

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

CP (IB) 282/MB/2018

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

M/s. SITI Networks Limited

..... Financial Creditor  
(Petitioner / Applicant)

v.

M/s. SCOD 18 Networking Private Limited

..... Corporate Debtor  
(Respondent)

Order Pronounced on: 06.09.2018

**Coram :**

Hon'ble M. K. Shrawat, Member (J)

**For the Petitioner :**

Mr. Rohan Cama, Counsel a/w. Ms. Ekta Tripathi, Advocate i/b. MDP & Partners – Advocates for the Financial Creditor / Petitioner.

**For the Respondent :**

Mr. Sharan Jagtiani, Advocate a/w. Ms. Sonali Mehta, Advocate and Ms. Manasi Kalnt, Advocate i/b. Mahernosh Humranwala, Advocate – Advocate for the Respondent / Corporate Debtor.

*Per: M. K. Shrawat, Member (J)*

**ORDER**

1. The Petitioner/Applicant viz. 'M/s. SITI Networks 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 23.12.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**).
2. Further under the head "Particulars of Corporate Debtor" the description of the debtor is stated as 'M/s. SCOD 18 Networking Private Limited' (hereinafter as **Debtor**) having Registered office at, Plot No. 97, 2<sup>nd</sup> Floor, Marol Co-Op. Industrial Estate, Makwana Road, Andheri (E), Mumbai, Maharashtra – 400059.

3. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt in default is stated as ₹ 11,00,00,000/-.

**4. Brief Background :**

- 4.1. The Financial Creditor is engaged in the business of receiving and distribution of cable TV signals to various affiliated local cable operators and subscribers through its various digital distribution networks across India. And the Debtor is also engaged in same business.
- 4.2. The Financial Creditor on 30.12.2015 signed the 'Term Sheet' with the Debtor for the purposes of acquiring the Equity Shareholding of the Debtor. Thereafter on 22.03.2016 the said Term Sheet was amended via an 'Addendum dated 22.03.2016' pursuant to the same the Closing date and the Payment Schedule was amended.
- 4.3. Pursuant to the said Addendum the Financial Creditor has advanced an amount of ₹ 11,00,00,000/- to the Debtor towards acquiring of the Equity Shareholding of the Debtor.
- 4.4. In addition to money paid as aforesaid the Financial Creditor has also supplied 25,000 Set Top Boxes in consonance with the business nature of the parties however in this Petition / Application the amount towards the STBs are not claimed.
- 4.5. As per the Financial Creditor the Term Sheet was signed on the representations made by the Debtor and Shareholders however subsequently it was noticed that the said representations are false and therefore the Financial Creditor had issued a Notice dated 24.03.2017 informing the Debtor that due to misrepresentations and breaches by the Debtor the Financial Creditor is not continuing with the agreement and also requested for the refund of the amount.
- 4.6. Since the Debtor neither made the payment nor issued the Shares, being aggrieved, the Financial Creditor has preferred this Petition / Application invoking the provisions of S. 7 of the Code praying for the commencement of the CIRP over Debtor Company.

**5. Submissions by the Financial Creditor :**

- 5.1. The Learned Counsel for the Financial Creditor has submitted that pursuant to the representations made by the Debtor the Term Sheet was signed on 30.12.2015 between the Debtor and Financial Creditor.

5.2. It is further stated that, pursuant to the Term Sheet it was agreed that the Financial Creditor will acquire the Equity Shareholding of the Debtor which will result into 76 % stake of the Financial Creditor in the enhanced Equity Share Capital of the Debtor. Thereafter the said Term Sheet was modified / amended vide an Addendum dated 22.03.2016 and pursuant to the said amendment the payment schedule and closing date were modified / amended. The amended Payment Schedule is as follows :

**Payment Schedule** : *Unless otherwise agreed, the consideration of the Transaction shall be paid in the following manner :*

