

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 617 of 2024 & I.A. No. 2231, 2232, 2233,
3223 of 2024

IN THE MATTER OF:

Pramod Kumar Jain, Ex- Director of Aryan Ispat & Power Pvt. Ltd. ...Appellant

Versus

Mangesh Vitthal Kekre, IRP of Aryan Ispat & Power Pvt. Ltd. & Anr. ...Respondents

Present:

For Appellant : Mr. Sunil Fernandes, Sr. Advocate, Mr. Rakesh Kumar, Ms. Preeti Kashyap, Ms. Diksha Dadu & Mr. Ankit Sharma, Advocates.

For Respondents : Mr. Sumesh Dhawan, Mr. Praveen M. Surange, Ms. Vatsala Kak, Mr. Shaurya Shyam, Advocates for R-2.

Mr. Kushal Bansal & Mr. Anish Ahlawat, for R-1.

Mr. Pranav Sachdeva & Mr. Jatin Bhardwaj, for Intervenor.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by an ex-director of the Corporate Debtor in order to challenge the order dated 22.03.2024 passed by the National Company Law Tribunal, New Delhi (in short 'Tribunal') by which an application filed the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') has been admitted.

2. The aforesaid application was filed by the Operational Creditor for an amount of Rs. 6,13,48,161.98/- out of which Rs. 4,97,22,461.16/- was towards the principal and Rs. 1,16,25,700.82 was towards the interest.

3. According to the Operational Creditor, the CD had already paid Rs. 4,97,22,461.16/- i.e. the principal amount out of Rs. 6,13,48,161.98 but the remaining amount of Rs. 1,16,25,700.82 includes both principal as well as the interest.

4. The Operational Creditor sent a demand notice to the CD on 05.07.2023 which was replied by the CD on 20.07.2023 and contested the amount demanded in the demand notice.

5. During the pendency of the proceedings before the Tribunal, the CD paid the entire amount of Rs. 4,97,22,461.16/- and sent an email to the Respondent on 31.01.2024. The subject of the email is as under:-

“We would like to inform you that we have paid the entire outstanding of Rs. 4,97,22,462/- today.

We would further like to inform you that there are no outstanding dues as on date in our books of accounts.

You are requested to kindly update the same in your books of accounts.

Please refer pendency of case no. CP (IB) No. 552 of 2023 and that it is requested to you to take necessary steps for withdrawal of the petition”

6. The factum of payment of Rs. 4,97,22,462/- by the CD to the OC towards principal amount has been noticed by the Tribunal in order dated 21.02.2024 which is also reproduced as under:-

“Ld. Counsel appears for the Applicant. Ld Counsel appearing for the Corporate Debtor has submitted that the Principal amount i.e. Rs. 4,97,22,461.16/- has been paid to the Operational Creditor. The Ld. Counsel for the Operational Creditor is refuted the same.

It is submitted that the Corporate Debtor is liable to pay an amount of Rs. 1,16,25,700.82/- towards interest.

List the matter for arguments on 22.02.2024.”

7. The ledger account of the CD also reflected a nil balance. The entry in this regard is also reproduced as under:-

ARYAN ISPAT & POWER PVT LTD							605	
AT\POST- BOMALOI, TEHSIL- BHAGALI, SAMBALPUR - 768212, SAMBALPUR, INDIA								
CIN : U27102DL2003PTC259157								
ACCOUNT LEDGER								
For the Period From : 01-APR-23 To : 31-JAN-24								
Account Name, ERP : [FAG03]-AGARWAL COAL CORPORATION PRIVATE LTD (A.P.)								
PAN No. : AACCA8468K								
Account Sch : SUNDRY CREDITORS - RAW MATERIALS (DOMESTIC)(F)								
Div	Vdate	Vno.	Type	Particulars	Debit Amt	For Div - Credit Amt	All Balance	
				OPENING BALANCE.	26,90,20,308.00	31,87,28,301.00	4,97,07,993.00 CR	
CB	31-01-2024	IK27131-001	BANK	KOTAK MAHINDRA BANK (5246981472) RT FCM-24013185/NPA/31-JAN-24	4,97,07,993.00		Nil	
CB	31-01-2024	IK23A-2366	BANK	KOTAK MAHINDRA BANK (5246981472) NT CMS0312498564631 BEING AMOUNT PAID	14,469.00		14,469.00 CR	
CB	31-01-2024	IK23131-001	JRNL	AGARWAL COAL CORPORATION PRIVATE LIMITED Amount transferred		14,469.00	Nil	

8. However, despite the payment of entire principal amount, the OC claimed interest though it is alleged that there was no express agreement or acknowledgment on the part of the CD regarding the interest. It is also alleged that no interest had ever been paid by the CD to the OC nor the interest component was ever recorded in the books of accounts.

