

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) No.83/ALD/2022

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

IN THE MATTER OF:

Mosco International Commodities Private Limited
Through its Director, Mr. Kishankumar Prabhu Rabari
Registered office at, Ganesh Bhavan,
Plot No 48, Sector-8, Gandhidham,
Kachchh, Gujarat- 370201

....Operational Creditor

Versus

SBEC Sugar Limited,
Registered Office at,
Village Loyan Malakpur,
Baraut, Distt. Baghpat,
Uttar Pradesh-250611

....Corporate Debtor

Order pronounced on 2nd February, 2024

CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

PRESENT-

Sh. G.P. Madaan with : *For the Operational Creditor*
Sh. Aditya Madaan and
Sh. Aishwarya Adlakha, Advs.

Sh. Navpreet Singh Ahluwalia : *For the Corporate Debtor*
alongwith Sh. Rahul Chaudhary
& Sh. Sahil Seth, Advs.

ORDER

1. The instant application is filed on 20.08.2022 by Mosco International Commodities Pvt. Ltd. (hereinafter referred as “**Applicant/Operational Creditor**”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the “**I & B Code, 2016**”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as “**the Rules**”) against SBEC Sugar Ltd. (hereinafter referred as ‘**Respondent/Corporate Debtor**’). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as ‘**CIRP**’) against the Respondent/Corporate Debtor due to default in payment of total outstanding Operational Debt of Rs.1,08,02,731/- (Rupees One Crore Eight Lakhs Two

Thousand Seven Hundred Thirty One Only) along with interest @ 24% per annum to (be calculated) till the date of payment.

2. The details of the facts of the case as averred by the Operational Creditor in its application filed in Form-5 containing part I, II, III, IV & V are as follows :-

- i.** The Operational Creditor has claimed to have made an *ad hoc* payment of Rs.2,02,63,750/- (Rupees Two Crore Two Lakhs Sixty-Three Thousand Seven Hundred and Fifty only) to the Corporate Debtor against the purchase order no.4500015 for supply of 55,000 quintal of molasses for the season 2019-2020 and 2020-2021.
- ii.** For the above supply of molasses, the Operational Creditor obtained M-IV license bearing no.122/2020-2021 from Gujarat Excise to import the molasses from the State of Uttar Pradesh on 18.12.2020 for which no objection certificate dated

14.01.2021 was issued by the Molasses Controller and Excise Commissioner, U.P.

iii. Out of 55,000 quintal molasses, only 18,771.35 quintal molasses were supplied by the Corporate Debtor to the Operational Creditor. Thereafter, Molasses Controller and Excise Commissioner (U.P.) suspended the supply of Molasses to the Operational Creditor due to certain complaints.

iv. The Corporate Debtor vide its letter dated 06.03.2021 cancelled the sale order as they were unable to supply the balance 36,228.65 quintals of molasses to the Operational Creditor. In view of the cancellation of this order, the Operational Creditor claimed that it was entitled to refund of an amount of Rs.1,08,02,731/- (Rupees One Crore Eight Lakhs Two Thousand Seven Hundred Thirty-One only). The calculation for the amount of refund amount has been provided by the Operational Creditor are as under :-

| Particulars | Amount (In Indian Rupees) |
|--|---|
| Amount paid by the Operational Creditor to Corporate Debtor | Rs.2,02,63,750/- |
| Amount for which Molasses were supplied by the Operational Creditor | Rs.94,61,019/- |
| Total amount due and payable by the Corporate Debtor to the Operational Creditor | Rs.1,08,02,731/- plus interest @ 24% |

- v.** As claimed by the Operational Creditor, a total number of 19 letters/ emails were sent by the Operational Creditor to the Corporate Debtor demanding refund of the amount of Rs.1,08,02,731/-, which was in default due to non-refund of the balance amount of advance against which no material was supplied, but the Corporate Debtor did not respond or even acknowledged any of the said correspondences.
- vi.** Consequently, on 31.05.2022, the Operational Creditor sent the demand notice U/s 8 of the I & B Code, 2016, to which the Corporate Debtor sent a reply on 11.06.2022 disputing the amount of debt

of Rs.1,08,02,731/- stating that there exist no legal liability and no debt is due from their company towards the Operational Creditor. Further, stating that the supply of molasses to Operational Creditor was stopped due to receipt of an order dated 10.02.2021 from Molasses Controller and Excise Commissioner, whereby it was directed to immediately cease the sale of balance quantity of molasses to Operational Creditor as the said Operational Creditor company was in violation of the export terms because the Operational Creditor was found to be illegally exporting the products to Hamburg, Germany instead of Singapore, the country for which the permission was sought by the Operational Creditor and finally a formal order dated 28.02.2021 was received by the Corporate Debtor from the Molasses Controller and Excise Commissioner, whereby it was categorically stated that the permission for lifting the balance quantity of 36,228.65 quintals was immediately revoked due

to export being done by the Operational Creditor to a wrong country. In view of this order of the Molasses Controller and Excise Commissioner and failure of the Operational Creditor to lift the balance quantity of 36,228.65 quintals of molasses within the validity period, the Corporate Debtor issued a cancellation letter dated 06.03.2021 to the Operational Creditor.