*(i) to the SCOD on the date of allotment either in cash or in kind.*

*However on request of SCOD;*

- A. Rs. 3 crores has been given to SCOD by SUTU as an advance / application money towards allotment of equity shares on 31<sup>st</sup> December 2016 via RTGS against which the agreed equity shares will be allotted to Siti, failing of which the advance application money will be refunded to Siti by SCOD.*
- B. Rs. 1 crore has been given to SCOD by SITI via RTGS on 8<sup>th</sup> January 2016 as an advance / application money towards allotment of equity shares, against which the agreed equity shares will be allotted to Siti, failing of which the advance application money will be refunded to Siti by SCOD.*
- C. Rs. 1 crore has been given to SCOD by SITI via RTGS on 18<sup>th</sup> February 2016 as advance / application money towards allotment of equity shares, against which the agreed equity shares will be allotted to Siti, failing of which the advance application money will be refunded to Siti by SCOD.*
- D. Rs. 1 crore has been given to SCOD by SITI via RTGS on 2<sup>nd</sup> March 2016 as advance / application money towards allotment of equity shares, against which the agreed equity shares will be allotted to Siti, failing of which the advance application money will be refunded to Siti by SCOD.*
- E. On behalf of SCOD, upto Rs. 1 crore shall be paid by SITI to CISCO which shall be adjusted against total Consideration.*
- F. On behalf of SCOD, Rs. 5 crores shall be paid by the SITI to various broadcasters (as per Annexure A attached to this Addendum) which shall be adjusted against the total Consideration.*
- G. 25000 Set Top Boxes has been given to SCOD towards advance / application money towards allotment of equity*

*shares on 27<sup>th</sup> February 2016, against which the agreed equity shares will be allotted to Siti, failing of which Rs. 3,19,00,500/- will be paid to Siti by SCOD.*

- 5.3. It is further stated that the Financial Creditor has subsequently noticed that the representations made by the Debtor i.e. the Debtor has 2.5 Lakhs digital subscriber base in Mumbai and 3 Lakh analog subscribers in Navi Mumbai is false and incorrect and therefore the Financial Creditor has decided to decline from the Term Sheet. Consequently, the said fact had been brought to the notice of the Debtor by the Financial Creditor vide its Notice dated 24.03.2017 and by the said Notice the Financial Creditor also requested for refund of money.
- 5.4. The Learned Counsel has also stated that the Debtor does not deny the fact that ₹ 11,00,00,000/- had been advanced by the Financial Creditor towards purchase of Shares and the Shares, till date, are not allotted however, the contention of the Debtor is that the said amount is cannot be termed as a 'Financial Debt' as per the Code because the amount has not been disbursed against consideration of the **time value of money**.
- 5.5. To this Argument of the Debtor the Learned Counsel has drawn attention towards the provision U/s. 42 (6) of the Companies Act, 2013 which reads as under :

***S. 46 (6) : A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day. (Emphasis supplied)***

In light of the above provision it is argued that, as the Debtor had failed to allot the Shares pursuant to the above provision the money had to be refunded within 15 days from the expiry of 60 days but the Debtor has failed to do so. Hence, now the Debtor is liable to refund the advance amount with the interest at the rate of 12 % p.a. and consequently the amount advanced is to be termed as the amount advanced as a consideration for time value of money.

5.6. The Learned Counsel has also argued that the Financial Creditor was wished to purchase share of the Debtor because as both the Companies are in same business the same will be beneficial for expansion of business of the Financial Creditor. And therefore the advance made by the Financial Creditor is having a commercial effect of borrowing and consequently it is a 'Financial Debt' U/s. 5 (8) (f) of the Code.

5.7. In light of above submissions the Learned Counsel has reiterated that the Debtor has not only failed to refund the advance money but also has neglected the same and therefore this Petition / Application may be Admitted for the commencement of CIRP.

**6. Submissions by the Corporate Debtor :**

- 6.1. The Learned Counsel for the Corporate Debtor firstly has raised the issue of the maintainability of this Application under provisions of the Code.
- 6.2. The Learned Counsel has submitted that the Debtor has not borrowed the money from the Financial Creditor against the payment of interest and therefore the amount advanced by the Financial Creditor **is not a 'Financial Debt'** covered under S. 5 (8) of the Code.
- 6.3. It is further submitted that the Financial Creditor had unilaterally declined from the Term Sheet and claimed for refund of advanced amount. And as the declination was unilateral the Debtor was unable either to repay the amount or to issue the Shares.
- 6.4. It is also stated that the Financial Creditor had wished to purchase Shares of the Debtor for its own benefit and therefore it does not have a Commercial Effect of Borrowing as envisaged U/s. 5 (8) (f) of the Code.
- 6.5. It is also stated that pursuant to the Rule 2 (c) (vii) of the Companies (Acceptance of Deposits) Rules, 2014, if the Company fails to issue the Shares within 60 days from the receipt of monies then the said receipt is to be treated as **Deposit**. And therefore the said receipt of monies cannot be termed as 'Financial Debt' but it is mere an Investment made by the alleged Financial Creditor.
- 6.6. It is also stated that the Financial Creditor, after execution of the Term Sheet, despite the due diligence of the records of the Debtor by the Financial Creditor he has declined from Term Sheet on false and malicious grounds.

