

NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
SPECIAL BENCH (COURT-II)

(IB)-356(ND)/2021

IN THE MATTER OF:

**Fidus Finance Private Limited,
Registered Office at:
4B B D BAG (E)
5th Floor, Stephen House,
Kolkata, West Bengal - 700001**

...Financial Creditor

VERSUS

**M/s. Elena Power and Infrastructure Limited
Registered Office at:
B-91/1 Ground Floor, Jawahar Park,
Khanpur, New Delhi-110062**

...Corporate Debtor

Section: 7 of IBC, 2016

Order Delivered on: 06.05.2022

CORAM:

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**

**(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)**

PRESENT:

For the Applicant : Adv. Kunal Godhwani

For the Respondent : Adv. Anuj Tiwari



ORDER

PER: NARENDER KUMAR BHOLA, MEMBER (T)

The present application is filed, under the Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC, 2016**') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Fidus Finance Private Limited (for brevity '**Financial Creditor**'), with a prayer to initiate the Corporate Insolvency process against M/s. Elena Power and Infrastructure Limited (for brevity '**Corporate Debtor**').

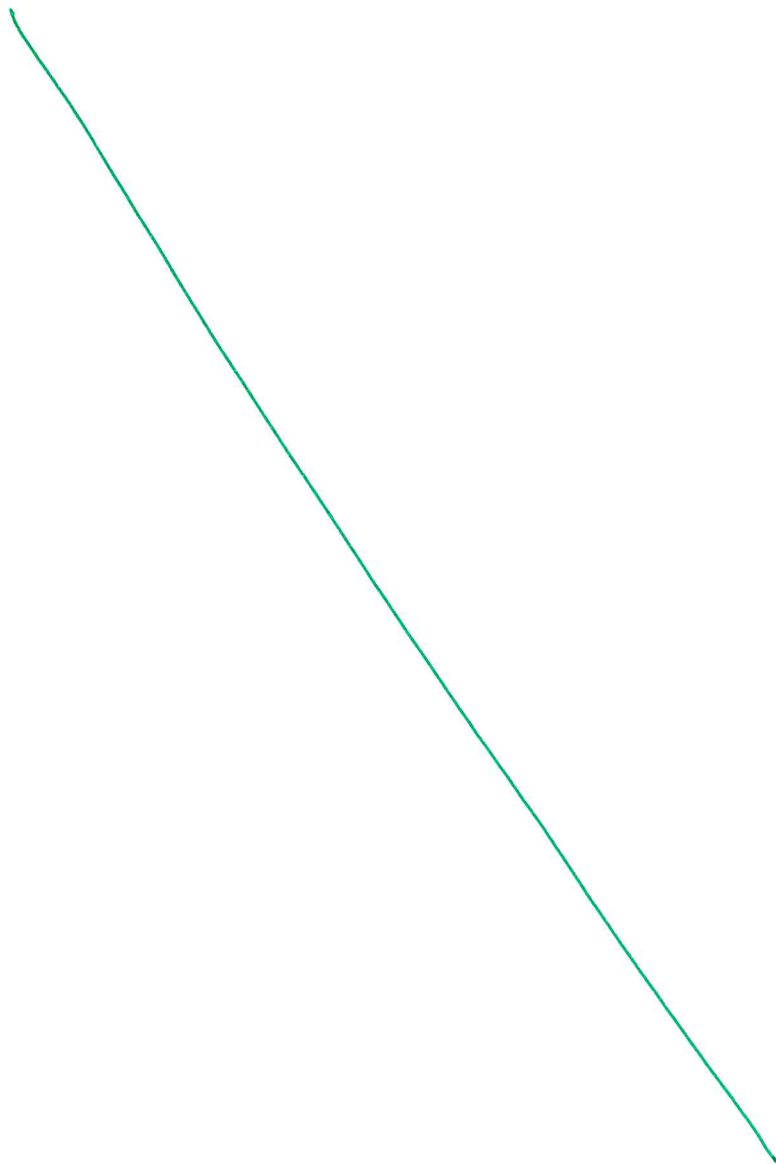
2. The Financial Creditor namely, Fidus Finance Private Limited is a Company incorporated on 11.11.1993 under the provisions of erstwhile Companies Act, 1956 with CIN U65999WB1993PLC060703, having its registered office at 4B B D BAG (E) 5th Floor, Stephen House, Kolkata, West Bengal – 700001.

