



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)
KOLKATA**

C.P. (IB) No. 150/KB/2021

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Gandhar Oil Refinery (India) Limited [CIN U23200MH1992PLC068905],
having its registered office at DLH Park, 18th Floor, S. V. Road, Goregaon (West),
Mumbai – 400 062;

....Operational Creditor

-Versus-

City Oil Private Limited [CIN U23201WB2003PTC095799], having its
registered office at 34, C.R. Avenue, Jobakusum Building, Kolkata – 700 012;

...Corporate Debtor

**Date of hearing: 27 February, 2023
Order Pronounced on: 19 April, 2023**

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor : Mr. Ajay Gaggar, Adv.
: Ms. Vedica Sureka, Adv.
For the Corporate Debtor : Mr. A. K. Awasthi, Adv



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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Tariq Rafique Lambe, Legal Executive, Gandhar Oil Refinery (India) Limited (*'Operational Creditor' or 'GORIL'*) duly authorised *vide* Board Resolution dated 23 December, 2019¹ for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against City Oil Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **07 April, 2021** before this Adjudicating Authority. The total amount claimed in default is Rs.1,04,39,547/- (Rupees One Crore Four Lakh Thirty Nine Thousand Five Hundred Forty Seven only) [*Principal – Rs.64,03,566/- and Interest – Rs. 40,35,941/-*]. Details of the invoices that were raise by the Operational Creditor are, as follows;

<i>SI No.</i>	<i>Purchase Order No. and Date</i>	<i>Invoice No. and Date</i>	<i>Due Date</i>	<i>Invoice Amount</i>
i.	COPL/GO/05/18-19 dated 18 August, 2018	SILMOL 1400005896 dated 23 August, 2018	22 September, 2018	Rs.15,12,571/-
ii.	COPL/GO/03/18-19 dated 10 May, 2018	SILMOL 1400001806 DATED 18 May, 2018	17 June, 2018	Rs.15,67,335/-
iii.	COPL/GO/03/18-19 dated 10 May, 2018	SILMOL 1400001680 dated 16 May, 2018	15 June, 2018	Rs.11,39,880/-
iv.	COPL/GO/02/18-19 dated 16 April, 2018	SILMOL 1400001712 dated 16 May, 2018	15 June, 2018	Rs.4,27,455/-

¹Annexure – C, Page 31 of the Petition.



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v.	COPL/GO/02/ 18-19 dated 16 April, 2018	SILMOL 1400001135 dated 01 May, 2018	31 May, 2018	Rs.13,14,933/-
vi.		SILMOL 1400001123 dated 30 April, 2018	30 May, 2018	Rs.13,94,453/-

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs. 2,50,00,000/- (Rupees Two Crore Fifty Lakh only) with subscribed share capital of Rs.80,92,000/- (Rupees Eighty Lakh Ninety Two Thousand only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
- 5.1 The Operational Creditor is a public Limited Company engaged in processing petroleum products to manufacture mineral oils, liquid paraffin, petroleum jelly, rubber process oils etc. The Operational Creditor also sources certain products from third party suppliers for direct sales to its customers. Whereas, the Corporate Debtor is engaged in manufacturing & trading of lubricating oil & grease.
- 5.2 In view of the business relationship between the Operational Creditor and the Corporate Debtor, the Corporate Debtor would periodically place orders with the Operational Creditor for supply of Divyol 75 and Divyol 480 (SN 500).
- 5.3 As the business was growing between the parties, the orders would be processed by the Operational Creditor, products would be delivered to the Corporate Debtor, and simultaneously, the Operational Creditor would raise invoices. As the business was growing over a period of time, the account of the Corporate Debtor had been a running account and the payment made by the Corporate Debtor to the Operational Creditor from time to time were being adjusted towards the then outstanding invoices of the Corporate Debtor.



