IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT – IV

Item No. 106
IA/4770/ND/2023 in IB/685/ND/2022
&
IB/685/ND/2022

IN THE MATTER OF:

Aditya Birla Finance Limited	…	Applicant
Versus		
Siti Broadband Services Private Limited	…	Respondent

Order under Section 7 of IBC, 2016.

Order delivered on 31.10.2023

CORAM:
MR. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

ORDER

IB/685/ND/2022 stands admitted.

IA/4770/ND/2023 in IB/685/ND/2022 stands dismissed.

Sd/-
DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

Sd/-
MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV

COMPANY PETITION NO. (IB) 685 OF 2022

IN THE MATTER OF:

ADITYA BIRLA FINANCE LIMITED

... FINANCIAL CREDITOR

VERSUS

SITI BROADBAND SERVICES PRIVATE LIMITED

... CORPORATE DEBTOR

Order Delivered on:31.10.2023

CORAM:
SHRI MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant application is filed on behalf of M/s. Aditya Birla Finance Limited ('Applicant') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Siti Broadband Services Private Limited ('Corporate Debtor') for defaulting in payment of financial debt amounting Rs. 4,38,50,997/-

2. The Respondent Company M/s. Siti Broadband Services Private Limited bearing CIN No. U64100DL2014PTC267911 is a private limited company incorporated on 09.06.2014 having its registered office situated at F-1, J

Block Market, Ashok Vihar, Phase-I, North West 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 sub-section (1) of Section 60 of the Code.

SUBMISSIONS OF LEARNED COUNSEL APPEARING FOR THE APPLICANT

3. Briefly stated the facts of the present case, as averred by the applicant are that M/s. Siti Broadband Services Private Limited ('Corporate Debtor') along with its group company namely, M/s. Siti Networks Limited ('Co-Borrower' / 'SNL') were sanctioned the term loan of Rs.5,00,00,000/- (Indian Rupees Five Crore Only) through the Facility Agreement dated 26.02.2020. The Clause 7 of the Facility Agreement dated 26.02.2020 provides that the term loan, to the extent availed by the Corporate Debtor was to be repaid in 19 quarterly instalments after a moratorium of 5 quarters from the first disbursement over the course of a 6year tenure.

4. The Applicant submitted that from the beginning November 2021, SNL (the Corporate Debtor's Co-borrower under the Facility Agreement) began and continued to default on loans availed by SNL from the Financial Creditor. However, despite repeated requests by the Financial Creditor, SNL failed to cure its default and till date has remained in default of its loan repayment obligations. The Clause 19.5 of the Facility Agreement provides that, if any member of the group of companies (that the Corporate Debtor and co-borrower belong to) is unable to or has admitted in writing its inability to pay any of its Financial Indebtedness, the same would result in occurrence of an 'event of default'.

5. Further, it was submitted that pursuant to the occurrence of the aforesaid event(s) of default, the Financial Creditor was constrained to issue a Notice of Recall dated 24 May 2022 and the entire Loan/Facility under Clause 19.19 (ii) of the Facility Agreement was recalled and the Corporate Debtor was called upon to make the payment of Rs. 4,43,04,986/- as DUE on May 23, 2022 (Rupees Four Crores Forty- Three Lakhs Four Thousand Nine Hundred and Eighty-Six Only) immediately together with accrued interest thereon as per contracted rate till the date of actual payment. The Applicant had received no reply or communication from the Corporate Debtor in response to the Loan Recall Notice. Accordingly, the Corporate Debtor had been in default of its repayment obligations under the Facility Agreement ever since May 2022. Accordingly, the Applicant prays for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

REPLY BY THE CORPORATE DEBTOR

6. The Corporate Debtor had filed its reply and submitted that the only intent of the Applicant behind initiating the present proceedings under Section 7 of the Code, 2016 is to "recover its dues" from the Corporate Debtor and is no-where linked to the effort of resolution of an insolvent company. It is submitted that the Balance Sheet of the Corporate Debtor as on 31.03.2022 also clearly reflects that the Corporate Debtor is a solvent company and a going concern and has a considerable amount of assets and has further seen a jump in revenue from operation since the previous financial year.

