



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI, BENCH -V**

C.P. (I.B) No. 1222/MB/2022

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of:

Dinesh Engineers Limited

DEPL House, Neighbourhood Shopping Complex, Sector-4, Nerul, Navi Mumbai- 400706.

...Operational Creditor

Vs

Joister Inforserve Private Limited

Gala No. 136, Shiv Shakti Industrial Estate, Opp. Mittal Ind. Estate, Andheri-Kurla Road, Andheri (East) Mumbai- 400059.

...Corporate Debtor

Order Dated:21.05.2024



Coram:

SHRI K. R. SAJI KUMAR, HON'BLE MEMBER (JUDICIAL)

MADHU SINHA, HON'BLE MEMBER (TECHNICAL)

Appearances: Hybrid

For Operational Creditor: Adv. Aniruth Purusothaman (PH)

For Corporate Debtor: Adv. Sundas Ansari

ORDER

1. BACKGROUND

1.1 This Company Petition bearing C.P. (I.B) No. 1222/MB/2022 (Application) is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by **Dinesh Engineers Limited**, the Operational Creditor (OC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of **Joister Inforserve Private Limited**, the Corporate Debtor (CD), for an alleged operational debt of **Rs. 6,76,02,536/-** consisting of the principal amount, interest and Goods and Services Tax. The date of default as stated in the Application is 31.05.2022. A Demand Notice dated 27.08.2022 was sent by the OC which was not replied to by the CD. Hence the present Application.




2. CONTENTIONS OF OC

2.1 The OC submits that it is an IP-1 registered with the Department of Telecommunications, Government of India and is having infrastructure to support telecommunication services including Dark Fiber and the CD is an Internet Service Provider (ISP) which had requested the OC to grant Dark Fiber, on yearly lease basis, and for that purpose, a Dark Fiber Lease Agreement dated 16.07.2018 was entered into between the parties.

2.2 The OC further submits that the CD has defaulted in aggregate payment of Rs. 6,76,02,536/- (Six Crore Seventy-Six Lakhs Two Thousand Five Hundred Thirty-Six Rupees) consisting of principal amount, interest and Goods and Service Tax thereon on account of outstanding dues towards lease of Dark Fiber to the OC.

2.3 The OC also submits that the lease charges for Dark Fiber squarely falls within the definition of 'operational debt' under Section 5(21) of the IBC. The same has been upheld by the Hon'ble NCLAT, Principal Bench in Company Appeal (AT) (Insolvency) No. 423 of 2021 vide order dated 05.07.2022 in the matter of Jaipur Trade Expocentre Private Limited Vs. M/s Metro Jet Airways Training Private Limited.

2.4. The OC has provided purchase orders raised by the CD and invoices regarding Dark Fiber and issued by the




OC. The CD has defaulted in making payment against invoices from 30.03.2021 to 08.07.2022.

2.5 It is further submitted that the CD has time and again been making only assurances to repay the outstanding debt and has even admitted its liability on various occasions. Thus, there is no question of any dispute with respect to the amount of default. There has not been any notice of dispute relating to unpaid operational debt. The OC has annexed affidavit under section 9(3)(b) of the IBC to the effect that there is no notice given by the CD relating to any unpaid operational debt.

2.6 It is submitted by the OC that owing to the non-payment of dues it sent a demand notice dated 27.08.2022 under section 8 of the IBC read with Rule 5 of the AA Rules to the CD *vide* hand delivery on 03.09.2022; email dated 27.08.2022; and speed postdated 27.08.2022, which was duly delivered on 03.09.2022. However, the CD has neither repaid the outstanding amount nor has replied to the said demand notice. The OC has recorded default with the Information Utility on 29.09.2022.

3. CONTENTIONS OF CD

3.1 The CD has filed its affidavit-in-reply dated 20.06.2023 to the present Application denying the claim of the OC.




3.2 The CD submits that there is no debt due stating that there are no documents to show that any debt is due and payable to the OC.

3.3 It is contented that the OC had suddenly shutdown all network fibers in October, 2022, which caused huge financial losses and loss of customers to the CD.

3.4 The CD had discussed the issue with the chartered accountant of the OC, Mr. Ravi Mansaka who assured restoration of the fiber links of the CD. Pursuant to this, the OC resumed the network links and things worked well till December 2032, but again the OC had shut down the network on 05.01.2023, without any prior intimation.

3.5 It is further submitted by the CD that the OC had purposely ignored all the calls and messages made by them which caused huge financial losses and loss of reputation to the CD before the customers in the areas, for which the they were dependent on the OC for fiber optic network. The situation had worsened to a level where the CD had lost complete area of operations, causing further financial losses to it.

3.6 The CD also states that its office address was changed and the demand notice was misplaced by their staff; hence it was not in a position to reply to the demand notice.




3.7 Therefore, according to the CD, no case has been made out by the OC for initiation of CIRP in respect of the CD requested dismissal of this Application with costs.