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- 5.4 In the usual course of business between April 2018 to August 2018, the Corporate Debtor issued 03 (three) purchase orders being; (i) Purchase Order No. (i) COPL/GO /02/18-19 dated April 16, 2018 (ii) COPL/GO/03/18-19 dated May 10, 2018 (iii) COPL/GO/05/18-19 dated August 18, 2018 for supply the said products. The products were supplied to the Corporate Debtor as per the Purchase Orders and same were accepted by without any demur.
- 5.5 Simultaneously, the Operational Creditor raised invoices in respect of the Product supplied amounting to Rs.73,56,627/- on the Corporate Debtor (invoices) and the same were accepted by the Corporate Debtor. On account of prior business transactions as on April 28, 2018 an amount of Rs.3,61,91,915.35 was due and payable by the Corporate Debtor to the Operational Creditor . Therefore, according to the Operational Creditor in these circumstances, a total principal amount of Rs.4,35,48,542.35 became outstanding in the account of the Corporate Debtor computed till August 23, 2018.
- 5.6 The Operational Creditor pursued recovery of its outstanding dues with the Corporate Debtor between May 2018 and October 2019, whereas, the Corporate Debtor paid an amount of Rs.3,62,00,000/- in partial discharge of its outstanding dues. Consequently, an amount of Rs.73,48,542.35/- remained due and payable by the Corporate Debtor as on 19th October, 2019.
- 5.7 The Operational Creditor time and again pursued recovery of its outstanding dues vide various telephonic calls and emails of January 16, 2019, January 25, 2019, March 28, 2019, May 13, 2019, June 10, 2019 and June 17, 2019. However, despite receipt of the said emails, the Corporate Debtor neither addressed any response to the said emails nor made any payment in discharge of its outstanding dues.
- 5.8 In these circumstances the Operational Creditor addressed a notice dated 31 December, 2019 to the Corporate Debtor inter alia demanding payment of an amount of Rs.73,48,542/- along with interest at the rate of 24% per



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annum in respect thereof. In response to the notice dated 31 December, 2019, the Corporate Debtor addressed its response *vide* letter dated 28 January, 2020.

- 5.9 By the said response dated 28 January, 2020, the Corporate Debtor inter alia
- a. Acknowledged the outstanding dues of the Operational Creditor
 - b. Admitted its inability to pay the outstanding dues; and
 - c. Proposed a settlement to clear the outstanding dues of the Operational Creditor within three Months from January 2020.

- 5.10 However, despite acknowledging its outstanding dues and agreeing to arrive at an amicable settlement, the Corporate Debtor did not made the entire payment in discharge of its outstanding dues. On the Corporate Debtors' failure to arrive at a settlement with the Operational Creditor, the Operational Creditor issued a demand notice dated 05 March, 2020 to the Corporate Debtor claiming an amount of Rs. 1,02,71,361.35 comprising of principal amount of Rs. 73,48,542.35/- (Rupees Seventy Three Lakhs Forty Eight Thousand Five Hundred and Forty Two and Thirty Five Paise Only) and an interest amount of Rs. 29,22,819/- (Rupees Twenty Nine Lakhs Twenty Two Thousand Eight Hundred and Nineteen Only) calculated @ 24% per annum computed from the due date of respective invoices till February 25, 2020.

- 5.11 Thereafter, on receipt of the demand notice the Corporate Debtor failed to reply to the notice but made payment of an amount aggregating to Rs.9,50,000/- (Rupees Nine Lakhs Fifty Thousand Only) with the last of such payment of Rs.2,00,000 tendered on 29 January, 2021.

- 5.12 Neither did the Corporate Debtor made the payment and cleared its dues nor did it dispute the existence of the same as stipulated under the provisions of the Insolvency and Bankruptcy Code, 2016.

6. *Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:*

- 6.1 That, the instant company petition is not maintainable in terms of the provisions of Section 4 of the Insolvency and Bankruptcy Code, 2016 as the



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principal amount claimed is only Rs.64,03,366/- and there is no valid, subsisting and enforceable agreement for payment of Interest between the Operational Creditor and the Corporate Debtor.

