



**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 indebtedness 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 indebtedness 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 indebtedness 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 disbursement 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/-

**(DR.BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)**