



**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

CP (IB) No.6/CB/2021

INSOLVENCY AND BANKRUPTCY CODE, 2016;

-And-

In the Matter of:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the Matter of:

TIRUPATI CONDUCTORS PRIVATE LIMITED, having its registered office at- EN-62, Sector V, 7th Floor, Salt Lake City, Paraganas North Kolkata- 700091

...Operational Creditor

-Versus-

SR ASSOCIATES INFRASTRUCTURE PRIVATE LIMITED, having its registered office at- S-2/40, Mancheswar Industrial Estate, Zone-A, Sector -A, Bhubaneswar- 751010

...Corporate Debtor

Appearances (through video conferencing)

For the Petitioner : Mr. Saswat K. Acharya
: Ms. Neha Sharma, Advs

**Order reserved on:13.09.2022
Order Pronounced on: 25.10.2022**

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)



ORDER

Per P. Mohan Raj, Member, (Judicial)

1. This application has been filed by **Tirupati Conductors Private Limited**, as an Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and bankruptcy Rules, 2016 (Application to Adjudicating Authority) to initiate Corporate Insolvency Resolution Process (CIRP) against **SR Associates Infrastructure Private Limited**, a Company registered under the provision of Companies Act, 1956.

The brief contention of Petition as follows: -

2. The Petitioner/Operational Creditor is an Unlisted Public Non-Government Company, limited by shares, registered under the provisions of the Companies, Act 1956. It is stated that during the course of business, the corporate debtor on 12.09.2013, 20,08,2014, 10,07.2015 and 12.09.2016 issued 4 purchase order to the applicant/operational creditor for supply of Conductors. After receipt the aforesaid purchase order, the operational creditor dispatched the entire materials to the corporate debtor from its factory from Khurda, Odisha, during the period December 2013 to July 2017 raised bills on the basis of supplies vide Delivery/Excise Invoices on various dates for a total value of Rs.26,00,78,140.13. The said invoice were duly accepted by the corporate debtor without any demur or objection in complete satisfaction of the materials received and utilised. However out of the said total invoice sum of Rs. 26,00,78,140.13, a sum of s. 24,75,00,000/-



has only being paid by the corporate debtor leaving behind a balance sum of Rs. 1,25,78,140.13/- last of such payment being made on 05.07.2019. Thus, a sum of Rs. 1,25,78,140.13/- on account of principal has admittedly become due and payable to the operational creditor on account of materials received and utilised by the corporate debtor. It is stated the petitioner/operational creditor claims a total sum of Rs. 6,58,51,014.48/- inclusive of interest of Rs.5,42,72,874.36/- as per Section 16 of MSMED Act 2016 @ 3 times of Bank Rate Per annum due from 05.07.2019. The operational creditor has sent demand notice dated 20.06.2019 under IBC, 2016. Despite the clear terms in the notices made a payment of Rs. 20,00,000/- only but no pre-existing dispute has been pointed out by the operational creditor within 10 days of the receipt of the notice. Corporate debtor in breach of its own purchase order/committed failed, neglected to pay the unpaid debt to the operational creditor. In this premisses it is just, fit and equitable that the Respondent Company should be proceeded for Corporate Insolvency Resolution Process (CIRP) under the provisions of Section 9 of the Insolvency and Bankruptcy Code, 2016. Hence this petition.

The brief contention of Reply as follows: -

3. The corporate debtor is stated that total amount of invoices raised by the applicant, Operational Creditors, on the respondent, corporate debtor, on account of supply of materials against the above four purchase orders, is Rs. 26,00,78,132/- against such invoice amount, the corporate debtor has paid Rs. 24,85,00,000/- which is more than 95% of the total amount, on various dates to the applicant. It is stated that on 20.06.2019 the applicant served notice for recovery of Rs.



1,45,78,140.13 towards principal and Rs.4,90,86,187.45 towards interest from the respondent in Form-3 under Section 8 of IBC,2016. On 05.07.2019, the respondent sent a letter through speed post to the applicant citing genuine business difficulties in delay in making payment of the rest amount. However, the respondent mentioned very clearly in their reply letter that as per their records, the outstanding amount remained unpaid as on date of notice was Rs. 1.05 crore against the demand of the applicant for Rs. 1,45,78,140.13 towards principal. The respondent also paid Rs. 20,00,000/- on 05.07.2019 to display seriousness in the matter and to keep a continuing business relationship with the applicant. On 12.07.2019, the respondent sent mail to the applicant for reconciliation of accounts and clearing of dues. On 17.07.2019, the respondent sent account statements through mail to the applicant for verification. Again on 19.07.2019, the respondent sent letter through speed post to the Applicant, requesting them for arranging meeting with accounts personnel for clearing all discrepancies and for a final settlement between the parties. It is stated that instead of reconciling the transactions between the parties and settling the dispute amicably, the applicant has chosen to extort more and more from the respondent by claiming interest in an illegal manner.

Points for consideration is:

Whether petitioner is entitled to claim MSMED rate of interest and it constitute an operational debt?