- 6.2 The purchase orders at pages 33-35 of the application does not contain any clause for payment of interest on delayed payments. These purchase orders are the contracts which the parties have entered into with eyes wide open and the Operational Creditor cannot be permitted to subsequently alter or modify the contracts by adding the interest.
- 6.3 The invoices at pages 36-42 of the application contain unilateral clause for payment of interest on delayed payment. The alleged rate of interest is 24% which was never to be treated as an enforceable term of the contract. This clause is a unilateral clause and was never agreed to by the Corporate Debtor.
- 6.4 The interest clause in the invoice is a generic clause contained in the invoices by default and is basically a penalty clause which was never to be acted upon by the parties as is evident from the subsequent conduct of the Operational Creditor.
- 6.5 Any material alteration of the terms and conditions of the purchase orders in the instant case can only be done by mutual consent of the parties. Further, from annexure - A at page 20 of the reply affidavit of the Corporate Debtor, it is apparent that the corporate debtor never accepted the clause of payment of interest as contained in the said invoices.
- 6.6 The Corporate Debtor has also filed a Title Suit No.612 of 2021 (*City Oil Pvt. Ltd. vs. Gandhar Oil Refinery (India) Limited*) before the Learned court of 4th Civil Judge (Junior Division) at Howrah, inter-alia, seeking a decree for declaration that clause of interest on delayed payment contained in the invoices are void-ab-initio and non-est. The said suit is still pending.
- 6.7 The ledger account of the Corporate Debtor in the books of the Operational Creditor does not contain any entry towards interest on delayed payments. This ledger account is an admission on the part of the Operational Creditor that the clause of interest on delayed payment was a generic clause



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incorporated in the invoices by default and was never to be treated as an enforceable term of the contract.

- 6.8 The emails at pages 49 - 60 of the application are the emails by the the Operational Creditor, wherein they have asked only the principal amount and not the interest amount. This is an express admission on the part of the Operational Creditor that the clause of payment of interest on delayed payments contained in the said invoices was expressly waived by the Operational Creditor as it was never to be treated as an enforceable term.
- 6.9 In the letter dated 28 January, 2020 [*Annexure – J at pages 77 – 80 of the Reply*] the Corporate Debtor has specifically denied and disputed its liability towards the alleged amount levied by the Operational Creditor on account of interest. Thus, the Corporate Debtor has denied and disputed the claim of the Operational Creditor on account of interest even prior to the issuance of the alleged statutory demand notice by the Operational Creditor.
- 6.10 Further, the working computation of interest on and from the expiry of the due dates of the respective invoices at page 32 of the application is wrongful, illegal and not tenable in law.
- 6.11 The statutory demand notice under section 8 of the Code, 2016 at page 81 of the application has not been served upon by the Corporate Debtor as will be evident from the tracking report at page 119A of the application. It appears that the item has been delivered to one ‘S. Maity’ at ‘Bowbazar SO’ and not on the Corporate Debtor or on any of its authorised representatives. There is no one by the name of S. Maity in the employment of the Corporate Debtor or in any way or manner associated with the Corporate Debtor.
- 6.12 As per the provisions of regulation 5(2) of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the demand notice is mandatorily required to be served on the corporate debtor at its registered address either by hand or by registered post or by speed post with acknowledgement due card or at the email ID of a whole time director of the corporate debtor. In the instant case, none of the aforesaid requirements have been met. There is no acknowledgment due card annexed to the said



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company petition or in the rejoinder in proof of delivery of the said statutory notice on the corporate debtor.

6.13 In the affidavit verifying petition appearing at page 121 of the application, it is stated that the application is filed for claiming 1,04,39,547/- which includes interest @24% per annum till February 18, 2021 after adjusting the amount. Thus, the petition is for recovery of money and not for initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor.

6.14 In support of the arguments stated hereinabove, the following cases are relied upon on behalf of the Corporate Debtor as extracted hereunder with supplied emphasis for clarity:-

(a) *CP (B) NO.6/CB/2021 Of The National Company Law Tribunal, Cuttack Bench Tirupati Conductors Private Limited v. Sr Associates Infrastructure Private Limited*], where the Hon'ble Bench noted that

“9. The petitioner claims interest for the delayed payment as per the clause found in the invoices, but on the respondent, side denies the liability of paying interest and stated in the reply that the petitioner with intent to extort more amount claims interest in illegal manner. The fact is there is no any written agreement between the parties regarding payment of interest on delayed payment, the invoices carry such a default clause, but the invoices are not acknowledged by the respondent, there is no counter signatures made by the respondent .

