the Corporate Debtor is obligated to pay the balance due immediately. Thereafter, as per the above said Agreement the Financial Creditor vide Loan Recall Notice dated 24.05.2022 recalled the subject loan and called upon the Corporate Debtor to pay the amount of Rs. 4,65,56,658/- as immediately due and payable, which Corporate Debtor failed to repay and stopped servicing the loan. Thus, the default which had commenced on 31.03.2022.

7. Applicant submitted that the Corporate Debtor did not respond to the Recall Notice and did not cure the events of default in accordance with the Facility Agreement. No further payments have been made (whether towards the installments or the monthly interest components) by the Corporate Debtor under the Facility Agreement. Hence, the present Application by the Financial Creditor against the Corporate Debtor for initiating Corporate Insolvency Resolution Process under Section 7 of the IBC is filed.

Reply of the Respondent/Corporate Debtor:

8. Consequent to the notice issued by this Tribunal, the Respondent filed its reply and submitted that all the averments, statements, submissions,

grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety.

9. Respondent further submitted that the intent of the Applicant behind initiating the present proceedings under Section 7 of Code is merely to "recover its dues" and is no-where linked to the effort of resolution of an insolvent company which is against the provisions/intent and objects of the Code. Respondent submitted that as the present proceedings have not been initiated for resolution of insolvency therefore, the same is barred under Section 65(1) of the Code and ought to be dismissed in limine.

10. Further the Respondent submitted that even after the alleged date of default i.e. 31.03.2022 as mentioned by the Applicant in the instant Application, the Respondent had made a payment of Rs. 15,00,000/- on 29.04.2022 and the said amount has been admittedly received and appropriated by the Applicant even after the purported declaration of default thus, rendering the present petition not maintainable.

11. The Respondent submitted the Loan Recall Notice were sent by the Applicant in favour of two entities namely the Corporate Debtor and the Co-borrower, i.e. Siti Networks Limited (SNL). The Applicant submitted that that the Arbitration clause has been invoked against the co-borrower in respect of which proceedings are pending before the Hon'ble

Delhi High Court under Section 9 of Arbitration and Conciliation Act, 1996.

12. Respondent submitted that trigger of default by the applicant against the Respondent was due to the purported defaults of the co- borrower i.e. SNL and not for the default of Respondent. Further submitted that the Applicant issued a Notice of Recall dated 24.05.2022 which is addressed to both the Respondent and co- borrower and when a Petition under Section 7 is filed against a co-borrower (i.e the Respondent) on account of another co-borrower's default in respect of unconnected facilities, the same is clearly an evidence of the fact that the Section 7 Application has been filed for reasons other than resolution and is barred under Section 65 of the Code.

13. It is submitted that the Applicant has relied upon the documents in which reference has been made regarding a different Loan amount and the Loan Recall notice has been sent regarding a different Loan amount which has triggered the event of default according to the Applicant. The said actions of the Applicant further depicts that the Applicant is admitting that the actions of the Respondent and co- borrower i.e. SNL are interlinked.

14. It is further submitted by the Respondent that the Section 7 Petition is liable to be dismissed on the ground that the Facility Agreement dated

26.02.2020 entered into, inter-alia between the Applicant, Siti Networks Limited, the Respondent as Lender and Facility Agent on which the Applicant has relied upon is not maintainable as it has insufficient stamping. The Facility Agreement involves a transaction of loan amounting to Rs. 5 Crores and upon that Stamp duty of Rs 200 is paid which is considerably under stamped and against the provisions of the Stamp Act. Thus, in light of the fact that there is a pre-existing dispute with respect to a purported default of a co-borrower, incorrect computation of default and other issues mentioned above the instant petition deserves dismissal with exemplary costs.

Rejoinder of the Applicant

15. That the Financial Creditor through his rejoinder denies all statements, averments, allegations, contentions and submissions in the Reply. Further the Applicant submitted that the Applicant has been constrained to file the Petition in view of continuing defaults of the Corporate Debtor in discharging its payment obligations under the Loan Facility Agreement. The default of 31 March 2022 is only one of the first instances of default and cannot be construed as the sole or the only instance of default committed by the Corporate Debtor, however, even a singular instance of default is sufficient for initiation of insolvency resolution proceedings.

