

**THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH, KOCHI**

IBA/12/KOB/19

Under Section 7 of IBC 2016

Order delivered on 20.9.2019

Coram: 1. Hon'ble Shri Ashok Kumar Borah, Member (Judicial)  
2. Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

In the matter of

Indunia Realtech Ltd. ]  
Regd Office: 11/6-B, Shanti Chamber, ] : Financial Creditor/Applicant  
Pusa Road, New Delhi – 110 005. ]

Vs.

Swami Cyber Solutions Ptd Ltd. ]  
Regd Office: No.315, Nila, Techno Park, ] : Corporate Debtor/Respondent  
Kariavattom, Trivandrum, ]  
Kerala. ]

**Parties/Counsels Present:**

For Operational Creditor/Applicant : Prince Jain, Advocate

For Corporate Debtor/Respondent : M/s. Firm Resolve Law Office

**ORDER**

1. The Financial Creditor/Applicant viz. 'Indunia Realtech Limited' (hereinafter as **Financial Creditor**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Financial Creditor" on 25.06.2019 by invoking the provisions of Section 7 of the Insolvency and



Bankruptcy Code (hereinafter as **Code**) against 'Swami Cyber Solution Private Limited' (hereinafter as 'Corporate Debtor'). The registered office of the Corporate Debtor is stated to be No.315 Nila, Techno Park, Kariavattom, Trivandrum, Kerala- 695 581.

2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt granted is stated to be ₹4,38,55,000/- (Rupees four crores thirty eight lakhs fifty five thousand only), and the amount claimed to be in default is ₹7,41,83,397/- (Rupees seven crores forty one lakhs eighty three thousand three hundred and ninety seven only) (including interest of Rs. 3,03,28,397/-).

**Brief History of the case:**

3. The Corporate Debtor herein along with their Directors, approached the Financial Creditor in the year 2014 by saying that Swami Cyber Solutions Pvt. Ltd. Employs talented software development professionals who have expertise knowledge in solving real world problems in industries as manufacturing retail & wholesale, legal, healthcare, accounting etc. The Corporate Debtor approached the Financial Creditor stating that InDunja.Com is owned by Swamy Cyber Solutions Pvt. Ltd, based in Kerala and has aimed to become the next generation Digital Real Estate Market Place powered by big data, cognitive decision support, targeting customers, agents etc.



4. The Corporate Debtor also claimed that they have Domain expertise in product development & Engineering on Mobile, Web, Cloud Expertise Software Development, Data Management Engineering, Data driven services for Cognitive and AI capabilities, Real Estate, Automotive, Oil & Gas, and Healthcare etc.

#### **Submissions by the Financial Creditor**

5. The Financial Creditor in the petition stated that the Corporate Debtor falsely presented that they will incorporate a new company as a promoter along with the financial creditor and the same will purchase/acquire the website named 'InDunia.Com' developed by the Corporate Debtor and its Directors. It was further stated by the corporate debtor that in turn InDunia.Com will establish alliance with credai.org, developers and lenders for their data and many other mis-representations.
6. The Corporate Debtor agreed that the entire business plan will be finished and operated in three phases:

**Phase I:** Dec.01, 2014 to May 31,2015- work streams and mile stones.

**Phase II:** June 01,2015 to Nov. 30,2015- the goal is to Phase II by Aug.31st, 2015, extra 3 months cushion is for any unanticipated adjustments or extra time for regulatory/licences/ negotiating agreements etc



**Phase III:** Nov 01,2015 onwards- scheduling Beta in 4 months, production go on live in 6 months in target markets, and the location will be extended to Trivandrum, Kerala, India, New York, USA.

7. The Directors of the Corporate Debtor entered into an MOU dated December 01, 2014 between the Directors of Corporate Debtor and SMC Real Estate Advisors Private Limited, one of the group Company. Later on, these persons have asked for any companies which can be converted as Indunia by changing the name clause and object clause. SMC group officials agreed and converted SMC ARC Limited to Indunia Realtech Limited on 24.03.2015 and the object clause was altered on 19.02.2015. The entire agreement executed with SMC Real Estate and Advisors Pvt. Ltd. has adopted by Financial Creditor herein and has started making the payment to the corporate debtor. The financial creditor has made the payment in 15 tranches starting from February 25,2015 to February 19,2016.
  