(b) On its behalf, in a similar situation the Karnataka High court observed in *Jyothi Limited v. Boving Fouress Limited [(2001) 3 Comp LJ 413 (Karn)]* as follows:

“Interest cannot be awarded merely on the basis of a term in a bill or invoice, unless the creditor proves that such provision is based on a contract or agreement on the part of the purchaser to pay interest. This is because a credit bill or an invoice is a unilateral demand by the supplier and is neither a bilateral agreement nor a promise by the purchaser to pay interest. Interest can be awarded on the basis of a provision in a bill invoice, if it is supported by an agreement or



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promise to pay interest by the purchaser. Such agreement may be established with reference to correspondence or by countersigning of the bill by the purchaser, or by acceptance by the purchaser of the term in the bill relating to interest. Where in the absence of an agreement or contract for payment of interest on the value of goods supplied, a notice of demand is sent by the supplier requiring payment of the value of goods supplied with interest thereon and a reply is sent by the purchaser in general terms seeking time to pay the bill amount, such reply cannot be construed as an admission to pay interest. Either an agreement to pay interest or a specific admission or promise to pay interest or an order or decree granting interest by a court or tribunal empowered to award interest, is a condition precedent to hold that interest is a debt due, for the purpose of a winding up petition. In the absence of a contractual or legal liability, nor act as an estoppel in regard to a subsequent denial by the company in legal proceedings.”

- 6.15 In view of this citation in the absence of an agreement or contract for payment of interest on the value of goods supplied, the interest claimed merely on the basis of invoices is not sustainable

Analysis and Findings

7. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
8. As held by the Hon'ble NCLAT in ***Jumbo Paper Products v. Hansraj Agrofresh Pvt. Ltd.***² that the threshold limit of Rs. 1 cr. will be applicable for application filed u/s 7 or u/s 9 on or after 24 March, 2020 even if default is of a date earlier than 24 March, 2020. Now, the prima facie issue that arises is ***Whether 'interest' can be clubbed with principal debt to cross-over the threshold limit of 1 Crore for filing petition under Section 9 of the Code?***

² Company Appeal (AT) (Ins) No. 813 of 2021



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9. The Operational Creditor has failed to bring forth any agreement between the parties that a default in payment would attract interest.
10. The interest of 24% is levied only in terms of a unilateral clause in the invoice and the Corporate Debtor never agreed or promised.
11. Without clubbing such interest with the Principal amount, threshold as per Section 4 of the Code is not met.
12. Hon'ble High Court at Karnataka in ***Jyothi Limited vs. Boving Fouress Limited [MANU/KA/1022/2000]*** has been categorical in holding, albeit in that a proceeding for winding up under section 433(e) of the Act that:
“(a) The term ‘debt’ refers to an ascertained and definite amount ‘due’ and does not refer to a claim for compensation/damages or a claim which requires assessment by a court before it becomes due and payable.
(b) The term ‘debt’ may refer not only to ‘principal’ (value of goods or amount advanced), but also to interest due thereon, where there is a contract to pay interest. Where the contract specifically provides for payment of interest, or where there is an admission or promise to pay interest by the company or where in proceedings for recovery of money, a competent court or arbitrator has determined the liability to pay interest, then non-payment of interest (whether with principal or interest alone) may amount to inability to pay debts.
(c) Interest cannot be awarded merely on the basis of a term in a bill or invoice, unless the creditor proves that such provision is based on a contract or agreement on the part of the purchaser to pay interest. This is because a credit bill or an invoice is a unilateral demand by the supplier and is neither a bilateral agreement nor a promise by the purchaser to pay interest. Interest can be awarded on the basis of a provision in a bill/invoice, if it is supported by an agreement or promise to pay interest by the purchaser. Such agreement may be established with reference to correspondence, or by countersigning of the bill by the purchaser, or by acceptance by the purchaser of the term in the bill relating to interest. Where in the absence of an agreement or contract for payment of interest on



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the value of goods supplied, a notice of demand is sent by the supplier requiring payment of the value of goods supplied with interest thereon and a reply is sent by the purchaser in general terms seeking time to pay the bill amount, such reply cannot be construed as an admission to pay interest. Either an agreement to pay interest or a specific admission or promise to pay interest or an order or decree granting interest by a court or tribunal empowered to award interest, is a condition precedent to hold that interest is a debt due, for the purpose of a winding up petition. In the absence of a contractual or legal liability, mere omission to deny a demand made in a notice will not create a liability, nor act as an estoppel in regard to a subsequent denial by the company in legal proceedings.”