6.7. In light of above submissions the Learned Counsel has reiterated that the Petition / Application is to be Dismissed with costs.

**7. Findings :**

7.1. I have gone through the facts and circumstances of the case and also through the submissions made by both the Learned Counsels. It is noticed that to decide this case there is necessity to decide the legal question raised by the Debtor that :

**“Whether the claimed amount is a Financial Debt or not?”**

7.2. To answer this question firstly is worth to place on record the definition of the Financial Debt envisaged U/s. 5 (8) of the Code which reads as under :

*“(8) "financial debt" means a debt alongwith 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 nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (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-clauses (a) to (h) of this clause;” (Emphasis Supplied)*

- 7.3. While going through the facts of this case it is noticed that the amount advanced by the Financial Creditor is pursuant to the Term Sheet signed by both the sides and therefore the amount advanced by the Financial Creditor is a result of the said Transaction.
- 7.4. It is further noticed that as both the Companies are involved in same business the Financial Creditor, may be, with a view to expand his business in the locality of the Debtor wished to purchase the Equity Shares of the Debtor and therefore in my opinion the said transaction **is having a commercial effect of borrowing** pursuant to S. 5 (8) (f) of the Code, as the acquiring of Equity Shares of the Debtor will result into 76 % holding in Debtor of the Financial Creditor and also there will be assured returns from such acquiring.
- 7.5. To give sanctity to this observation I want to place reliance on the decision of this very Bench in the case of *IL & FS Financial Services Ltd. v. La-Fin Financial Services Pvt. Ltd. (T.C.P. No. 919/I&BC/NCLT/MB/MAH/2017)* dated 28.08.2018 wherein it is recorded as under :

*“11.1. On careful reading of this section, in my humble opinion, Financial Debt can be segmented into two types. One is disbursed against the consideration for the time value of money. The second is any amount raised under any other transaction having commercial effect of a borrowing. It is not necessary that there is always a “disbursement” of money, because of the reason that in the first segment a Financial Debt is to be disbursed against the consideration for the time value of money. In this category, therefore, money borrowed against the payment of interest falls within the definition of Financial Debt as defined in sub-section (a) of Section 5 (8). But there are examples where there is no actual disbursement of money. In other word there are examples of Financial Debt where the money in kind has not change hands or transferred from an account of lender to the account of borrower. For e.g. in the definition of Financial Debt Section 5(8) as per clause (g) of I&B Code, any derivative transaction entered into in connection 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. Under this category of “Financial Debt” only a value of transaction is taken into account as there is no physical exchange of money in kind.*

11.2. *The definition of "Financial Debt" is a very wide definition. From sub-clauses (a) to (i) there are several types of transactions which are the examples of Financial Debt. In these examples the Financial Debt may be in the nature of "counter-indemnity-obligation" in respect of a guarantee.*

*Thus, a careful decipher of this section may lead to a conclusion that it is not necessary that every borrowing should have a consideration for the time value of money. If an amount has been "raised" with an objective of economic gain or commercial effect may also be treated as "Financial Debt". I, hereby, hasten to add that an investment, may or may not be a long term investment, with the purpose of acquisition of an asset, right or ownership and prima facie a capital-outlay may be having commercial intention, shall not fall within the definition of "Financial Debt". Thus a broad distinction can be made that if there is an assured return or commercial gain within a guaranteed period than that transaction be not considered an Investment under the Insolvency Code but a Financial Transaction so as to fall within any of the long list of categories prescribed u/s 5 of the Code defining 'Financial Debt'."*