7. The Corporate Debtor submitted that no default has occurred by the Corporate Debtor with respect to the loan amount and that the Applicant has issued the loan recall notice on the purported default of the Co-

Borrower with respect to other loans and not the present loan. Furthermore, the Corporate Debtor submitted that before 31.05.2022 which was the next date of repayment, the Applicant proceeded to issue a recall notice on 24.05.2022. That as per the recall notice, an event of Default had occurred as M/s. Siti Networks Ltd ('Co-Borrower') was in default with its 'lenders' with respect to certain other loans, hence in purported compliance with Clause 19.5 and 19.19(ii) of the Facility Agreement, since a group company had defaulted with its 'lenders', the Applicant proceeded to recall the entire loan facility advanced to the Corporate Debtor and called upon the Corporate Debtor to pay a sum of Rs. 4,43,04,986/- .

8. The Corporate Debtor submitted that such recall was bad in law as there had not been any default by the Corporate Debtor till the said date. The same is evident from the fact that the Corporate Debtor was servicing the loan which was completely payable till 2026 and the account of the Corporate Debtor was not declared as a Non-Performing Asset.

REJOINDER BY THE APPLICANT

9. The Applicant had filed its rejoinder wherein the submissions of the Corporate Debtor were rebutted and it was submitted that the Corporate Debtor had not responded to the Loan Recall Notice. The Applicant submitted that the default by the Co-Borrower/ M/s. Siti Network Limited in its loans taken from any other banks and financial institution constituted an 'Event of Default' warranting recall of the loan. Therefore, the Applicant, in view of the contractual provision, had rightfully recalled the loan from the Corporate Debtor.

10. Further, the Corporate Debtor had also defaulted in its loan repayment obligations to the Financial Creditor by failing to repay the entire outstanding amount with interest which was recalled and therefore, the default of the Corporate Debtor is to be examined in view of non-payment after the loan was recalled and the fact that there being no default in instalment prior to the recall of the loan is not relevant.

ANALYSIS AND FINDINGS

11. We have heard the submissions made by the Learned Counsel for the parties and perused the averments made in the application. From the submissions of the parties, the issue before this Adjudicating Authority is, ***"whether there exists a default in respect of the loan sanctioned to the Corporate Debtor vide Facility Agreement dated 26.02.2020"?***

12. We have meticulously considered the covenants of the Loan Facility Agreement dated 26.02.2020 executed between M/s. Aditya Birla Finance Limited (Financial Creditor), M/s. Siti Broadband Services Private Limited ('Corporate Debtor') and M/s. Siti Networks Limited as a Co-borrower for a loan of Rs. 5 Crore. The Clause 2.2. (Rights and Obligations of the Borrowers), Clause 19 (Events of Defaults), Clause 19.5 (Cross Defaults) and Clause 19.19 (consequences of Default) as provided in the Loan Facility Agreement dated 26.02.2020 are reproduced herein below:-

> **Cl. 2.2 – Rights and obligations of the Borrowers**
> All obligations, duties and liabilities of the Borrowers under this Agreement and the other financing Documents **shall be joint and several and the Facility (or any part thereof) disbursed to either of the Borrowers shall be deemed to have been provided to both the Borrowers.**
>
> **Cl. 19 – Events of Default**

Each of the events or circumstances set out in clause 19.1 to 19.18 shall constitute an event of Default. ('Events of Defaults')

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Cl. 19.5 Cross Default

(i) Any member of the Group is unable or has admitted in writing its inability to pay any its Financial Indebtedness as they mature or when due or has defaulted in payment of any amount in respect of any of Its Financial Indebtedness;