16. The Applicant through its Rejoinder denied the contention of the Respondent that the default of 31 March 2022 was rectified/cured by the Respondent in its subsequent payment of INR 15,00,000 on 29 April 2022. Applicant Further submitted that not a single payment has been made by the Corporate Debtor since 29 April 2022 either as of the date of filing of the Petition or thereafter.

17. Further the Respondent denied that the Petition is not maintainable due to the pendency of proceedings initiated by the Applicant against SNL under Section 9 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). It is submitted by the Applicant that the said proceeding pertains to an entirely unrelated and unconnected transaction between the Applicant and SNL under a completely different loan facility extended to SNL.

18. Applicant submitted that the insufficient stamping is not only curable but also does not prevent admission of a petition under Section 7 of the Code, so long as there is substantial proof of disbursal of the loan in question and its utilization by the Corporate Debtor.

Analysis and Findings

19. We have heard Ld. Counsels for the applicant as well as the Ld. Counsel for the Respondent and perused the averments made in the application, counter affidavit and rejoinder. The relevant documents annexed with

the submissions have also been examined. We have also perused the copy of Facility Agreement executed between the both parties and Co-borrower on 26.02.2020.

20. In order to affirm that this petition falls within the ambit of Section 7, we need to see whether there is a "debt" owed to the Financial Creditor and whether there is a "default" with respect to such debt.

21. In the present case, the Financial Creditor and the Corporate Debtor along with the Co-Borrower entered into a Facility Agreement dated 26.02.2020 (copy of which is annexed as Annexure A-7 with the present Petition). In accordance with the Facility Agreement the Financial Creditor has disbursed the amount to the Corporate Debtor on 02.03.2020, 03.03.2020 and 03.06.2020. Further, the Financial Creditor has placed on record, its Supplementary Affidavit dated 17.05.2023, which is certificate of disbursal. Furthermore, the Corporate Debtor in its reply affidavit dated 06.12.2022 has admitted in Para 20 of the reply that it owes a debt towards the Financial Creditor. Therefore, one essential ingredient with respect to Section 7, that there has been a "debt", stands substantiated.

22. The subsequent essential requirement of Section 7 of the IBC is to ascertain whether there is a 'default' with respect to such debt.

23. As per the Facility Agreement dated 26.02.2020 the parties are agreed upon a Equated Monthly Installment "EMI", in which the Corporate Debtor had to make a payment of an amount of Rs. 19,39,096/- as on 31.03.2022, the Corporate Debtor in its reply affidavit dated 06.12.2022, in Para 10 has admitted the default in making the payment of said amount on 31.03.2022 and paid Rs 15,00,000 on 29.04.2022. At this juncture it is important to referred the case of *Innoventive Industries Ltd. Vs. ICICI Bank Ltd (2018) 1 SCC 407*, where it was held as below:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. ***Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount****. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between*

debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

24. Further, the relevant clauses of Facility Agreement dated 26.02.2020 as shown below:

19.1 (Non-payment)

"Fallure by any Obligor in making payments of any of the Secured Obligations under the Financing Documents on the relevant due date at the place and in the currency in which it is expressed to be payable."

19.19 Consequences of an Event of Default

"On and at any time after the occurrence of an Event of Default the Lenders and/or the other Finance Parties may, upon the delivery of 1 (one) Business Days' notice to the Borrowers, which notice the Borrowers acknowledge herein as being reasonable and sufficient, take any one or more of the following actions:"

19.19 (ii) "declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the

Financing Documents be immediately due and payable, whereupon they shall become immediately due and payable;"

25. The clause 2.2 of the Facility Agreement makes it clear that the liability of the Corporate Debtor and its Co-borrower towards the Loan Facility Agreement dated 26.02.2020 is joint and several. Further, a co-joint reading of Clause 19, Clause 19.5 and Clause 19.19, leads to an interpretation that if any of the Borrowers (Corporate Debtor or SNL) are unable to pay the loan or admitted in writing its inability to pay any of its financial indebtedness as they mature or when due, that will constitute an Event of Default. Further, in case if there is an Event of Default, the Financial Creditor may recall the present loan with 1 (one) Business Days' notice to the Corporate Debtor and it would become due & payable.