8. The corporate debtor has executed the investment agreement with financial Creditor and others on 19.02.2016 in which the entire payment of Rs. 4,38,55,000/- was acknowledged by the Corporate Debtor and have assured for implementation of the business plan of developing the unique and un-paralleled website creating Digital Market Place in the Real Estate with the characteristics of trouble shooting and resolving and rendering all the issues of Market intermediaries and clients.



9. The Financial Creditor mentioned that even after the last tranches of the fund was made, no website was created. It has also revealed that not even a single employee working in the Company. Entire employees and the assets of the Corporate Debtor have been diverted to their other companies and for wrongful gains of the Directors and other group companies. That the said corporate debtor have continuously pretended working on the project with their false, frivolous communication and about the stage of the project and met continued inducement for the release of the entire funds thereafter left nothing but the lame excuses and concocted stories.
10. Despite the admission and assurance Corporate Debtor defaulted in making the website and also in returning the payment of the amount.
11. That the Financial Creditor has also preferred its remedy under the Criminal Court and Indian Penal Code. However, the said remedies were of no avail. That pendency of said proceedings nowhere precludes the Financial Creditor herein to prefer remedy under Insolvency and Bankruptcy Code.

**Submissions by the Corporate Debtor :**

12. The learned counsel for the Corporate Debtor has filed a written submission and raised objections to Corporate Insolvency Resolution Process initiated by Financial Creditor. The Corporate Debtor has clearly denied the averments made by the Financial Creditor and denied his liability to pay the amount claimed. In support of his arguments, the learned counsel has submitted the following points:



- i. It is claimed that the amount which has been deposited with the Corporate Debtor is not a 'Debt' as per the provisions of IBC as there is no time value of money involved.
- ii. That the entire foundation of an application under Section 7 of Code is based on the premise that there is a default in relation to a financial debt. As per Section 5(7) and 5(8) of the Code, the Financial Creditor has to prove that there is an outstanding financial debt. Without prejudice to the other grounds raised herein, it would submit that the alleged transaction between the applicant and respondent is that of an equity contribution for the development of a Real Estate Portal, viz. InDunia.com. In support of his contentions, the learned counsel has cited the judgement of Hon'ble NCLT, Mumbai (Jagdambey International v. Visa Powertech Pvt.Ltd., reported as CP (IB)-4023/I&BP/MB/2018, Order dated 06.03.2019).
- iii. That the Corporate Debtor is not a party to the Memorandum of Understanding, as evidenced by the recitals. The execution of the alleged investment agreement is also not entered by the authorized representative of the company. Further, the documents which are mandatorily required to be registered, and not done, cannot be relied on to prove the facts in issue.
- iv. That the claim of the Financial Creditor is barred by the limitation in view of the fact that the alleged loan was advanced lastly on 19.02.2016 and the petition is filed in June, 2019.



- v. That as per the Investment Agreement, an amount of INR 11,45,000 is due from the Financial Creditor to the Corporate Debtor. For evading this payment, this application has been illegally moved.
- vi. That without prejudice to foregoing contentions and submissions and without admitting any liability of the company, it was submitted that the Financial Creditor is not entitled to claim any interest on the alleged dues of the company as the same was only equity contribution/investment and no interest is charged thereon.
- vii. That in the interest of justice and fair play, the applicant should have called upon the Directors of the respondent Company for peaceful resolution of differences, rather than invoking insolvency proceedings for an alleged short satisfaction of contractual performance.
- viii. The Financial creditor has misrepresented the facts and this application does not fit into the definition under Section 7 (4) of IBC. As such the application may be dismissed.

13. However, the learned counsel for Financial Creditor have filed a rejoinder and mentioned the following as contentions towards the above stated reply:

- i. That a decided case by Supreme Court, i.e., *Pioneer Urban Land & Infrastructure Ltd. V. Union of India & ors*, states that the investment made by the Financial Creditor is a 'Financial Debt' and has time value of money.