(ii) An event of default, howsoever described, occurs and is subsisting under any agreement or document relating to any Financial Indebtedness of any member of the Group;

(iii) Any creditor of any member of the Group declares, or becomes entitled to declare, any Financial Indebtedness of that entity due and payable prior to its specified maturity as a result of any actual or potential default, event of default, credit review event or similar event (however described)

(iv) If any lender, including any financial institution or bank with whom any member of the Group has entered into agreement (s) for financial assistance, has refused to disburse, extend, or has cancelled or recalled its/ their assistance; or

(v) Any Affiliate of the Finance Parties or the Finance Parties became entitled to declare a default under any other agreement that is made between any member of the Group and that Affiliate or the Finance Parties"

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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:

(i) **cancel or suspend the Commitment whereupon it shall immediately be cancelled**; and/or

(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 became immediately due and payable; and/or"

13. 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.

14. 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 5 tranches, i,.e., Rs.1,00,00,000/- disbursed on 28.02.2020, Rs.50,00,000/- disbursed on 28.02.2020, Rs.2,00,00,000/- disbursed on 28.02.2020, Rs.50,000,000/- disbursed on 03.03.2020 and 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.

15. The extract of disclosure dated 01.02.2022 made by SNL to BSE/NSE disclosing about the default is extracted below:-

SITI Networks Limited
LG Floor, FC-19 & 20, Sector-16 A, Film City,
Noida, Uttar Pradesh-201301, India
Tel: +91-120-4626700
Website : www.sitinetworks.com

January 2, 2022

To,

The General Manager
Corporate Relationship Department
BSE Limited
Phiroze Jeejeebhoy Towers
Dalal Street, Fort,
Mumbai- 400 001
BSE Scrip Code: 532795

The Manager
Listing Department
National Stock Exchange of India limited
Plaza, 5th Floor, Plot no. C/1, G Block
Bandra Kurla Complex, Bandra (E)
Mumbai- 400 051
NSE Scrip Symbol: SITINET

Kind Attn. : Corporate Relationship Department

Subject : Disclosure in compliance with Para 3(C1) of SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/2019/140 dated November 21, 2019, of default on payment of interest/repayment of principal amount on loans from Bank(s)

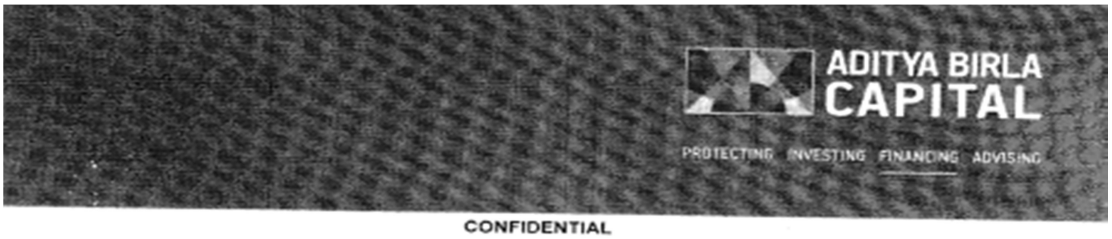
Dear Sir,

This is in reference to the SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/2019/140 dated November 21, 2019, regarding disclosure of defaults on payment of interest/repayment of principal amount on loans from Bank(s).
In compliance with Para 3(C1) of above referred SEBI Circulars, details pertaining to default(s) effected in payment of loans and interest thereon from Bank(s) are as follows:

Sl. No.	Type of Disclosure	Details
1.	Name of the Listed Entity	Siti Networks Limited
2.	Date of making the disclosure	January 2, 2022
3.	Nature of obligation	Term loan instalments
4.	Name of the Lender(s)	HDFC Limited, IDBI Bank, SCB, RBL, Axis Bank, ABFL, IndusInd Bank
5.	Date of default	November 30, 2021 (i.e. default of November 30, 2021 and continues beyond 30 days)
6.	Current default amount (break-up of principal and interest in INR crore)	Principal: 7.50 Interest: 6.4 *(We have taken interest @8.5 % post discussion with bankers under restructuring process)*
7.	Details of obligation (total principal amount in INR crore, tenure, interest rate, secured / unsecured, etc.)	

