IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

CP (IB) No.561/MB-IV/2021

Under Section 9 of the I&B Code, 2016

In the matter of:

Diligent Media Corporation Limited

[CIN: L22120MH2005PLC151377]

…Financial Creditor/Applicant

V/s

Gajank Telecommunications & IT Solutions Private Limited

[CIN: U74999MH2017PTC296714]

...Corporate Debtor/Respondent

Order Dated: 12.04.2023

Coram:

Mr. Prabhat Kumar Hon'ble Member (Technical)	Mr. Kishore Vemulapalli Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Shreni Shetty, Advocate.

For the Respondent(s) : None.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application bearing C.P. (IB) No. 561/MB-IV/2021 filed by Diligent Media Corporation Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution

Process (CIRP) against Gajank Telecommunications & IT Solutions Private Limited, Corporate Debtor.

2. The Operational Creditor is a Company. The Application is filed by Mr. Nishikant Upadhyay, Director of the Operational Creditor, duly Authorised vide Board Resolution dated 12.02.2021, passed by Board of Directors of Operational Creditor, claiming total outstanding amount of Rs.8,55,80,274/- (Rupees eight crore fifty-five lakh eighty thousand two hundred seventy-four only).

3. The date of default is stated as 31.05.2019 in part IV of the application. The said default appears to have determined on basis of clause 3 of the Memorandum of Understanding ("MoU") dated 01.02.2019 relied upon by the Applicant, which states that "*The agent further undertakes to refund the said amount of Rs. 7,00,00,000/- (Rupees Seven Crores Only) along with an interest @ 12% p.a. to the Company in the event it is unable to handover the said residential premises to the Company by 30th May, 2019 as stated hereinabove*". However, the clause 2 of MOU states that the Corporate Debtor has undertaken to finalized and handover the Residential Premises to the Operational Creditor on or before the expiry of two years form the date of execution of the said MoU i.e. 01.02.2019. The Petition is filed on 04.06.2021 which is well within the period of limitation from the date of default.

4. The case of the Operational Creditor is that the Operational Creditor had entered into MoU dated 01.02.2019 with the Corporate Debtor for procurement of residential premises admeasuring 5000 sq. ft., in a posh locale of Central Mumbai. said MoU was to handover the aforesaid premises to the Operational Creditor on or before 30.05.2019. For abovementioned purpose the Operational Creditor had advanced a sum of Rs.7,00,00,000/- on 25.02.2019 to the Corporate Debtor.

5. The Operational Creditor has issued Notice for refund dated 01.10.2019 and Intimation Notice dated 20.12.2019 to the Corporate Debtor for refund of the advanced sum of Rs.7,00,00,000/-

6. The Operational Creditor issued Demand Notice dated 06.04.2021 in Form-3 upon the Corporate Debtor claiming total outstanding of Rs.8,55,80,274/- (Rupees eight crore fifty-five lakh eighty thousand two hundred seventy-four only). The Operational Creditor has filed the Bank Account Statement of IDBI Bank. The Operational Creditor has filed Affidavit under Section 9 (3) (b) as required under the Code.

7. The Corporate Debtor has not appeared in the matter after giving several opportunities to the Corporate Debtor. Vide order dated 26.08.2021, the Court Notice was ordered against the Corporate Debtor. On 01.12.2021, Mr. Neeraj Yadav, representative of the Corporate Debtor was appeared and sought time to engage a Counsel. Then after, on 04.02.2022, 12.04.2022, 21.07.2022, 27.09.2022 and 22.02.2023 the Corporate Debtor did not appear in the matter. Hence, vide order dated 03.06.2022, the Corporate Debtor's right to file reply was forfeited and vide order dated 15.12.2022 the Corporate Debtor was set ex-parte.

Findings:

8. We have heard the arguments of the Learned Counsel for Operational Creditor.

9. After perusal of the material on record, this Bench observes that the Operational Creditor and the Corporate Debtor entered into MoU dated 01.02.2019 for the purpose of procurement of residential premises situated in a posh locale of Central Mumbai. Pursuant to this, the Operational Creditor had advanced a sum of Rs.7,00,00,000/- to the

Corporate Debtor. As per clause 3 of the said MoU, the Corporate Debtor was to arrange the premises on or before 30.05.2019 if it failed to so as a result of which it is liable to refund the advance amount along with interest @12%. p.a.

10. However, as per the third para of recital of said MoU, the Corporate Debtor represented to the Applicant that "*it would acquire premium residential premises in the central business district of Mumbai for the company within the next two years. The Agent offered the Company to acquire/construct tailor made residential premises for the Company at cost plus 10% margin*". This recital is incorporated as clause 2 of MOU which provides that "*The agent hereby undertakes to finalized and handover the Residential Premises to the Agent on or before the expiry of two years form the date of execution of these presents*". Accordingly, this Bench notices inconsistency in the provisions of clause 2 & 3 of the MOU, but finds that provisions of clause 2 are in line with the intent expressed in the 3rd para of the recitals. Accordingly, this bench feels that this MOU had stipulated performance of the agreement within 2 years from the date of its execution.

11. Hence, the date of default would be 31.01.2021 within the period prescribed under Section 10A of the Code, which places a bar on filing of an Application arising from the default of the Corporate Debtor. Section 10 A of the Code states as follows:

> *"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified2 in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

12. In view of the above, this Application is not maintainable as the date of default falls between the period specified in Section 10A of the Code, which bars filing of any application u/s 9 of the Code.

ORDER

13. The petition bearing CP (IB) 561/MB-IV/2021 filed by Diligent Media Corporation Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Gajank Telecommunications & IT Solutions Private Limited, Corporate Debtor, is hereby **Dismissed**.

14. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present Petition.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Kishore Vemulapalli
Member (Judicial)

12.04.2023