26. Coming to the factual matrix of the present case, pursuant to the Facility Agreement dated 26.02.2020, the Applicant had disbursed the Loan Amount of Rs.5,00,000,000/- to the Corporate Debtor in 3 tranches, i,.e., Rs.2,00,00,000/- disbursed on 02.03.2020, Rs.2,00,00,000/- disbursed on 03.03.2020, Rs.1,00,00,000/- disbursed on 03.06.2020. It is an admitted fact that the Corporate Debtor was regular in repayment of the Loan as per the prescribed repayment schedule. However, M/s. Siti Network Limited (Corporate Debtor's Co-borrower) in its various letters/disclosures dated 02.01.2022, 31.01.2022, 03.03.2022,

31.03.2022, 30.04.2022, 01.06.2022 and 2.07.2022 made to the NSE and BSE had admitted in writing its inability to pay its financial indebtedness in respect of loans availed from the Financial Creditor as well as other loans availed from other Banks and financial institutions. In view of the Event of Default as specified in Clause 19.5 (i) & (ii) taking place, the Financial Creditor recalled the loan vide Loan Recall notice dated 24.05.2022, wherein the Financial Creditor seeks its repayment as being immediately due and payable and the same was duly received by the Corporate Debtor. After, the receipt of the Loan Recall Letter dated 24.05.2022 the Corporate Debtor had stopped servicing the loan.

27. Further, on perusal of the Loan Recall Notice dated 24.05.2022, we find that the Loan Recall Notice dated 24.05.2022 categorically by referring to Clause 19.5 of the Loan Facility Agreement had stated that "Since Siti Networks Limited (basis various disclosures about payment defaults to the Stock Exchanges) is already in default with its lenders, an Event of Default has occurred under the terms of the Financing Documents". Further, it is evident that, in the Loan Recall Notice dated 24.05.2022, a clear reference is made to default made by SNL with its lenders as per the disclosure made to the Stock Exchange.

28. Now, coming back to our findings on the point in controversy, i.e., "whether there exists a default in respect of the loan sanctioned to the

Corporate Debtor vide Facility Agreement dated 26.02.2020"? , on considering the conspectus of facts, this Adjudicating Authority is of the considered view that the Applicant is in default in repayment of the loan amount of Rs.4,62,54,279/- pursuant to the Loan Recall Notice dated 24.05.2022 issued to the Corporate Debtor on the occurrence of Event of Default as specified in Clause 19.5 of the Facility Agreement. The entire loan was recalled as per clause 19.19 (consequences of event of default) and the said loan was not repaid by the Corporate Debtor. The Applicant in Cl.2 of Part-IV of Form 5 of the Application had mentioned the date of Default as 31.03.2022.

29. The main contention of the Corporate Debtor is that the Loan Recall Notice dated 24.05.2022 is bad in law. But curiously, the Corporate Debtor has not brought any challenge against the said Recall Notice. No evidence, of any challenge in a court of appropriate jurisdiction has been placed on record before us. Since, the legal validity of the Loan Recall Notice cannot be adjudicated by this Adjudicating Authority in its summary jurisdiction, the best case of the Corporate Debtor before us would be on account of dispute raised that the recalled debt was not due and payable, when it was recalled, and that the CIRP could not be initiated against the Corporate Debtor as it is a solvent company. Reliance has also been placed by the Corporate Debtor on Hon'ble

Supreme Court's judgement in '**Vidarbha Industries Power Ltd. v Axis Bank Ltd.**' **[(2022) 8 SCC 352]** to state that the instant application under Section 7 of the Code, 2016 is not maintainable against the Corporate Debtor which is a solvent Company.

30. In view of the above and taking into into account the fact of the case and not payment of the loan amount on recall notice, we observed that not payment of EMI/Installment amount by the Corporate Debtor is a default which is defined section 3(12) of IBC. Therefore, another major essential ingredient of Section 7 i.e., "default" with respect to the debt stand substantiated.