- vii.** In the above mentioned reply dated 11.06.2022 of the Corporate Debtor, it is further stated that the representatives of the Operational Creditor approached the Corporate Debtor requesting it orally to hold back the balance quantity of 36,228.65 quintals of molasses as Operational Creditor was stated to be exploring options to take the permission from the Molasses Controller and Excise Commissioner again for lifting the said quantities, towards which as claimed by the Corporate Debtor to have readily agreed. However,

the Operational Creditor vide a letter dated 14.06.2021 demanded the refund of the balance advance money deposited with the Corporate Debtor. Thereafter, the Corporate Debtor started looking for alternate buyers to pick up the quantity of molasses, but there was a accidental fire at the plant of Corporate Debtor on 22.07.2021 and a total quantity of 76130.35 quintal of molasses (which included the balance quantity of 36228.65 quintal of molasses earmarked for the Operational Creditor) was damaged. In support of this accident, an intimation letter dated 23.07.2021 sent to the Excise Officer of Uttar Pradesh, has been attached by the Corporate Debtor with his reply.

viii. In its reply, the Corporate Debtor has claimed to have suffered a huge losses due to the accidental fire in its plant on 22.07.2021 and was constrained to auction the salvage of molasses through e-auction. A proof of auction process of salvage of

molasses in terms of letter dated 14.02.2022 sent by the Corporate Debtor to the Successful Bidder of salvage, has also been attached with the reply. The details of the quantity of molasses pertaining to the advance amount of Rs.1,08,02,709/- has been computed to be 21,898.10 quintals, for which the salvage value has been computed at Rs.13,13,886/-. The computation of this salvage value in the reply of the Corporate Debtor has been given, which is as under :-

| PARTICULARS | AMOUNT (IN RS.) |
|--|------------------------|
| Total Balance with our Company (after adjusting the molasses already lifted against the total amount received) | 1,08,02,709.00 |
| Less: Balance amount for molasses not lifted for Season 2019-20 (12864.15 quintal @ Rs.450) | 57,88,867.50 |
| Less: Balance amount for molasses not lifted for Season 2020-21 (9033.95 quintal @ Rs.555) | 50,13,841.50 |
| TOTAL QUANTITY NOT LIFTED: 21898.10 QUINTAL [12864.15 (2019-20) / 9033.95 (2020 - 2021)] | |
| SALVAGE VALUE @ Rs.60 for Balance Quantity: 21898.10 quintal | 13,13,886.00 |

ix. Out of Rs.13,13,886/- as computed above, the Corporate Debtor in his reply dated 11.06.2022 has mentioned that it has already paid a sum of Rs.10,00,000/- to the Operational Creditor on 10.06.2022 i.e. after issuing of notice U/s 8. It has also been stated in the said reply that the balance amount of Rs.3,13,886/- shall be remitted on 13.06.2022.

x. In view of the above facts as stated by the Corporate Debtor in its reply to the demand notice u/s 8 issued by the Operational Creditor, it has been stressed in the reply of the Corporate Debtor that there exists no legal liability and no debt due from the Corporate Debtor towards the Operational Creditor. The Corporate Debtor has also taken an argument about its company being a solvent company, hence, the Operational Creditor does not have any right to approach the NCLT for initiating insolvency proceedings against the Corporate

Debtor as the alleged debt being claimed by the Operational Creditor as due is less than the threshold limit of Rs.1 Crore as defined under I & B Code, 2016. It is further argued that the proceedings under I & B Code, 2016 is not intended to be substituted to a recovery forum to initiate recovery proceedings to extract illegal compensation from the Corporate Debtor. In support of its argument, the Corporate Debtor has referred to a decision of Hon'ble Supreme Court of India in the case of **Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited (2019) 12 SCC 697**, and another judgment passed by the Hon'ble NCLAT in the case of **Aparna Enterprises Ltd. vs. SJR Prime Corporation Pvt. Ltd. in Company Appeal (AT) (Ins.) No.632/2020**.