9. The Tribunal admitted the application, filed under Section 9 of the Code, on the ground that the interest is payable by the CD because of its provision in the invoice and relied upon a decision of this Court rendered in the case of CA (AT) (Ins) No. 690 of 2022 “Mr. Prashat Agarwal s. Vikash Parasrampur and Ors.” The Tribunal has further relied upon two decisions of the Hon’ble Supreme Court in the case of Asset Reconstruction Company India Limited Vs. Tulip Star Hotels Limited & Ors., 2022 SCC OnLine SC 944 and Bharat Heavy Electricals Limited Vs. R.S. Avtar Singh & Company, (2013) 1 SCC 243 to hold that in case of part payment it is for the recipient of the

money to adjust it firstly towards interest in the absence of any direction of adjustment.

10. On these two premises, the application was admitted, moratorium was imposed and Mr. Mangesh Vithal Kekre was appointed as the IRP of the CD.

11. Counsel for the Appellant has argued that the OC has relied upon invoice in which there is a provision for charging of interest at the rate of 12% in case of delay in payment. One such invoice is reproduced as under:-

Description of Goods		HSN/SAC	Quantity	Rate	Per	AMOUNT
Indian Coal		27011200	29.920	8701.62	MT	260352.47
OUTPUT CGST				2.500	%	6508.81
OUTPUT SGST				2.500	%	6508.81
CESS				400.000	MT	11968.00
Total			29.920			285338.09

Amount Chargeable(In words)
Two Lakh Eighty Five Thousand Three Hundred Thirty Eight Rupees Nine Paise
Company's PAN : AACCA8488K
Declaration :
1. EX-MINES Delivery , Transportation arranged & paid by Consignee
2. In case of delay payment , Interest will be charged @ 12% or as per the agreed terms.
3. E & OE
4. Subject to INDORE Jurisdiction
Terms and Conditions :

AGARWAL COAL CORPORATION PVT. LTD.
Signature valid
AGARWAL COAL CORPORATION PRIVATE LIMITED L.
Authorised Signatory

HO Address : Agarwal House , 5 Yeshwant Colony Indore 452003 MP

12. It is submitted by the Appellant that the interest clause in the footnote of the invoice is merely a boilerplate provision and was never acknowledged or signed by the CD.

13. It is further submitted that nothing has been brought on record by the OC by way of any email, purchase order or any other document which may substantiate the claim that the interest was ever agreed upon by the parties.

14. It is also argued that even the clause of the footnote do not specify the date of payment to hold the delay for triggering the component of interest.

15. In this regard, he has relied upon two decisions in the case of Comet Performance Chemicals Pvt. Ltd. Vs. Aarvee Denims and Exports Limited CA (AT) (Ins) No. 1878 of 2024 decided on 13.01.2025 and Rohit Motawat Vs. Madhu Sharma Proprietor Hind Chem Corporation & Anr., CA (AT) (Ins) No. 1152 of 2022 decided on 03.02.2023.

16. On the other hand, Counsel for the OC/Respondent No. 2 has reiterated its stand taken before the Tribunal contending that the Respondent No. 2 is entitled to apportion the amount received first towards interest amount and thereafter towards principal amount and has referred to a decision of the Hon'ble Supreme Court in the case of Asset Reconstruction Company India Limited (Supra), BHEL (Supra) and Beitel Teletech Ltd. Vs. Arcelia IT Services Pvt. Ltd., 2023 SCC OnLine NCLAT 642.