31. At this juncture, it is important to refer to landmarks judgment of the Hon'ble Supreme Court in "***Innoventive Industries Limited v. ICICI Bank and Another***" where it was held that once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the Application under Section 7 of I & B Code, 2016. The relevant extract of the said judgment is reproduced hereunder as:

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is

"due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

32. More recently, Hon'ble Supreme Court have reiterated in **Suresh Kumar Reddy v. Canara Bank & Ors. [Civil Appeal No. 7121 of 2022]** as under:-

"13. Thus, it was clarified by the order in review that the decision in the case of Vidarbha Industries was in the setting of facts of the case before this Court. Hence, the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries and E.S. Krishnamurthy. The view taken in the case of Innoventive Industries still holds good."

33. From the perusal of aforesaid facts, it is clear that the applicants are Financial Creditors and the debt owed to them by the Corporate Debtor is a Financial Debt, and there has been a default, as stipulated in Sections 3(12), 5(7) and Section 5(8) of the IBC.

34. The allegation of pre-existing dispute in the instant case is irrelevant and pending cannot be a ground to reject an application under Section 7 of the IBC Code and therefore, a pre-existing dispute

cannot be a subject matter of Section 7 IBC, though it may be relevant under Section 9 of IBC.

35. That the allegation of the present petition being barred by Section 65 of the IBC is being examined in I.A. 4980/2023 in CP (IB) No. 686/ND/2022.

36. The present petition made by the Financial Creditor is complete is all respects as required by law. The Petition established that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under Section 4(1) of the Code, stipulated at the relevant point of time. We are of the view that since this Petition was filed on 12.04.2023, and the debt owed to the Financial Creditor is an amount of Rs.4,62,54,279/- meets the threshold of Rs. One Crore.

37. In light of the above observation, we admit the instant Application i.e CP No. (IB)-686/ND/2022 and initiates the Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s Siti Jind Digital Media Communications Private Limited with immediate effect.

38. Sub-section (3) (b) of Section 7 mandates the Financial Creditor to furnish the name of an Interim Resolution Professional("IRP"). In compliance thereof the applicant has proposed the name of Mr. Harvinder Singh for appointment as Interim Resolution Professional

having Registration No. (IBBI/IPA-001/IP-P00463/2017-2018/10806). The Proposed IRP has a valid AFA which is valid upto 10.05.2024. Accordingly, this Adjudicating Authority, hereby appoints Mr. Harvinder Singh to act as Interim Resolution professional. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

39. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

40. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

a) "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;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or 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;

d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

41. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

42. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in

accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any preferential/undervalued/tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional shall make an application to this Adjudicating Authority with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

43. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate

Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

Let copy of the order be served to the parties

Sd/-	**Sd/-**
(RAHUL BHATNAGAR)	**(MAHENDRA KHANDELWAL)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI
I.A. 4980/2023
IN
COMPANY PETITION (IB) No.686/ND/2022

APPLICATION UNDER RULE 11 OF THE NATIONAL COMPANY LAW TRIBUNAL RULES, 2016 READ WITH SECTION 65 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

In the matter of:

SITI JIND DIGITAL MEDIA COMMUNICATIONS PRIVATE LIMITED

.....APPLICANT/CORPORATE DEBTOR

Versus

AND
AND IN THE MATTER OF:

ADITYA BIRLA FINANCE LIMITED
Having its registered office at:-
Indian Rayon Compound,
Veraval, Gujarat – 362266
Corporate office at:-
Ground Floor, Eros Plaza,
Eros Corporate Tower,
Nehru Place New Delhi-110 019

... FINANCIAL CREDITOR

Versus

SITI JIND DIGITAL MEDIA COMMUNICATIONS PVT. LTD.

Address: F-1, J Block Market, Ashok Vihar,

Phase-I, New Delhi North West DL 110052 India

.....APPLICANT/CORPORATE DEBTOR

Order Pronounced on: 22.03.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Manvi Adlakha, Debarshi Dutta, Advs