- ii. That it is clear from the Board's Reports dated 12.06.2017 of the Corporate Debtor that the amount of INR 4,38,55,000/- had been duly verified by the statutory auditors and the same has been mentioned in the Board's Report and in Financial Statements dated 12.06.2017. Therefore, there is no question of commencement of Limitation on or before 10.07.2017, the date on which the Financial Statements as well as Board's Report has been adopted by the shareholder of the Corporate Debtor.
- iii. That the Doctrine of Estoppel precludes a person from alleging the facts that contrary to the previous claims or action is also applicable in this case.
- iv. The learned counsel for the Financial Creditor stated that the citation quoted by Corporate Debtor in his reply, namely 'Jagdambey International v. Visa Powertech Pvt. Ltd.' is not relevant to the facts of this case as the judgement is only for the agreement those are verbal while contrary there is specific written agreement dated 19.02.2016 has been duly executed.
- v. That if the project has not been completed by the Corporate Debtor, then the distribution of amount among themselves and the Investors on pro rata basis does not arise and any question with respect to equity holding arises only after the completion of Development of agreed website.



14. Notwithstanding the above, the learned counsel for the Corporate Debtor submitted a counter affidavit in support of his earlier arguments and quoted the following:

- (i) Section 186 (4) mandates that all loans are to be disclosed to its members in the company's Annual Financial Statement. The applicant being a public limited company, it is statutorily restrained by Section 186(2), from giving loans to any other corporate body, in excess of 60% of its paid-up share capital, free reserves and securities premium or 100% of its free reserve and securities premium. As the amount of Rs. 4,38,55,000/- exceeds the paid-up capital of the applicant company, which is Rs.2,50,00,000 and amounts to statutory contravention.
- (ii) The Ld. Counsel for corporate debtor further stated that as per Section 186 (7) of the Companies Act, a loan shall not be given at a rate of interest lower than prevailing yield of 1-year, 3-year, 5 year or 10-year government security, closest to the tenor of the loan. As the incurrence of interest is absent in the Investment Agreement, the applicant company is restrained from claiming this amount to be a loan.
- (iii) Besides that, the learned counsel for the corporate debtor submitted the fact that Rs.4,38,55,000/- was disbursed and received as advance only and is evidenced by the Investment Agreement and the email dated 14.04.2017. produced as annexures.



(iv) In addition to the above contentions, the respondent submitted that the respondent has discharged all its contractual obligations and the Memorandum of Understanding. Finally, the learned counsel for the corporate debtor submitted that this is nothing but an abuse of process of law as such prayed for dismissal of the petition.

15. The Financial Creditor vehemently objected the above submissions of the corporate debtor and submitted the copies of audited financial statements for the year 2014-15 and 2015-16 of Indunia RealTech Limited, which was submitted with the Registrar of Companies. It has clearly shown in the statements that the due amount, i.e., Rs.4,38,55,000 is mentioned as the short-term loans and advances for the year 2015-16 thereby proving that they have disclosed their debt in their financial statements. He further submitted that as it was a forward sale-purchase transaction, which is not covered under section 186 (4), hence not disclosed in the (400100) Disclosure of general information about company. These contentions by Corporate Debtor are frivolous and not valid. Thus prayed for admission.

### **Findings:**

16. Both the sides have been heard at length. Case record is perused carefully along with the evidences as well as the case laws referred. Certain facts as discussed above are not in dispute and summarised hereinbelow with the purpose of addressing the claim and counter claim of both the sides. A Petition is filed in the capacity of a 'Financial Creditor' for a 'Financial Debt' of



₹7,41,83,397/- (Rs.4,38,55,000/- + Rs. 3,03,28,397/-) recoverable from the Corporate Debtor Swami Cyber Solution Private Limited. On one hand the Financial Creditor is claiming the impugned amount as 'financial debt', but on the other hand, the argument of the Corporate Debtor is that the impugned amount was not in the nature of loan but an investment by the Financial Creditor that too without interest.

