



IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT – IV

C.P. (IB) NO.: 715/ND/2023

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

IN THE MATTER OF:

Kuldeep Kumar Conatractors

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/s. NBCC (India) Pvt. Ltd.

...RESPONDENT/CORPORATE DEBTOR

CORAM:

**SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN,
HON'BLE MEMBER (TECHNICAL)**

Order Delivered on: 09.05.2025



For the Applicant : Mr. Kamal Kumar, Mr. Vidit Garg, Advs.

For the Respondent : Mr. Amish Chawla, Mr. Sirish Gupta, Advs.

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (JUDICIAL)

1. The present application has been filed by M/s. Kuldeep Kumar Contractors (hereinafter referred to as Operational Creditor/Applicant) through its Authorised Representative, namely, Mr. Pankaj Kumar to initiate Corporate Insolvency Resolution Process ("CIRP") in accordance with Section 9 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "the Code") against the Corporate Debtor/Respondent herein, i.e., M/s. NBCC (India) Limited (hereinafter referred to as the 'Corporate Debtor') for the alleged default on the part of the Respondent amounting to INR 4,29,98,630/- being the total amount due (out of which INR 3,75,00,000/- being the principal amount, INR 54,98,630/- being the interest for the delayed period from the date the said debt fell due till 09.01.2025.
2. The Corporate Debtor herein, i.e., M/s. Enerture Technologies Private Limited, incorporated under the provisions of the Companies Act, 1956 has its registered office situated at 128, 2nd Floor, Kaveri Apartment, D-



6, Vasant Kunj, South Delhi-110070. Since the registered office of the Respondent Corporate Debtor is in New Delhi, this Adjudicating Authority has jurisdiction in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Corporate Debtor.

CONTENTIONS

3. The particulars of transactions leading to the filing of the present application as averred by the Applicant/Operational Creditor are as under—

- a. The Operational Creditor/Applicant herein is a duly registered partnership firm in accordance with relevant laws. The Applicant herein is a reputed class 1 Government Contractor and has made a name for itself in the list of top service providers in building construction works in the country.
- b. The Corporate Debtor/Respondent herein is a company registered under the Companies Act, 1956 and has its operations spreading across the country as well as abroad, and is organized into three market-focused segments: PMC (Project Management



Consultancy), EPC (Engineering Procurement & Construction) and RE (Real Estate).

- c. It is submitted that the Corporate Debtor herein issued a tender notice no.: NBCC/SBG/CISF/ALHBD/2016/60 for the construction of Type-II (10 units), Type-III (6 units), Type-IV (2 units), Type-V (2 units) residential quarters at CISF Group Head Quarter at Allahabad (Uttar Pradesh). The Applicant herein participated in the aforementioned tender. Further, the Respondent accepted the Applicant's tender bid and awarded the contract for the aforementioned tender works as per the Terms and Conditions in the Letter of Award no.: NBCC/SBG/CISF/ALHBD/2016/1605 dated 27.08.2016.
- d. Subsequently, in accordance with the aforementioned contract, the Applicant herein performed the scope of work as envisaged and raised various invoices against the Respondent herein. The Applicant herein has stated to complete his work on 31.10.2018 and raised the final bill against the total work done for Rs.4,82,26,994/- (Rupees Four Crore Eighty-two Lakh Twenty-six Thousand Nine Hundred Ninety-four only). Further, on 31.10.2019, the Applicant herein became entitled to retention



money of Rs.10,53,498/- (Rupees Ten Lakh Fifty-three Thousand Four Hundred Ninety-eight only) held by the Respondent herein.

- e. It is categorically submitted that the Respondent herein has defaulted in making payments of Rs.1,69,90,395/- (Rupees One Crore Sixty-nine Lakh Ninety Thousand Three Hundred Ninety-five only) inclusive of the aforementioned retention money. The Date of Default for the said debt is 31.10.2018. Such inordinate delay clearly indicates the inability of the Respondent herein to pay off the outstanding dues leading to the filing of instant application. It is pertinent to mention herein that the Corporate Debtor has admitted its liability with respect to running bills vide Letter dated 04.06.2020.
- f. It is submitted by the Operational Creditor that the Corporate Debtor, in its reply to the Notice issued under Section 8 of the Code, have raised frivolous issue of deteriorating condition of the building due to non-handing over the work. However, it is established that the Applicant herein has issued several requests to the takeover of the possession of the completed construction works as well as clear arrears in payments.
- g. In light of the aforementioned facts and circumstances, the Applicant herein has filed the instant Application against the



Corporate Debtor under Section 9 of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The amount that is alleged to be outstanding by the Operational Creditor aggregates up to INR 4,29,98,630/- (Rupees Four Crores Twenty-nine Lakh only) which is inclusive of interest as on 23.11.2024.