For the Respondent : Ms. Smriti Churiwal, Mr. Hardik Khatri, Advs.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. The present Application has been filed by the Siti Jind Digital Media Communications Pvt. Ltd. (hereinafter referred as 'Applicant/Corporate Debtor) under Rule 11 of NCLT Rules, 2016 (hereinafter referred as the Rule) read with section 65 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred as the IBC/Code) against the Aditya Birla Finance Limited (hereinafter referred as the Financial Creditor/Respondent) for praying the following reliefs:

i. To Allow the present application under section 65 of the Insolvency and Bankruptcy Code, 2016 and dismiss CP(IB) No. 686 of 2022;

ii. Impose penalty under section 65 of the Code Insolvency and Bankruptcy Code, 2016 for instituting malicious proceedings against the Applicant as this Hon'ble Tribunal may deem fit;

iii. Pass any such orders as this Hon'ble Adjudicating Authority may deem fit and proper in the interest of justice

Averment by the Applicant/Corporate Debtor

2. Briefly stated, the facts of the present case as averred by the applicant and relevant to the issue are that M/s. Aditya Birla Finance Limited (Financial Creditor') had filed an Application i.e. C.P.(IB)/686/ND/2022 seeking initiation of the Corporate Insolvency Resolution Process against M/s. Siti Jind Digital Media Communication Private Limited with an intention to fraudulently push the Corporate Debtor into CIRP. It is submitted that a loan amounting to Rs. 5 Crore was sanctioned to two entities as co-borrowers viz. the present Corporate Debtor and Siti Networks Limited ("Co-Borrower") vide Facility Agreement dated 26.02.2020. The Facility Agreement contains events of default including cross- default by Co-Borrower. It is the case of the Financial Creditor, that during the subsistence of the facility, in and around January 2022 – May, 2022, the Financial Creditor had acquired the knowledge of various defaults of the Co-Borrower with the other lenders through the SEBI Disclosures made by the Co-Borrower. Consequently, the Financial Creditor in view of the defaults by the Co-Borrower and despite, the Corporate Debtor servicing its loan in terms of the repayment schedule under the Facility, had prematurely issued a recall notice dated 24.05.2022 and recalled the entire facility.

3. The Applicant submitted that at the time of grant of Facility to the Corporate Debtor, the Financial Creditor was aware of the various defaults by the Co-Borrower and also, at the time of grant of the Facility to the Corporate Debtor, the Co-Borrower was in default against the present Financial Creditor. It is submitted that Financial Creditor was aware of the Defaults of Siti Networks Limited /Co-Borrower at the time of sanctioning the facility i.e., 26.02.2020, therefore, Financial Creditor had waived off the right to invoke the Cross Default clause in the Facility Agreement based on the same Defaults and is estopped from recalling the loan on such pretext. Moreover, the applicant submitted that the Financial Creditor had recalled the present facility granted to the Corporate Debtor on frivolous grounds only with a purpose to recover the amount from the Corporate Debtor.

4. In response to the submissions of the Applicant/Corporate Debtor, the Financial Creditor submitted that the present application is based on new facts and documents which were not pleaded by the Corporate Debtor in the Reply Affidavit dated 17.10.2023. Besides, the Corporate Debtor had already taken the plea of Section 65 in its Reply to the Section 7 Petition but in a different context and if such a plea had been taken, then there was no occasion to file an application under Section 65 of the IBC. The Corporate Debtor had given no reason in the present application as to why such plea and documents were not stated in reply

to the loan recall notice or in the Reply dated 06.12.2022 filed by the Corporate Debtor. The Corporate Debtor always had these documents and cannot be now permitted to introduce them at the final hearing stage. The Financial Creditor further submitted that there is a difference between contending that the petition is filed for recovery of debt and in contending that the petition has been filed fraudulently with malicious intent.

5. We have heard the Learned Counsels for both the parties and perused the submissions made by the parties. The documents annexed with the submissions are meticulously perused. The issue to be adjudicated in the present case is, "whether the averments made by the Corporate Debtor in the present application, constitute the grounds for exercising powers under Section 65 of the Code, 2016?"

6. At this stage, we would like to refer the provisions of Section 65 of the Code, 2016, which are reproduced below :-

7. At this stage, we would like to refer the provisions of Section 65 of the Code, 2016, which are reproduced below :-

"65. Fraudulent or malicious initiation of proceedings. –

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the

Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or (b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees."