4. The operational creditor is carrying on business in supplying conductors. The operational creditor supplied goods to the respondent in pursuant of four purchase orders dated 12.09.2013,20.08.2014,10.07.2015 and 12.09.2016 and



raised invoices for total sum of Rs.26,00,78,140.13/- It is the case of the petitioner that the respondent paid a sum of Rs. 24,75,00,000/- towards the claim amount and a sum of Rs.1,25,78,140.13/- is due towards principal and a sum of Rs.5,42,72,874.36/-due towards interest and filed this petition. After filed the petition also the respondent made payment of Rs.9,080,000/-and said that entire amount payable to the petitioner has been paid. In contrary on the petitioner side stated that there is still a sum of Rs.34,98,140.19/- is due towards principal and a sum of Rs. 70,010,406,71/- is due towards interest. As on today even according to the petitioner the amount payable towards the principal amount is Rs.34,98,140/- which is below the threshold amount, further petitioner in the petition claims a sum of Rs.5,42,72,874.36/-towards the interest.

5. Now the points to be considered is whether the interest calculated on MSMED rate form part of the operational debt? In this regard on the petitioner side relies upon the NCLAT order passed in Prashat Agarwal vs Vikash Parasrampururia and another Company Appeal (AT) (Ins)No.690 of 2022 dated 15.07.2022 there it is observed that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself shall be included to constitute the threshold amount. In our case according to the invoices there it is mentioned that 18% interest per annum will be charged for delayed payment, but the petitioner calculated the interest on the basis of MSMED Act three times Bank Rate per annum on monthly compounding towards interest. In the supra citation it is referred that the interest amount stipulated in the invoices alone form part of the operational debt but here



the interest added is not part of the interest amount stipulated in the invoices, hence the citation is not supporting the case of the petitioner.

6. On the petitioner side at the fag end of enquiry submitted the calculation sheet claiming interest as per the invoice at 18% and arrived interest due amount at Rs.70,010,406.71/- as on 23.08.2022 not as on the date of filing petition 19.03.2020 and argued still the due amount as on today exceed the threshold amount mentioned in section 4 of IBC 2016.

7. This contention of petitioner cannot be accepted because the petitioner claims interest of Rs.4,90,86,187.45/- in section 8 statutory notice and also claims the interest of Rs.5,42,72,874.36/- in the petition, now all of sudden wants to adopt the rate of interest calculation as per invoices at 18% per annum, It is well settled law that no amount of evidence is admissible in the absence of pleading; the petitioner pleading remains same as claiming interest at MSMED rate but the petitioner made request to consider the rate of interest at 18% this is against its own pleading hence it is not acceptable. The adjudicating authority is not a court of equity to modify the pleading and alter the relief as prayed on the petitioner side.

8. There are divergent view exists regarding inclusion of interest for delayed payment as an operational debt. It is held by NCLAT in Ranjeet Singh and others vs Karan Motors Private Limited and others in MANU/NL/0345/2021 If on delayed payment, the Appellant claims any interest, it will be open to it to move a court of competent jurisdiction for recovery of interest. But initiation of the CRIP is not the answer. Further NCLT-Delhi held in NCLT Delhi in *CBRE South Asia*



(P) Ltd. v. United Concepts and Solutions (P) Ltd 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.

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 or 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:

(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 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.

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.

10. The petitioner adopted a novel method in computation of amount against the trade practice. The common trade practice is when there is principal and interest are due, If the amount is paid by the respondent/CD falls short of the due amount, the petitioner/OC shall appropriate the amount first towards interest, then towards



principal due under the invoices. Further when there are more invoices/bills are pending if any amount is paid it shall be utilised to clear the oldest invoices and similarly in seriatim manner. The appropriation rule popularly known as clayton rule not followed. The relevant provisions governing contractual dealings found in Section 59 to 61 of the Indian Contract Act 1872, are also not followed. Here the petitioner given credit to all the amount towards the principal and allow the interest to earn further interest and resulted in interest due amount is several folds more than the principal due amount.

11. Now even according to the petitioner the principal due amount is Rs.34,98,140.13/-which is below the threshold amount. It is held by NCLAT-Delhi in Vidul Sharma vs Technopak Advisory Pvt Ltd CA.(AT)No.131 of 2017 dated 01.09.2017 that if the disputed amount falls below threshold amount as a result of settlements after a petition under section 9 of IBC 2016 is presented but before it is admitted by the Adjudicating Authority, such petition will not be maintainable under the code. Here also even though at the time of filing petition the claim amount is Rs. 1,25,78,140.13, now it has been reduced to Rs. 34,98,140.13/-as per the code on the date of admission of petition into CIRP the petition shall satisfy the threshold amount, here the balance operational debt amount payable is below the threshold hence petition is liable to be dismissed.

12. In the circumstances it is answered that the MSMED rate of interest claimed by the applicant shall not be construed as operational debt in the absence any contract in this regard as such the petition is liable to be dismissed.

In the result petition is **DISMISSED**.



IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH

CP (IB) No.6/CB/2021

13. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

14. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2022.10.25 11:17:37 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN
RAJ
Date: 2022.10.25 11:25:21 +05'30'

P. Mohan Raj.
Member (Judicial)

Signed on this 25th day of October, 2022.

Supriya-P.s_