Bank name	Term loan outstanding Rs in Crs	Loan default Rs in Crs	overdue amount Rs in Crs *	Tenure	Interest rate	Secured/ unsecured
HDFC Bank	199	199	245	5	12.85%	Secured
IDBI	15	15	16	5	12.30%	Secured
SCB Bank	68	68	86	5	11.85% to 13%	Secured
RBL Bank	48	48	52	3	10.5% to 10.65%	Secured
Axis Bank	173	173	225	6	10.5% to 11.5%	Secured
ABFL	134	29	35	7	11.00%	Secured
Indusind	139	65	72	5	9.5% to 9.85%	Secured
Total	776	597	748			

16. 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. The Loan Recall Notice dated 24.05.2022 is extracted below:-



CONFIDENTIAL

Ref: ABFL/PSFG/3715 **Date: May 24, 2022**

To

Siti Broadband Services Private Limited ("SBSPL or Borrower") B-10, Lawrence Road Industrial Area, New Delhi – 110035	**Siti Networks Limited ("SNL or Co-Borrower") Ecity Bioscope Rd, Film City, Sector 16A, Noida, Uttar Pradesh 201301**

Kind Attention: **Mr. Bipin Goyal (SBSPL) / Mr. Gulshan Khandelwal (SNL)**

Sub: Loan Recall Notice

Reference:

1. Credit Arrangement Letter issued by Aditya Birla Finance Limited ["ABFL"] dated 7th February 2020 bearing reference number: ABFL/PSFG/CAL/0002337 ["CAL"]
2. Facility Agreement dated February 26, 2020 ["Facility Agreement"] executed inter-alia between SJMPCL, SNL and Aditya Birla Finance Limited ("**ABFL**")

All Capitalizes terms not defined herein shall have the meaning ascribed to such term in the Facility Agreement and other Transaction Documents ("Financing Documents")

Dear Sir,

ABFL had sanctioned a Facility amounting to Rs. 5 Crores to SBSPL and SNL in accordance with the terms and conditions of the CAL and Facility Agreement. As per Clause 19.5 of the Facility Agreement, if any member of the Group is unable to or has admitted in writing its inability to pay any of its financial indebtedness on due date or has defaulted in its payments towards its financial indebtedness, the same would result in an Event of Default. 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.

The said Event of Default has triggered the consequences mentioned in the clause 19.19 of the Facility Agreement.

In light of the aforesaid, in terms of Clause 19.19(ii) of the Facility Agreement we hereby declare that the entire outstanding including all indebtedness is due and payable on immediate basis and you are hereby instructed to pay sum of Rs. 4,43,04,986/- as on May 23, 2022 (Rupees Four Crores Forty Three Lakhs Four Thousand Nine Hundred and Eighty Six Only) immediately together with accrued interest thereon as per contracted rate till the date of actual payment.

For any further clarification, please feel free to contact the following officials from ABFL:

- Mr. Rishi Agarwal (Head - Operations and Credit Monitoring) - rishi.agarwal@adityabirlacapital.com
- Mr. Amit Agrawal (Head – Operations) - amit.ag@adityabirlacapital.com

This notice is without prejudice to any other rights ABFL has under contract, equity or under applicable law. Capitalised terms used but not defined herein shall have the same meaning as assigned to it under the Facility Agreement.

17. 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.4,43,04,986/- 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 31.05.2022.

18. 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.

19. The Hon'ble Supreme Court in the matter of **Innoventive Industries Ltd. vs. ICICI Bank & Anr (2018) 1 SCC 407,** held as follows :-

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.
>
> 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."

20. 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."