8. A perusal of the above provision makes it clear that the section 65 of the Code, 2016 per se states that, if an application has been filed with malicious or fraudulent intent for any purpose other than initiation of insolvency, this Adjudicating Authority may impose penalty and set aside the application for being fraudulent. Further, neither the term 'Fraudulently' nor the term 'with Malicious Intent' has been defined under the Code, 2016. To get a better understanding, we refer the judgment of the Hon'ble Supreme Court passed in the matter of **West Bengal State Electricity Boards vs. Dilip Kumar Ray [Civil Appeal**

5188/2016; dated 24.11.2006] in which, the definition of term 'malice' has been discussed as follows: -

"Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin malitia means badness, physical or moral-wickedness in disposition or in conduct-not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose. design, intent, or motive. But intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of the two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive."

(Emphasis placed)

9. It is the contention of the Corporate Debtor/applicant in the present application that at the time of extending the loan, the Financial Creditor was aware of the indebtedness of Siti Network Limited ('co-borrower') and the same is recorded in Facility Agreement dated 26.02.2020. Further, M/s. Siti Networks Limited ('co-borrower') was in default of Rs. 150 Crore

as against the Financial Creditor and other lenders / creditors much prior to SEBI disclosures of January 2022 and the Financial Creditor was aware of it, however, the Financial Creditor has chosen not to file "any proceedings" under the Code against the Co-Borrower for its default but chose to proceed only against the present Corporate Debtor.

10. Coming to the factual matrix of the present case, Credit Arrangement Letter dated 7.02.2020 was issued by Financial Creditor (Financial Creditor) to (M/s. Siti Jind Media Communications Private Limited (Corporate Debtor') and M/s. Siti Networks Limited ('SNL') as a Co-borrower for a loan of Rs. 5 Crore and Facility Agreement dated 26.02.2020 was executed between the Financial Creditor, Corporate Debtor & Co-Borrower. In view of the fact that M/s. Siti Network Limited (Co-borrower) had admitted in writing its inability to pay its financial indebtedness in respect of other loans availed from other Banks and financial institutions in the various letters/disclosures made to the NSE and BSE through default disclosures dated 2.01.2022, 31.01.2022, 03.03.2022, 31.03.2022, 30.04.2022, 01.06.2022 and 2.07.2022, and such disclosure of default constitutes an 'Event of Default' as specified in Clause 19.5 of the Facility Agreement dated 26.02.2020, consequent to which, the Financial Creditor had recalled the loan on 24.05.2022. The sum and substance of the Corporate Debtor's argument is that the Financial Creditor was aware of the default of the M/s. Siti Network

Limited before sanctioning the credit facilities, but still sanctioned the credit facility to the Corporate Debtor and M/s. Siti Networks Limited as the Co-Borrower with a wrongful motive to recover the dues from the Corporate Debtor herein.

11. It is pertinent here to examine the issues of prior knowledge of default committed by the co-borrower on the part of the financial creditor at the time of sanction of the facility of Rs. 5 crore on 26.02.2020. The corporate debtor has placed reliance on the SEBI Disclosure of indebtness dated 31.10.2020 filed by the co-borrower Siti Networks Limited, showing list of debts availed from various lenders and the said list shows that a sum of Rs. 128 crores is outstanding against the co-borrower Siti Networks Limited qua the financial creditor. Further, other communications from the financial creditor dated 11.02.2019, 01.11.2019 to the co-borrower in respect of overdue outstanding payments of principal with interest has been relied upon by the corporate debtor to buttress its argument, that since the financial creditor was already aware of the default already committed by the co-borrower at the time of grant of new facility for Rs. 5 crore on 26.02.2020, the clause of 'cross default' stood waived.

12. The financial creditor on the other hand has submitted that the 'cross default' clause in the facility agreement could not be triggered on the basis of communications from the financial creditor to the co-borrower,

but for the cross-default clause to trigger, admission in writing by the debtor (co-borrower) was necessary. It is further considered that the SEBI Disclosure of indebtness dated 31.10.2020 did not have the details of default, but only overdue amount was shown. According to the financial creditor, the disclosure of indebtness filed in January 2022, clearly showed the loan default amount based on which the Loan Recall Notice dated 24.05.2022 was served on the corporate debtor and on the basis of the such Loan Recall Notice dated 24.05.2022 which was neither replied to, nor the amount recalled was paid by the corporate debtor, the application bearing C.P.(IB) No. 686/ND/2022 was filed. Thus, there is no fraudulent or malicious initiation of CIRP by the financial creditor.