4. In response to the same, the Corporate Debtor has raised several averments against the present application which are mentioned hereinbelow—

A. It is submitted that the present application is not maintainable since the amount alleged as 'debt' by the Applicant herein falls below the pecuniary 'threshold' of Rs.1,00,00,000/- as defined in accordance with Section 4 of the Code. It is alleged by the Corporate Debtor that the debt amount has been inflated by including the interest on debt amount arbitrarily. Interestingly, the debt amount excluding the alleged interest amount amounts to Rs.91,87,179.90/- (Rupees Ninety-one Lakh Eighty-seven Thousand One Hundred Seventy-nine and Ninety Paise only).

B. It is pertinent to mention herein that there is a clause in the GCC executed between the parties which explicitly prohibits the charge



of any interest from the Respondent herein. the relevant extract is reproduced hereinbelow—

“23. PAYMENTS

23.1 All running payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed and/or accepted by NBCC and shall not preclude the recovery for bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed or re-erected or be considered as an admission of the due performance of the Contract, or any part thereof, in this respect, or the accruing of any claim, nor shall it conclude, determine or affect in any way the powers of the NBCC under these conditions or any of them as to the final settlement and adjustments of the accounts or otherwise, or in any other way vary/ affect the contract.

*23.2 It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NBCC and the contractor; the contractor shall become entitled to payment only after NBCC has received the corresponding payment(s) from the client/ Owner for the work done by the contractor. Any delay in the release of payment by the client/ Owner to NBCC leading to a delay in the release the corresponding payment by NBCC to the contractor **shall not entitle the contractor to any compensation/ interest from NBCC**”*

- C. Secondly, the alleged debt is barred by the law of limitation. It is submitted that the Applicant herein has admitted the date of default as 31.10.2018, whereas the instant application has been filed on 23.10.2023; hence, the instant application is barred due to limitation having been expired.
- D. That even otherwise, the alleged debt claimed vide the instant application is disputed as there is pre-existing dispute pertaining



to non-completion of works, defects in the newly building constructed by the Operational Creditor which is an express to the admission of such an application due to catena of judgements passed by the Hon'ble Supreme Court. It is submitted that such defects were pointed vide Letter dated 10.01.2022. The Respondent had issued another Letter dated 25.09.2023 to the Applicant herein while attaching a Letter sent by CISF/Client informing about the defects in the work.

- E. Since, the defects have not been removed so far, the building has not been handed over. Therefore, retention money cannot be released, resulting in deduction of retention money from the outstanding dues.
- F. It is categorically submitted that the claims made herein by the Applicant are admittedly already pending adjudication before the Hon'ble High Court of Delhi in W.P.(C) No.:3236/2022 titled as '*M/s. Kuldeep Kumar Contractor vs NBCC (India) Ltd.*' and the same is listed on 10.05.2024 for final arguments.
- G. In light of the aforementioned objections as well as averments, it is submitted by the Corporate Debtor herein that the instant application ought to be dismissed.



5. We have heard the Ld. Counsels for both of the parties appearing for the Operational Creditor as well as the Corporate Debtor and perused the averments as well as enclosures placed on record by both the parties. It was further directed to both of the parties to place their written submissions along with relevant judicial precedents on record vide Order dated 17.10.2024.

Consequently, we have thoroughly perused the contents of the all of the arguments placed on record via their written submissions as well.

6. Briefly, the arguments placed by the Applicant herein have been mentioned hereinbelow—

- i. The Respondent herein vide its Letter dated 14.05.2020 acknowledges that the amount due towards the pending 6th & 7th running bills is Rs.91,87,038/- (Rupees Ninety-one Lakh Eighty-seven Thousand Thirty-eight only) which is duly verified and entered in books of account. Further, security deposit of Rs.10,53,498/- (Rupees Ten Lakh Fifty-three Thousand Four Hundred Ninety-eight only) is also liable to be refunded to the Applicant herein.
- ii. The Respondent herein had not raised any objection the charging of interest prior to the filing reply to the instant application nor



raised the dispute under Section 8 of the Code; hence the same ought to be deemed as admitted.