17. It is further submitted that the interest has been charged by the R2 on the basis of a clause in the invoice as per which, on the delayed payment, CD was liable to pay interest at the rate of 12 %. It is also submitted that the claim of the interest is part of the debt for which an application under Section 9 of the Code is maintainable. In respect of its claim in regard to interest, he has relied upon a decision of this Court in the case of Prashat Aggarwal

(Supra). He has further submitted that the judgment relied upon by the Appellant in the case of Rohit Motawat (Supra) and Comet Performance Chemicals Pvt. Ltd. (Supra) are not applicable to the facts of this case and has prayed that the appeal may be dismissed.

18. Notice in this appeal was issued on 01.04.2024 and the following order was passed:-

“Learned Counsel for the Appellant submits that out of the total amount of Rs.6,13,48,161.98/-, principal amount was Rs.4,97,22,461.16/- out of which the Appellant has paid Rs.4,97,22,461.16/- which has been noticed by the Adjudicating Authority in paragraph 10. It is submitted that Adjudicating Authority admitted Section 9 Application only on the ground that amount of interest of Rs.1,16,25,700.82/- has not been paid whereas, according to Appellant in the invoices unilaterally the interest was claimed which was never accepted by the Corporate Debtor. He submits that there was no liability to pay the interest and more so, principal amount having been paid Section 9 application ought not to be admitted only for interest.

Mr. Dhawan submits that amount was paid only after filing of application under Section 9 and the invoices contained liability of interest hence it was for the Corporate Debtor to pay the interest also.

Learned Counsel for the Operational Creditor submits that amount has been appropriated towards the interest.

Submission needs scrutiny. Issue notice.

Let Reply be filed within two weeks. Rejoinder be filed within two weeks thereafter. List this Appeal on 06th May, 2024. In the meantime, Impugned Order dated 22.03.2024 shall remain stayed.

In event the Appeal is dismissed the Appellant undertakes to pay the interest.”

19. There is no dispute to the fact that out of total amount of Rs. 6,13,48,161.98/- Rs. 4,97,22,461.16 was towards the principal amount and Rs. 1,16,25,700.82/- was the interest. It is also not in dispute that Respondent No. 2 has claimed the interest only on the basis of invoice in which it has been mentioned that “in case of delay payment, interest will be charged @ 12% or as per the agreed terms” whereas no other document has been placed on record, much less, any purchase order or the agreement between the parties which can reflect the terms and conditions of the interest. It is also not in dispute that the CD had already paid the principal amount of Rs. 4,97,22,461.16/- and in this regard sent an email on 31.01.2024 informing the OC/R2 that there is no outstanding dues in their books of accounts and had also requested that the OC should also update its books and accounts accordingly and withdraw the company petition. There is no reply to this email by the OC/R2 that it had adjusted the amount of Rs. 4,97,22,461.16 first towards interest and the balance amount is the principal rather it has come in the order dated 21.02.2024 passed by the Tribunal that the principal amount has been paid to the tune of Rs. 4,97,22,461.16 and the CD liable to pay Rs. 1,16,25,700.82/- towards interest. The ledger account of the CD also reflects that principal amount claimed by the OC has been shown as nil which means that the principal amount has already been paid and has been accepted as such by the OC as the principal amount has been received without any murmur, therefore, the Tribunal is not correct to hold that the amount paid by the CD to the OC of Rs. 4,97,22,461.16 was adjusted towards interest at the first instance by making reference to the decisions in the case of Asset Reconstruction Company India Limited (Supra) and BHEL (Supra).

20. Now the question is as to whether the amount of Rs. 1,16,25,700.82/- can be claimed even as an interest by the OC only on the basis of the boilerplate provision in the invoice in the absence of any agreement between the parties towards for the payment of interest or anything which may reflect it by way of email or purchase order etc.

21. It is also pertinent to mention that provision in the invoice says that the CD shall be liable to pay interest on the delay payment but no period of payment has been prescribed in the invoice, therefore, it is not known as to from which date the interest has been charged by the OC. In this regard, the Appellant has relied upon a decision in the case of Comet Performance Chemicals Pvt. Ltd. (Supra) and referred to para 16 to 18 which are reproduced as under:-

“16. First, we look into the claims and counter claims of the threshold limit under Section 4 of the IBC. The Appellant's claims aggregates Rs 1,36,30,679/- (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only) including interest. Section 5 (21)1 of the IBC restricts claims to those arising from goods or services, and interest is recoverable only when expressly agreed upon by the parties. In the absence of such agreement, the interest component cannot be considered part of the operational debt. Consequently, without interest the outstanding principal amount alone is Rs 60,44,800/- (rupees sixty lakhs, forty-four thousand and eight hundred only) and is well below the threshold of Rs 1 crore specified under Section 4 of the IBC.