13. In *Steel India v. Theme Developers Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 1014 of 2019]* Hon’ble NCLAT observed that;

“It is settled that the charging of interest, ought to be an actionable claim, enforceable under law, provided it was properly agreed upon between the parties.”

14. In *Pavan Enterprises v. Gammon India [Company Appeal (AT) (Insolvency) No. 148 of 2018]* the Hon’ble NCLAT was of the view that ;

“If in terms of any agreement interest is payable to the Operational of Financial Creditor then the debt will include interest.”

15. In *SS Polymers vs. Kanodia Technoplast Limited [CP(IB)121/ND/2019]*, it was held that *not every interest can be treated as a debt. If in terms of the agreement, interest is payable to the operational and financial creditor; then the debt will include interest; otherwise the principal amount is to be treated as a debt which is the liability in respect of the claim that can be made from the corporate debtor.*

16. In a more recent order, on one such situation, the co-ordinate bench of NCLT Delhi in *CBRE South Asia (P) Ltd. v. United Concepts and Solutions (P) Ltd. [CP(IB) No. 797/ND/2021]* dismissed the Section 9 petition and held that;



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“ Interest amount cannot be clubbed with the principal amount to arrive at the minimum threshold of INR 1 crore. In this case, operational creditor had claimed a default of total amount of Rs.1,39,84,400, out of which INR 88,50,886 was towards principal whereas the remaining INR 51,33,514 was towards interest. Since the principal outstanding was less than INR 1 crore, NCLT dismissed the petition as not maintainable.

It can be inferred that the ‘interest’ can be claimed as the financial debt, but neither there is any provision nor there is any scope to include the interest to constitute as the operational debt.”

17. In *Mr. Prashat Agarwal v. Vikash Parasrampuriah & Ors [Company Appeal (AT) (Ins) No. 690 of 2022]*, Hon’ble NCLAT considered the definition of claim as in section 3(6) of the Code in the backdrop of the definition of “debt” under 3(11) of the Code and as on 15 July, 2022 held *“Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for “right to payment” (Section 3(6) IBC) and therefore will form part of “debt” (Section 3(11) IBC³).*”

18. Section 3(6) of the Code defines “claim” as –

“(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”

3(6)(b) is explicit that a claim is also a right to remedy for ‘breach of contract’ therefore unless the ‘contract’ is explicit about the liability to pay interest in default, no actionable claim can be said to exist.

19. Whereas the Hon’ble High Court at Karnataka in *Jyothi Limited (Supra)* in no uncertain terms as on 01 December, 2000 summarised the legal

³ 3 (11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;



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proportion as to claims for ‘interest’ albeit in a Winding Up proceeding under section 433(e) of the Companies Act, 1956, as enumerated supra.

20. *Mr. Prashat Agarwal (Supra)* is a subsequent judgment, where the decision of the the Hon’ble High Court at Karnataka in *Jyothi Limited (Supra)* was not placed, which if placed may have influenced the Hon’ble NCLAT. The decision of a superior forum, which is also prior in time, could not be brushed aside. Hence, we would be constrained to hold that levying of interest being neither mentioned in any agreement entered into by the parties, nor being specifically admitted by the Corporate Debtor, in absence of any promise of the Corporate Debtor to pay such interest, could not be clubbed with the principal amount due to hold the interest as a ‘debt’ so as crossover the threshold amount of 1 Crore as ingrained in Section 4 of the Code by virtue of notification No. So 1205(E) dated 24 March, 2020 of the Ministry of Corporate Affairs increasing the threshold limit from one lakh to one crore for the purpose of section 4 of the Code.
21. In light of the above precedents *C.P. (IB) No. 150/KB/2021* is *dismissed*
22. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 19th day of April, 2023

SA [LRA]