3. The Corporate Debtor namely, M/s. Elena Power and Infrastructure Limited is a Company incorporated on 24.04.2008, under the provisions of erstwhile Companies Act, 1956 with CIN U45204DL2008PLC177186, having its registered office at B-91/1 Ground Floor, Jawahar Park, Khanpur, New Delhi-110062, which is within the jurisdiction of this Tribunal.



4. It is stated by the Financial Creditor that it has provided loan facility amounting to Rs.1,05,00,000/- @ 12% per annum to the Corporate Debtor. It is further stated that the loan was payable on demand in terms of Clause 4 of the Loan Agreement.

5. That the details of the total amount of unpaid Financial Debt and the date of default is mention in the Part IV of the Application. The same is reproduced below for the convenience:



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PART - IV

PARTICULAR OF FINANCIAL DEBT	
<p>1. TOTAL AMOUNT OF DEBT GRANTED AND DATE (S) OF DISBURSEMENT</p>	<p>The Corporate Debtor was in need for financial assistance and accordingly approached the Financial Creditor/Applicant with a request to grant loan amounting to INR Rs. 105,00,000.00/- (Indian Rupees One Crore Five Lakh only. The Financial Creditor and the Corporate Debtor thereafter entered into a Loan Agreement on 27.01.2020 to record the terms and conditions upon which the Loan was to be granted, to give financial assistance to the Borrower.</p> <p>The said Loan of Rs. 1,05,00,000/- was disbursed to the Corporate Debtor in two tranches i.e. on 27.01.2020 and on 21.12.2020 respectively. The said loan amount was repayable on 07.04.2021 with 12% interest per annum. Thus, per the Loan Agreement, the amount became due and payable on 07.04.2021. However, the Corporate Debtor failed to repay the loan amount alongwith interest on 07.04.2021 and hence, the Financial Creditor was constrained to issue Demand Notice vide email dated 06.05.2021 upon the Corporate Debtor for repayment of the loan amounting to Rs. 1,11,43,232/- (Rupees One Crore Eleven Lakhs Forty-three Thousand Two Hundred and Thirty-two Only) along with applicable interest, failing which the Financial Creditor shall be constrained to file petition under the Insolvency and Bankruptcy Code, 2016. That apart from an acknowledgement of receipt of the Demand Notice, no Reply has been received from the Corporate Debtor till date. Copy of the Loan Agreement entered between the Financial Creditor and the Corporate Debtor is annexed herewith and marked as <u>ANNEXURE A-5.</u></p> <p>That the Corporate Debtor has failed to repay the debt of</p>

FIDUS FINANCE PVT. LTD.



		the Financial Creditor despite issuance of notice and in view of the default committed by the Corporate Debtor, the Financial Creditor has preferred the instant application under Section 7 of the IBC.								
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<p>The total amount claimed to be in default is Rs. 1,11,43,232/- (Rupees One Crore Eleven Lakhs Two Hundred and Thirty-Twoonly) (inclusive of interest) as on 07.04.2021.</p> <p>DATE OF DEFAULT:07.04.2021</p> <table border="1"> <thead> <tr> <th>Financial Creditor</th> <th>Amount (Rs.)</th> <th>Due Date</th> <th>Date of Default</th> </tr> </thead> <tbody> <tr> <td>Fidus Finance Private Limited (Financial Creditor)</td> <td>1,05,00,000</td> <td>07.04.2021</td> <td>07.04.2021</td> </tr> </tbody> </table>	Financial Creditor	Amount (Rs.)	Due Date	Date of Default	Fidus Finance Private Limited (Financial Creditor)	1,05,00,000	07.04.2021	07.04.2021
Financial Creditor	Amount (Rs.)	Due Date	Date of Default							
Fidus Finance Private Limited (Financial Creditor)	1,05,00,000	07.04.2021	07.04.2021							

6. That from perusal of the Part IV of the Application it is observed that the total unpaid Financial Debt claimed by the Financial Creditor is amounting to Rs. 1,11,43,232/- and the date of default is of 07.04.2021.

7. That the Financial Creditor has annexed the following documents to prove the existence of Financial Debt:

- a) Loan Agreement dated 27.01.2020 executed between the parties.
- b) Disbursement and Re-payment Schedule.
- c) Copy of bank statements depicting disbursement of Loan in two tranches i.e., Rs. 25,00,000/- on 27.01.2020 and Rs. 80,00,000/- on 21.12.2020.
- d) Legal Notice dated 06.05.2021 recalling the loan advanced to the Corporate Debtor.