17. In order to determine whether the amount disbursed by Financial Creditor to the Corporate Debtor is a 'Financial Debt' or not, we fall back on the definitions given under 'Guide to the Insolvency and Bankruptcy Code' [(First Edition), Vol. I, by O.P Wadhwa, K.K. Wadhwa, V.K. Wadhwa And S.K. Wadhwa]; which are applicable to this application:

***"Creditor" ( Clause (10))***

*Creditor means-*

- i. a person to whom a debt is owed*
- ii. A financial creditor*
- iii. An operational creditor*
- iv. A secured creditor*
- v. An unsecured creditor, and*
- vi. A decree holder*

*The IBC segregates creditors of company into two broad categories of financial and operational creditor. In addition to the three classifications of creditors existing before, the IBC introduces the concept of Financial and Operational Creditors. The definition of financial creditor appears in Section 5(7) which*



is to be read along with Section 5(8) and section 3(10) of the Code.

The usage of "includes" in Section 3(10) of the code suggest that the definition of "creditor" is an inclusive definition.

**"Debt" [ Clause (11)]**

"Debt means-

- (i) a liability obligation in respect of a claim which is due from any person
- (ii) financial debt,
- (iii) operational debt

'Debt' as defined under S. 3(11) refers to an amount that is due from any person, including the corporate debtor. This conception of debt is relevant in the context of initiation of insolvency proceedings under Ss. 7-10 of the IBC.

**Financial Debt**

Financial Debt is defined in Section 5(8) to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;



- (d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) *receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*2[Explanation. -For the purposes of this sub-clause, -*

- (i) *any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) *the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*
- (g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*



- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

18. In our view, the present application filed by the financial Creditor is satisfying all the definitions of "Creditor", "Debt" and "Financial Debt" and qualifies for filing an application under Insolvency and Bankruptcy Code. Further, we have also gone through the Judgement delivered by the Hon'ble Supreme Court in W.P (c) No. 43/ 2019, *Pioneer Urban Land & Infrastructure Ltd v. UOI & Ors*, defines about the financial debt and time value of money as follows:

"61. The definition of "**financial debt**" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in *Black's Law Dictionary* (10th ed.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money.

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment). "



19. In the present context, it is clear that the expression “disburse” to the payment in tranches by the Financial Creditor to the Corporate Debtor for developing web portal. The expression “disburse” refers to the ‘Time value of money’. In short, the disbursal must be money & must be against consideration of ‘time value of money’, thereby, the fact that money is no longer with them, but it is with the Corporate Debtor, who then utilises the money.

20. With respect to “time value of money” the Hon'ble Supreme Court in its above-mentioned judgement stated the ‘Dictionary of Banking Terms’ (Second edition) by Thomas P. Fitch in which “time value for money” was defined thus:

*“present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.”*

21. In the instant case, it is clear that this is against consideration for the time value of money, as the money that is no longer with the financial Creditor but with the Corporate Debtor who is legally obliged to give money's equivalent to the Financial Creditor having used it in the development of the web portal and being at a discounted value. So far as the Financial Creditor is concerned as he is to get web portal fully developed for commercial use. This is also amply clear from the Investment Agreement dated 19.02.2016 entered into between the parties.



## 22. As per the Investment Agreement:

*Company is the owner and developer of a real estate portal by the name InDunia.com (hereinafter referred as the 'portal') which aims to become the next generation digital real estate Marketplace powered by big data, cognitive decision support targeting consumers, agents/brokers, developers and lenders and redefining digital real estate using proprietary cognitive and predictive analytical models with associated Discovery capabilities, big data with social media data, and digital gaming responsive design. The company's investment into the development of the Portal as per their valuation is INR 12,40,00,000/- (Rupees twelve crores forty lacs) (hereinafter "company's software value")*

*The portal is partially completed and would require further development in order to complete in global market and company is desirous for further development of the portal, however is in requirement of funds for the execution. That the investor desires to invest an amount of INR for 4,50,00,000/- (Rupees four crores and Fifty lakhs only) for development of the Portal (hereinafter "Investor Investment Amount"). It is acknowledged by the parties that the investor has already advanced a sum of INR 4,38,55,000/- (Rupees Four Crores Thirty-Eight Lakhs Fifty Five Thousand) to the company towards the aforesaid commitments.*

## 23. Investments terms stated as

*3.1 The investor has decided to invest an amount of INR 4,50,00,000/- (Rupees Four Crores and Fifty Lakhs only) (hereinafter "investor investment amount") for the development of the Portal. The company acknowledge that it has already received a sum of INR for 4,38,55,000/- ( rupees four crores thirty eight lacs fifty five thousand only) from the investor in relation to the same. The statement of payment made by the investor to the company as on the Effective Date is provided in schedule a to this agreement.*