- 7.6. It is further noticed that the S. 42 (6) of the Companies Act, 2013 does provide the payment of interest towards the Share Advance Money if not refunded within 15 days from expiry of 60 days from the acceptance of monies, if shares are not allotted. Hence, in my view the argument of the Debtor that the Application Money is mere a Deposit and not an amount disbursed against time value of money is automatically ruled out due to oppression of Law.
- 7.7. Further, while perusing the 'Companies (Prospectus and Allotment of Securities) Rules, 2014 it is noticed that the Rule 11 of the said Rules also provides that, if the Shares were not allotted in specified period then the application money shall be repaid within 15 days thereafter and on failing of the same the interest at the rate of 15 % shall be charged.
- 7.8. Hence, though there are different rate of Interests are provided in Act and Rules but the fact remains same that the Company shall refund the Application Money, if shares are not allotted within specified time, along with Interest. Hence, in my view the amount claimed in this Petition / Application is against the consideration of time value of money and therefore it is consonance of the S. 5 (8) (a) of the Code, though expressly not borrowed by the Debtor against the payment of Interest.

7.9. In this case it is an accepted position that the Debtor has received an amount towards the Share Application Money amounting to ₹ 11,00,00,000/- and the Debtor has not issued the Equity Shares pursuant to this amount. This is an example of misleading representations by the Debtor Company to obtain the money by false or deceitful promise of share allotment. Under misrepresentation the Financial Creditor was allured and tempted to make the payment hence, by no means it can be termed as an Operational Debt specially on failure of promise by the Debtor.

7.10. In light of above observations it is clear that the amount advanced by the Financial Creditor is a Financial Debt and consequently the answer of the legal question is in **Affirmative**.

7.11. Further that, as far as question of default is concern it is an accepted position that the Debtor has neither issued the Equity Shares nor refunded the money as on date hence, the 'Default' as defined U/s. 3 (12) is also there.

7.12. It is further noticed that the Debtor has sought to raise a 'Dispute' stating that the Financial Creditor had unilaterally declined from the Term Sheet and therefore the Debtor is not supposed to repay the amount however it is worth to place on record the Jurisdiction of this Bench envisaged U/s. 7 (5) of the Code for adjudication of the Petition / Application U/s. 7 of the Code which reads as under :

*"(5) Where the Adjudicating Authority is satisfied that—*

*(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

*(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

*Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."*

In light of above observation it is noticed that the Adjudicating Authority need to record its satisfaction only regards to the completion of the Petition / Application and the eligibility of the proposed Interim Resolution Professional. The Adjudicating Authority may dismiss the Petition / Application where the 'Default' has not occurred or where the Petition / Application is not in conformity of the S. 7 (5) (a). Therefore, to carve out it can be stated that the scope of dismissing the Petition / Application filed U/s. 7 of the Code is limited one. In light of this provision the Bench has also perused the Form – 2 i.e. Written Consent of the Proposed Interim Resolution Professional, furnished by the proposed IRP pursuant to the provisions of the Code, and noticed that against the said proposed IRP any disciplinary proceedings are not pending.

7.13. Hence, keeping the facts and submissions in mind this Bench has come to conclusion that, the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. Further, admittedly there is a "Default" as defined under section 3 (12) of the Code on the part of the Corporate Debtor.

7.14. As a consequence, keeping admitted facts in mind that the Financial Creditor had not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Financial Creditor and any disciplinary proceedings are not pending against the proposed Interim Resolution Professional it is my conscientious view that this Petition deserves '**Admission**'.

7.15. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, **Mr. Snehal Kamdar**, having address as '**302, Poonam Pearl, Juhu Lane, Andheri (W), Mumbai, Maharashtra – 400058**, having Mb. No. **09869351460**, E-mail : **rp@jjkandco.com** and having registration no. **IBBI/IPA-001/IP-P00415/2017-2018/10738**, is hereby appointed as Interim Resolution Professional to initiate the Insolvency Resolution Process.

7.16. 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 and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or 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.

7.17. 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.

7.18. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** 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. Liberty is granted to intimate even at an early date, if need be.

7.19. The Petition is hereby **“Admitted”**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

8. Ordered Accordingly.

**Dated : 06.09.2018**

SD/-

**M. K. SHRAWAT**  
**MEMBER (JUDICIAL)**

Avinash