8. That on issuance of notice, the Corporate Debtor has filed its reply and has denied the fact that any default has been committed by it.

9. It is further stated by the Corporate Debtor that since, the Financial Creditor has not filed the record of default available with Information Utility. Therefore, the Form I filed by the Financial Creditor is incomplete and is not in accordance with section 215 of IBC, 2016.

10. It is submitted by the Corporate Debtor that the Application has been filed by the Financial Creditor for the purpose of recovery and not for resolution of the Corporate Debtor. That during the course of hearing on 29.04.2022, the Corporate Debtor has also placed emphasis on Section 65 of IBC, 2016, in support of this contention.

11. That during the course of final hearing, the Ld. Counsel appearing for the Financial Creditor has rebutted to the submission of the Corporate Debtor and has stated that the non-filing of record with Information Utility will not absolve the Corporate Debtor from its liability. It was further added that the present application has been filed with the purpose of seeking resolution of the Corporate Debtor and not with any other intent.

12. After hearing submission of both the parties and perusing the documents placed on the record this Bench observes that there is



14. Since the Corporate Debtor failed to discharge the aforesaid loan amount, therefore, in our considered view, the Corporate Debtor had committed default towards the payment of the aforesaid amount. From the documents placed on record by the Financial Creditor, the fact about existence of financial debt due and default in payment of the same by Corporate Debtor is proved.

15. That with respect to objection taken by the Corporate Debtor that the Application is incomplete since the Financial Creditor has not filed the record with the Information Utility. In this context we would like to refer to the Judgement of Hon'ble High Court of Calcutta passed in the matter of **Univalue Projects Pvt. Ltd. Versus The Union of India & Ors. W. P. No. 5595 (W) of 2020 dated 18.08.2020** wherein, it was held that Section 215 of IBC, 2016 is not mandatory in nature. The extracts of the relevant portion (Para 67) of the Judgement are reproduced below –

“b) I am of the view that financial creditors can rely on either of the modes of evidences at hand to showcase a financial debt, that is, either a record of default from the IU OR any other document as specified which showcases the existence of a financial debt. Such other documents may belong to any of the four classes of documents stated in sub-regulation 2(b) of Regulation 8 of the CIRP, 2016 or as the Supreme Court has observed in Swiss Ribbons (P) Ltd. (supra), all the eight classes of documents stated in Part-V to Form-1 appended with the AA Rules, 2016.

c) Based on sub-paragraph (b) above, it may therefore be inferred that Section 215 of the IBC, 2016 is not mandatory in nature.”

In view of the above, we find no force in the Arguments of the Corporate Debtor that the Application is incomplete.

16. That with regard to objection made by the Corporate Debtor in respect of filing of application for the purpose of recovery and malicious intent, we are of the considered view that the Corporate Debtor has failed to demonstrate that as to how the application is filed with the malicious intent and not for the purpose of seeking its resolution.

17. In the given facts and circumstances, the present Application being complete and having established the default in payment of the Financial Debt for the default amount being committed above the threshold limit, **the present Application is admitted** in terms of Section 7(5) of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14(1) (a), (b), (c) & (d), the following prohibitions are imposed, which must be followed by all and sundry:

- “(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.”

18. As proposed by the Financial Creditor, this Bench appoints Mr. Ashok Arora as IRP having Registration No. IBBI/IPA-003/IC-AI-N-00279/2020-21/13170 (Email:ashok.arora79@yahoo.com), subject to the condition that no disciplinary proceedings are pending against the IRP so named and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. This Adjudicating Authority orders that:

“Mr. Ashok Arora as IRP having Registration No. IBBI/IPA-003/IC-AI-N-00279/2020-21/13170, (Email: ashok.arora79@yahoo.com) is directed to take charge of the CIRP of the Corporate Debtor with immediate effect. The Court Officer will inform the IRP so appointed by all modes.”


The IRP is directed to take the steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016.


19. The Financial Creditor is directed to deposit Rs. 2,00,000/- (Two Lakh) only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.



20. A copy of this Order shall be communicated to the Financial Creditor, the Corporate Debtor and the IRP mentioned above by the Registry of this Tribunal.

21. In addition, a copy of the Order shall also be forwarded by the Registry to the IBBI for their records and Registrar of Companies, Delhi and Haryana for updating the status of Corporate Debtor on MCA website for information of general public.


(Bachu Venkat Balaram Das)
Member (J)


(Narender Kumar Bhola)
Member (T)