17. The Respondent relies upon Rishabh Infra Through Hari Mohan Gupta vs Versus Sadbhav Engineering Ltd [Company Appeal (AT) (Insolvency) No. 1881 of 2024] wherein it has been held that invoices with interest clauses, which were not part of the formal agreement, are unenforceable. This judgment supports the case of the Respondent.

18. Accordingly, we agree with the submissions of the Respondent and also the findings of the Adjudicating Authority that no interest can be charged against the supply of goods and services for delayed payments until and unless there is an express agreement between the parties. We find justification in

the claim of the Respondent that the interest claim was unilaterally imposed and lacked any contractual basis.”

22. Counsel for the Appellant has further relied upon a decision in the case of Rohit Motawat (Supra) and has referred to para 10 which is reproduced as under:-

“10. We have heard counsel for the parties and after perusal of record, are of the considered opinion that the impugned order is patently illegal and deserves to be set aside. The question which has been raised by the Appellant, is hereby Company Appeal (AT) (Ins) No. 1152 of 2022 answered in favour of the Appellant in view of the decision taken by this Court in case of 'S.S.Polymers' (Supra), 'Permali Wallace Pvt. Ltd.' (Supra) as well as the decision of the 'Hon'ble Karnataka High Court' in the case of 'Jyothi Limited' (Supra). Before parting, we are constrained to observe that the Adjudicating Authority has erred in not looking into the facts that the principal amount has entirely been paid and the issue was only regarding to interest for which the application under Section 9 of the Code was not maintainable as the spirit of the legislation of the Code is for 'resolution of debt' and not for 'recovery'.”

23. On the other hand, Counsel for the Respondent No. 2 has relied upon the case of Prashat Agarwal (Supra) and has referred to following observations made therein:-

“In this context, as discussed above, all 9 invoices clearly stipulated provision of interest on delayed payment. It is also observed that payments of three invoices has been made in full and for one invoice in part against said invoices by CD and no dispute on this clause was ever raised as noted from record available before us”

24. In the case of Prashat Agarwal (Supra) the issue was regarding the maintainability of the application because of the threshold provided under Section 4 of the Code.

25. Be that as it may, in the case of Prashat Agarwal (Supra) it was a condition in the invoice that “interest will be charged @ 18% plus GST P.A after due date of the bill” and the dispute was regarding the maintainability of the application filed under Section 9 in which the amount in question was less than Rs. 1 Cr. which is the minimum threshold prescribed under Section 4.

26. On the other hand, in the present case, condition prescribed in the invoice is that in case of delay in payment, interest will be charged at the rate of 12 @ as per the agreed terms. This clause in the invoice is totally vague because it does not specify the period within which the amount was to be paid unlike the case of Prashat Agarwal (Supra) in which it was prescribed that interest will be charged after due date of bill. Secondly, it is mentioned in this clause that interest will be charged as per the agreed terms whereas no agreed terms have seen the light of the day to enable the OC to claim interest as a part of debt. In this regard, the observation has been made, in the case of Comet Performance (Supra) by a three members bench of this Court, relying upon Rishabh Infra Through Hari Mohan Gupta Vs. Sadbhav Engineering Ltd., CA (At) (Ins) No. 1881 of 2024) in which it has been held that “invoices with interest clauses which were not part of the formal agreement are unenforceable”.

27. Thus, in the given facts and circumstances, we are inclined to follow the decision of this Court in the case of Comet Performance Chemicals Pvt. Ltd. (Supra) and Rohit Motawat (Supra) in which it has been held that “the application for interest was not maintainable as the spirit of the legislation of the Code is for resolution of debt and not for recovery”.

28. No other point has been raised.

29. In view of the aforesaid facts and circumstances, the present appeal is allowed and the impugned order is set aside. No costs.

IAs, if any, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
19th February, 2025

Sheetal