- iii. The Applicant herein, being MSME registered contractor, is entitled to interest as per MSME Act which stipulates for payment of compound interest at the rate three times of the bank rates in accordance with Reserve Bank of India, which has been recognized by the Respondent herein in its Letter dated 14.05.2020.
- iv. Hon'ble NCLAT in judgment of *Prashant Agarwal vs Vikash Parasrampuria & Anr.; C.A. (AT) (Ins.) No.: 690 of 2022* has squarely held that the Applicant is legally entitled for interest as per MSME Act, 2006 for delay in payment towards the work completed by the Operational Creditor.
- v. With regards to the bar with respect to the law of limitation alleged by the Respondent herein, it is submitted that the Corporate Debtor had acknowledged the debt vide its Letter dated 04.06.2020, which gives rise to fresh period of limitation as per Section 18 of the Limitation Act, starting from 04.06.2020. further reliance is placed on the decision of the Hon'ble Supreme Court in the case titled as *In Re: Cognizance for extension of Limitation, Suo Motu W.P.(C) No.: 3 of 2020*.



- vi. It is submitted that there is no pre-existing dispute regarding completion of works by the Applicant herein. Any dispute alleged by the Respondent herein is only owing to *mala fide* intent of the Corporate Debtor to avoid making payments for the work duly completed by the Applicant herein.
- vii. Further, as per the contract, after the completion of the work, the Corporate Debtor was required to raise the dispute within a period of one year by written communication, and the contention of the Corporate Debtor that it raised dispute as to the work completed on 28.06.2023 without any communication to the Operational Creditor is *ipso facto* not maintainable.

7. Briefly, the arguments placed by the Respondent herein have been mentioned hereinbelow—

- I. The Applicant herein has inflated the alleged debt by including the interest in the debt amount. The alleged debt amount is admittedly Rs.91,87,179.90/- (Rupees Ninety-one Lakh Eighty-seven Thousand One Hundred Seventy-nine and Ninety Paisa only) which is less than the threshold as prescribed under Section 4 of the Code. With regards to the interest computed, it is strictly against the Clause 23 of the GCC as mentioned in the Reply of the



instant application; therefore, no interest could be added while ascertaining the 'debt' amount herein.

- II. The aforementioned position of law has been reiterated in the judgment passed by Hon'ble NCLAT in the matter of *Krishna Enterprises vs Gammon India Ltd.*; 2018 SCC OnLine NCLAT 360.

The relevant paragraph has been reproduced hereinbelow—

“4. It is submitted that the 'debt' includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement, interest is payable to the Operational or Financial Creditor then debt will include interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor.”

- III. In light of the above decision, considering there is a contractual bar against charging of interest in the agreement, the amount claimed as interest would hence not be considered a valid component of the claim.
- IV. It is submitted that there is pre-existing dispute pertaining to the non-completion of the construction works as well as defects thereof. As a result, claims were filed by the Operational Creditor before the Hon'ble High Court of Delhi, which was disposed off on



10.05.2024. Consequently, the Applicant has instituted the pre-institution mediation under the Commercial Courts Act before South East District Services Authority for settlement of commercial dispute between the parties in terms of the aforementioned order.

- V. It is submitted that as per the decision of the Hon'ble Supreme Court of India in *Mobilox Innovations Private Ltd. Vs. Kirusa Software Private Limited*, 2018 (1) SCC OnLine 353 held that an existence of a pre-existing dispute is a bar to the initiation of the Corporate Insolvency Resolution Process.
- VI. It is further submitted that that Claims made by the Operational Creditor were also filed before the Haryana Micro & Small Enterprise Facilitation Council (HMSEFC) in case no.: HR10/S/HRY/01744 titled as "*M/s. Kuldeep Kumar Contractor Vs. NBCC (India) Ltd.*" However, the same was withdrawn and matter was pursued in the Hon'ble High Court of Delhi.
- VII. It is submitted that the Corporate Debtor sent intimation to the Applicant herein to rectify the defects as pointed out vide Letter dated 25.09.2023; however, the said defects were not rectified due to which possession of the building could not be transferred to the Respondent herein. As a result of the same, the defect liability



period had not even started which was one year from the handing over of the building as provided clause 3 of the contract.

- VIII. It is submitted that the Applicant herein is entitled to payment only after the Respondent has received the corresponding payment from the client/CISF. The relevant clause is 23.2 of the GCC which is reproduced hereinbelow—

*“It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NBCC and the contractor; **the contractor shall become entitled to payment only after NBCC has received the corresponding payment(s) from the client/Owner for the work done by the contractor. Any delay in the release of payment by the client/ Owner to NBCC leading to a delay in the release the corresponding payment by NBCC to the contractor shall not entitle the contractor to any compensation/interest from NBCC**”*

- IX. However, no such payment has been received from the CISF/Client and thus, under the terms mentioned hereinabove, there is no liability towards the Operational Creditor and hence, the instant application is not maintainable.



X. It is submitted that the Operational Creditor has approached the MSME Arbitration forum, Hon'ble High Court of Delhi, Saket District Court as well as present Hon'ble Tribunal seeking the same claims. This shows that it is indulging in forum shopping and initiating *mala fide* litigation, without there being any liability at the present point of time.