4. ANALYSIS AND FINDINGS

4.1 We have heard the arguments of both the Ld. Counsel for the OC as well as the CD and have gone through the records placed before us.

4.2 The case of the OC is that an amount of **Rs.6,76,02,536/-** is the debt due on account of services provided and the pending amount is due and payable. It is on record that a Dark Fiber Lease Agreement dated 16.07.2018 was executed between the OC as Service Provider and the CD as Customer. Clause 7.2 of the said Agreement provides that the Customer shall pay the Service Provider the agreed consideration as set forth in the agreement subject to covenant, inspection and performance. The OC has brought on record list of invoices from 30.03.2021 to 08.07.2022 suggesting amounts in default by the CD with different default dates. The date of default is stated to be 31.05.2022. Demand Notice dated 27.08.2022 was sent by the OC and the same was not replied to by the CD.



4.3 From the perusal of the documents placed on record, it is observed that the OC has granted Dark Fiber services to the CD pursuant to Dark Fiber Lease Agreement dated 16.07.2018. Invoices were raised by the OC from time to time against the CD to pay the lease charges for Dark Fiber.

4.4 The Invoices placed on record by the OC between 30-03-2021 till 08-07-2022 reflect the lease charges to be paid by the CD. The purchase orders attached to the present Application has been raised by the CD and are duly signed by the authorised representative of the CD Mr. Nikunj Kampani. A sample of such purchase order is reproduced as under-



PURCHASE ORDER						
Supplier: Dinesh Engineers Limited DEPL House Neighbourhood Shopping Complex Sector 4, Nerul West State Maharashtra PAN AACCD3117C GST 27AACCD3117C129				Bill to: Joister Infoserve Private Limited 136, Shiv Shakti Industrial Premises, Andheri kurla road, Andheri East PAN - AAJCS2264E GST - 27AAJCS2264E22C		
				PO No. DEPL/20-21/06		
				PO Date: 08-Mar-21		
				PO Validity		
We are pleased to place an order with you for the service of dark fiber single core on yearly lease basis subject to the Terms & Conditions mentioned here under.						
Sr. No.	Description (Milestone) of Work	SAC	UOM	Qty	Rate (INR)	Total (INR)
1	Khed to Ratnagiri	9973	KM	192	15,000	28,80,000
					Subtotal	28,80,000
					CGST 9%	2,59,200
					SGST 9%	2,59,200
					Grand Total	33,98,400
Terms and Condition:						
1						
2	Taxes will be extra as and when applicable.					
3	1 month notice period shall be applicable for discontinue of Services. Billing is applicable for disconnection					
Joister Infoserve Private Limited   Authorized Signatory Name: Nikunj Kampani Date: 08/03/21 Place: Mumbai						


Joister Infoserve Private Limited

136, Shiv Shakti Industrial Premises, Marol
 Andheri East, Mumbai 400069

E - helpline@joister.com
 W - www.joister.com



4.5 The acknowledgement by way of stamp and signature by the authorised signatory of the CD itself reveals that the CD has availed of the services of Dark Fiber from the OC. The perusal of the above document makes it clear that there exist a privity of contract between the OC and the CD.




4.6 The OC has also recorded the default with the Information Utility on 29.09.2022. Although the CD has submitted in its reply that there is no debt due but has not been able to produce any evidence to substantiate the same. Thus, in our considered opinion, the essential ingredient required for admission under Section 9 of the IBC, i.e., the existence of debt and default in this case are proved against the CD. Hence, this Application in respect of the CD deserves to be admitted into CIRP.

ORDER

1. The above Company Petition No. 1222/IBC/MB/2022 is hereby admitted and CIRP is ordered in respect of Joister Infoserve Private Limited, the CD.
2. The OC has proposed the name of Ms. Garima Diggiwal, an Insolvency Professional having email address garima286@gmail.com registered with the Insolvency and Bankruptcy Board of India (IBBI) having registration No IBBI/IPA-001/IP-P-02018/2020-2021/13158.
3. We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:
4. We prohibit-
5. the institution of suits or continuation of pending suits or proceedings against the CD including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;



6. transferring, encumbering, alienating or disposing of by the CD any of its assets or any legal right or beneficial interest therein;
7. any action to foreclose, recover or enforce any security interest created by the CD in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
8. the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.
9. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
10. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.
11. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
 - I. That this Bench hereby appoints Ms. Garima Diggiwal, an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) having registration No IBBI/IPA-001/IP-P-02018/2020-2021/13158 and email address garima286@gmail.com as the IRP to carry out the



functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

- II. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- III. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the FC to deposit a sum of Rs.3,00,000/- (Three Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- IV. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.
- V. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.



VI. The Registry is also directed to forward a copy of this order to the IBBI forthwith for their records.

VII. **Compliance report of the order by Designated Registrar is to be submitted today.**

SD/-

MADHU SINHA
MEMBER (TECHNICAL)
/Aakansha/

SD/-

SHRI K. R. SAJI KUMAR
MEMBER (JUDICIAL)