24. However, on the question of accruing of interest on the said amount, it was found that under the subhead of *Financial Commitments* in the Board's Report for the Financial Year 2015-16 dated 12.06.2017, it is stated as



"The company is developing a real estate portal by the name InDunia.com, which is partially completed. Indunia Realtech Limited has agreed to pay an amount equivalent to INR 4,50,00,000/- as interest free loan to the company for further development of the portal secured by a first charge on the Portal, to be created on completion of the Portal. The company is yet to register the charge with the Registrar of Companies..... "

It is found that the Corporate Debtor themselves have considered the investment so stated to be a charge on the Web Portal being developed.

25. It is evident from the Annexure enclosed in the petition, in Extract of Annual return as on 31.03.2016 of Swami Cyber Solutions Private Limited, under the head 'Indebtedness', the Corporate Debtor has clearly mentioned the debt. Balance Sheet as on 31.03.2016 also depicts the debt under the head 'Long-term borrowings.

26. We have also considered the additional arguments advanced by the Ld. Counsel for corporate debtor and the rejoinder arguments by the Ld. Counsel of financial creditor. We are convinced that, the said transaction is a forward sale-purchase transaction and Section 186(4) of the Companies Act, 2013 does not cover the same. Nothing withstanding this, the financial creditor has shown this amount in the audited annual financial statements as 'Short-term loans and advances' as on 31.03.2016.

27. The arguments that the said investment is in excess of 60% of paid up capital / reserves in contravention of section 186(2) also will not hold good. Even if there is contravention, the company is liable for action by the appropriate authorities. In our view, this does not invalidate the right of the financial creditor to recover the debt.

ORDER

28. In the aforesaid background, and after thoroughly perusing the records, we are of the view that, the application filed on behalf of financial creditor/ Applicant is complete, and no disciplinary proceeding is pending against proposed IRP by the Financial Creditor.

29. There is a default in the payment of the financial debt. Therefore, as per section 7(5)(a) of the code, the present application filed under I B C, 2016 deserves to be Admitted.

30. Hence, after perusal of the provisions of the Code and facts and circumstances of this case along with the submissions of the Financial Creditor, it is hereby held that this Petition/Application is **Admitted**.

31. The Financial Creditor has suggested the name of **Mr Suman Kumar, IBBI/IPA-002/IP-N00365/2017-18/11033, email id sumankrcs@ gmail.com,** residing at B-106, Basement, Amar Colony, Lajpat Nagar-IV, New Delhi-110059 for appointment as Interim Resolution Professional (IRP). He has filed a declaration in Form-2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. Accordingly, the IRP proposed by the Financial Creditor is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.



32. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of order shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.

33. However, the supply of essential services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

34. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

35. That the Interim Resolution Professional shall perform the duties as assigned under **Section 15** and **Section 18** of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

36. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of admission.



37. Ordered Accordingly.

Dated this the 20<sup>th</sup> day of September, 2019

Sd/-

**Veera Brahma Rao Arakapudi**  
Member (Technical)

Sd/-

**Ashok Kumar Borah**  
Member (Judicial)

Certified to be True Copy

*[Handwritten Signature]*  
20/09/2019

Deputy Registrar  
National Company Law Tribunal  
Kochi Bench

Memo No.TIBA/12/KOB/2019/ *526*

Date: 20.09.2019

To

1. Mr.Prince Jain, Advocate, Chamber No.334, Western Wing, Tis Hazari Courts, New Delhi-110054. (Counsel for the Financial Creditor)
2. Mr.Sandeep Gopalakrishnan, Firm Resolve Law Office, OS No.1,Third Floor, GCDA Complex, Marine Drive, Cochin-682031. (Counsel for the Corporate Debtor)
3. **Mr Suman Kumar, IBBI/IPA-002/IP-N00365/2017-18/11033**, residing at B-106, Basement, Amar Colony, Lajpat Nagar-IV, New Delhi-110059 (Interim Resolution Professional)