ANALYSIS

8. This Adjudicating Authority has thoroughly perused all of the submissions tendered by the parties involved herein along with recording the arguments made thereupon.

9. At this juncture, it is appropriate to understand and interpret Section 9 of Code, which is reproduced hereinbelow—

“9. Application for initiation of corporate insolvency resolution process by operational creditor—

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the



operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.



(4) *An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.*

(5) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if—

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending⁴ against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;



(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending⁴ against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

10. A mere reading of the provision under Section 9 of the Code shows that it is of utmost essence that an application filed under Section 9 of the Code requires certain pre-requisite conditions to be followed for the application to be considered complete; and if not done so, these become grounds for rejection by this Adjudicating Authority. This Adjudicating Authority has observed that a notice of dispute concerning the pre-existence of disparity ought to be established before or at the time of the issuance of a Demand Notice under Section 8 of the Code.

11. It is pertinent to mention herein that the aforementioned section refers to the term ‘debt’ which is elaborately defined in accordance with



Section 4 of the Code which expressly states that the 'debt' has to be computed more than the threshold ascertained as Rs.1,00,00,000/- (Rupees One Crore only). However, the principal outstanding amount of the alleged debt is amounting to Rs.91,87,179.90/- (Rupees Ninety-one Lakh Eighty-seven Thousand One Hundred Seventy-nine and Ninety Paisa only).

It has been sufficiently established that the interest could not be charged by the Operational Creditor due to express bar against the same in accordance with the clause 23 of GCC. It is settled position of law that this Adjudicating Authority has to reject Operational Creditor's interest component on the ground of unavailability of specific agreement for the same.

12. There is a case of *SS Polymers v. Kanodia Technoplast Limited*; [2019] *ibclaw.in* 193 NCLAT, NCLAT affirmed the position that when there is no agreement between the parties for the same, interest cannot be sought as a matter of right. Further, judgment passed by Hon'ble NCLAT in the matter of *Prashant Agarwal v Vikas Parasrampur* (2022) *ibclaw.in* 509 NCLAT; wherein it was held that both, the principal debt and the interest on delayed payment will be considered to assess



maintainability in case the interest was stipulated in invoice and/or agreement executed between the parties in advance.

13. In conclusion, the evolving landscape of interest on operational debt within the framework of the has witnessed significant clarifications and determinations by the NCLAT. The recent decision in *Maulick Kirtibhai Shah vs United Telecoms Ltd. (2023) ibclaw.in 595 NCLAT* underscores the principle that the IBC should not be utilized as a mere recovery mechanism, emphasizing the need for explicit agreements or signed documents when it comes to interest claims.

14. Additionally, it is pertinent to mention herein that the Applicant has raised his right for payment of interest in lieu of being categorised under MSME Act. In the judgment passed by this Adjudicating Authority (NCLT, Mumbai) in the matter of *Govind Sales vs Gammon India* held that an operational creditor could not claim interest amount due under the MSMED Act because there was no valid agreement stipulating such an interest liability.

15. Resultantly, this Adjudicating Authority is of the considered view that the instant application ought to be rejected on the basis of the aforementioned ground solely, as the said default cannot cross the threshold under Section 4 of the Code.



16. Another observation made by this Adjudicating Authority is that the Operational Creditor has approached the MSME Arbitration forum, Hon'ble High Court of Delhi, Saket District Court as well as present Hon'ble Tribunal seeking the same claims. This establishes forum shopping and initiating *mala fide* litigation, without there being any liability at the present point of time on part of the Applicant herein.

17. Therefore, this Adjudicating Authority is of the considered view that there are disputes existing between the parties involved, as admitted by the Applicant herein. As a result, this Adjudicating Authority is of the considered opinion to reject the instant application on the basis of the said ground.

18. In view of the averments as well as arguments tendered by the Applicant herein, this Adjudicating Authority is of the considered view that due to the alleged debt amount not reaching threshold as well as pre-existence of disputes leading to various litigations between the parties, the instant application cannot be admitted under Section 9 of the Code.



CONCLUSION

19. In light of the abovementioned facts as well as averments along with arguments on part of the parties involved, this Adjudicating Authority **rejects** this petition as it has been made amply clear that there exists a pre-existing dispute.

Accordingly, the present petition bearing **C.P.(IB) No.:715 of 2023** is **rejected**.

A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities

Let the copy of the said Order be served to the parties involved.

Consign the file to the record room.

Sd/-

(DR. SANJEEV RANJAN)

MEMBER (T)

Sd/-

(MANNI SANKARIAH SHANMUGA SUNDARAM)

MEMBER (J)