21. Thus, it is clear that when a default takes place i.e., the debt becomes due and if it is not paid, the Insolvency Resolution Process shall begin against the corporate debtor even if the debt is disputed by the Corporate Debtor, unless it is interdicted by some law. In the instant case, we are of the opinion the debt has become due and payable on the basis of recall notice dated 24.05.2022 which has not been challenged by the Corporate Debtor. Once, the validity of the recall notice remains unchallenged by the Corporate Debtor in a court of law, it cannot argue that the said notice is invalid. Therefore, on the basis of discussion in the aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant Bank/financial creditor is entitled to move the application against the corporate debtor in view of outstanding financial debt in default above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the instant petition ***I.B./685/ND/2022 stands admitted*** and CIRP of M/s. Siti Broadband Services Private Limited is initiated.

22. The petitioner in Part-III of the petition has proposed the name of Mr. Harvinder Singh as proposed Interim Resolution Professional, having Registration Number IBBI/IPA-001/P00463/2017-2018/10806. Mr. Harvinder Singh as proposed Interim Resolution Professional, having Registration Number IBBI/IPA-001/P00463/2017-2018/10806 is hereby appointed as an Interim Resolution Professional (IRP) for corporate debtor. The consent of the proposed interim resolution profession in

Form-2 is taken on record. The IRP so appointed shall file a valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within Five (5) days of pronouncement of this order.

23. 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.
> (e)The IB Code 2016 also prohibits *Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

24. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and 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.

25. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 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.

26. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs (Two Lakh Rupees) with the Interim Resolution Professional namely Mr. Harvinder Singh to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount, however, is subject to adjustment towards Resolution Process cost as per applicable rules.

27. The Interim Resolution Professional shall perform all his functions as 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.

28. 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 tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.

29. 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 his 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.

30. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

31. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing **I.B./685 (ND)/2022 stands admitted.**

Sd/- **Sd/-**

(DR.BINOD KUMAR SINHA) **(MANNI SANKARIAH SHANMUGA SUNDARAM)**
MEMBER (T) **MEMBER (J)**

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV

I.A(IBC) No. 4770/2023
IN
COMPANY PETITION NO. (IB) 685 OF 2022

IN THE MATTER OF:

ADITYA BIRLA FINANCE LIMITED

... FINANCIAL CREDITOR

VERSUS

SITI BROADBAND SERVICES PRIVATE LIMITED

... CORPORATE DEBTOR

IN THE MATTER OF:

SITI BROADBAND SERVICES PRIVATE LIMITED

...APPLICANT

Order Delivered on:31.10.2023

CORAM:
SHRI MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant Interlocutory Application is filed on behalf of M/s. Siti Broadband Services Private Limited ('Applicant') under Rule 11 NCLT Rules read with section 65 of I&B Code, 2016 ('the Code, 2016') inter alia seeking the following relief(s):-

a) To allow the present application under Section 65 of the Code, 2016 and dismiss C.P.(IB) No. 685/2022;

b) Impose Penalty under Section 65 of the Code, 2016 for instituting malicious proceedings against the Applicant as this Hon'ble Tribunal may deem fit'

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

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)/685/2023 seeking initiation of the Corporate Insolvency Resolution Process against M/s. Siti Broadband Services 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 20.12.2022. 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 Affidavit dated 20.12.2022 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 :-

> "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."

7. 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)**

8. 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.

9. 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 Broadband Services 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 M/s. Siti Network Limited ('Default') 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.

10. 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.

11. 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 CP(IB) No. 685/ND/2022 was filed. Thus, there is no fraudulent or malicious initiation of CIRP by the financial creditor.

12. 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.

13. 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."

14. 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.

15. 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)/4770/2023 being devoid of merit stands dismissed.**

Sd/-	**Sd/-**
(DR.BINOD KUMAR SINHA)	**(MANNI SANKARIAH SHANMUGA SUNDARAM)**
MEMBER (T)	**MEMBER (J)**