13. We have considered the rival submissions. It is pertinent to note that on the date of grant of facility of Rs. 5 crore i.e. 26.02.2020 both the corporate debtor as well as the co-borrower, its sister company M/s.Siti Networks Limited, were fully aware of the terms of such facility agreement, including the cross default clause, still they entered into the facility agreement for getting disbursal of Rs. 5 crore as loan from the financial creditor. Therefore, they cannot claim any waiver of the 'cross default' clause at this stage. Moreover, even if there were communications from the financial creditor to the co-borrower before grant of facility of Rs. 5 crore to the corporate debtor , such communications could not be made the basis of trigger of 'cross default'.

Again, it is admitted fact that the facility was granted in February 2020, but loan was recalled not immediately thereafter, but after more than two years. Therefore, the financial creditor has not used any prior knowledge for triggering the 'cross default' clause, but patiently waited until they came to know of the Disclosure of Default filed by the co-borrower in January 2022, for issuing the Recall Notice dated 24.05.2022. In fact, the application under Section 7 was filed not on the default committed by the co-borrower, but on the default committed by the corporate debtor herein after issue of the Recall Notice dated 24.05.2022. Certainly, moving in accordance with the terms of Facility Agreement can neither be termed as fraudulent nor malicious, particularly, in view of the fact that the Recall Notice dated 24.05.2022 has remained unchallenged on the basis of any fraud or malafide intention on the part of the financial creditor before filing of Section 7 application by the financial creditor.

14. The Hon'ble NCLAT in **Indiabulls Housing Finance Ltd. Vs. Revital Realty Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 994 of 2022]** had held that it is not necessary for the Appellant to file an application under Section 7 of the Code, on the happening of first default of amount due and it is the discretion of the Financial Creditor to decide filing an Application under Section 7 as per the facts and his legal rights. The relevant Para of the judgement is extracted below:-

"22. The 'Financial Creditor' gets rights for filing an Application under Section 7 of the Code when the right to apply against default accrues and for every default there is a fresh period of limitation. It seems that the Adjudicating Authority' has taken the date of 09.05.2016 as the date of default presuming that the first instalment was due, payable and not paid and therefore date of default became 09.05.2016. We take note from the 'List of Dates' which has been filed along with the present appeal that 09.05.2016 is the date when entire loan was disbursed by the Appellant' to the 'Corporate Debtor'. It seems that the 'Adjudicating Authority' has further wrongly presumed that it is the first default which is only relevant date for counting limitation period and has ignored the subsequent defaults which give fresh and new cause of default / defaults.

23. Therefore, it emerges that either of the date i.e. 19.08.2018 i.e., the date on which the instalment was due, resulting into default payable and not paid or the date of 28.03.2022 when the entire loan account stood defaulted in terms of Loan Recall Notice dated 25.03.2022, would have been and is covered within the limitation period as discussed in the preceding paragraphs.

15. As regards the argument that the Financial Creditor was aware of the Financial Stress of the Co-Borrower, there may be situation, where the loan agreement itself states that the corporate debtor is in distress, and the loan is needed for making urgent payments, required to be made by

the corporate debtor. Later if, the Financial Creditor, seeks repayment by way of a demand notice within few months of granting of such loan, and thereafter on non- payment within stipulated time, initiates insolvency proceedings, under Section 7 IBC, whether such an application can be considered to be one in good faith or whether the case will be considered to be a fit case for fraudulent initiation of insolvency proceedings, as per Section 65 of the Code? In our considered view, the logical conclusion that follows is that the said application would not be intuitively, qualify to be initiated with malicious or fraudulent intent. Therefore, the argument of the Corporate Debtor cannot be sustained.

16. In view of the aforesaid discussion, this Adjudicating Authority is not inclined to allow the present application. Resultantly, the present Application i.e., I.A(IBC)/4980/2023 being devoid of merit stands dismissed.

Let a copy of order be served to parties.

Sd/-	**SD/-**
(RAHUL BHATNAGAR)	**(MAHENDRA KHANDELWAL)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**