- xi.** The Corporate Debtor in its reply has also disputed inclusion of interest @ 24% per annum in the

operational debt stating that there is no agreement between the Operational Creditor and Corporate Debtor to pay interest and/ or penalty in case of any default. It has also been contended that the interest does not fall under the term operational debt as defined in I & B Code, 2016. In support of its contention, the Corporate Debtor has relied on the decisions in case of ***M/s Wanbury Ltd. Vs. M/s Panacea Biotech Ltd. (2017 SCC OnLine NCLT 475)***, and in the matter of ***Swastik Enterprises Vs. Gammon India Limited (CP No. 1297/I&BC/NCLT/MB/MAH/2017)***.

- xii.** The above reply of the Corporate Debtor dated 11.06.2022 has been countered by the Operational Creditor in its one letter placed from page no.160-175 of the paper book of the petition contending that the facts stated by the Corporate Debtor in its reply are false representation, which is nothing but a futile attempt to raise a spurious and illusory

dispute, which never existed. They also denied the claim of the Corporate Debtor approaching it to orally requesting to hold back the balance quantity of molasses and mentioned that it was the Corporate Debtor who unilaterally cancelled the purchase order vide its letter dated 06.03.2021 seemingly with the sole intention to usurp the balance amount, which ought to have been refunded to the Operational Creditor the moment purchase order dated 15.12.2020 was cancelled.

xiii. The Operational Creditor has also disputed the claim of the Corporate Debtor about an accidental fire in the plant as intimation regarding this was never communicated to the Operational Creditor when the accident took place, and also when the alleged auction was conducted.

xiv. On the payment of Rs.13,13,886/- by the Corporate Debtor after receiving of the demand notice alleged to be salvage value of the damaged

molasses, it has been contended by the Operational Creditor that this payment has been made with intention to make a futile attempt to bring the amount of the default below Rs.1 Crore, the minimum threshold amount of default prescribed for the purpose of filing an application U/s 9 of the Code. Thus, the Operational Creditor has concluded that the amount of unpaid operational debt has been admitted by the Corporate Debtor and this conduct of the Operational Creditor making a part payment of Rs.13,13,886/- establishes the *mala fide* intention of the Corporate Debtor to evade its liability for the unpaid operational debt that has become due and payable.

xv. As regards the inclusion of interest under the operational debt, the Operational Creditor has contended that the Hon'ble NCLT in their certain judgments has observed that there is also some time value of money for an operational debt as

goods or services are supplied against money as consideration and it is not expected that the delay in payment of consideration beyond time is left uncharged. It is further contended that it has also been observed that on the commercial side, the Operational Creditor claiming interest is quite normal and justified, after all, a business always runs keeping in mind the time value of money. However, no supporting judgment, or any relevant provision of law, or any agreement has been produced by the Operational Creditor in support of its claim for interest to be included in operational debt.

- 3.** In counter to the above application of the Operational Creditor, the Corporate Debtor has filed its reply 30.01.2023 along with his counter affidavit disputing the demand for operational debt raised in the application against the Corporate Debtor, reiterating that there is no operational debt much less and admitted operational

debt, on which the claim of the Operational Creditor is founded. In this reply, the Corporate Debtor has countered all allegations made in the application by the Operational Creditor raising similar contentions as it has already raised in its reply dated 11.06.2022 sent in response to the demand notice of the Operational Creditor issued u/s 8 of the I&B Code, 2016, which has already been discussed in previous paras from point nos. (vi) to (xi) .In this reply, it has been again stressed that the claim of the Operational Creditor is less than the threshold limit of Rs.1 Crore as defined U/s 4 of I & B Code, 2016. The claim of the Operational Creditor is neither due nor payable by the Corporate Debtor, the claiming of an interest @ 24% per annum along with principal amount of Rs.1,08,02,731/- is without there being any agreement between the Operational Creditor and Corporate Debtor for payment of interest in case of default, and the present proceeding before the NCLT as initiated by the Operational Creditor is wrong, incorrect and *mala fide*, which is for the purpose of recovery as against the object

and purpose of the Act as well as against various judicial pronouncement in this regard.

4. The Corporate Debtor in its reply to the present Application has also mentioned about there being a pre-existing dispute between the Operational Creditor and Corporate Debtor on account of a letter dated 10.02.2021 and further an order dated 28.02.2021 received from the Molasses Controller and Excise Commissioner for stopping the supply of molasses to Operational Creditor on account of violation of certain terms and conditions, on which export of molasses by the Operational Creditor was allowed by Molasses Controller and Excise Commissioner, and also failure of the Operational Creditor to lift the balance quantity of 36,228.65 quintal of molasses within the validity period between 23.01.2021 and 07.02.2021, which resulted into cancellation of order by the Corporate Debtor vide its letter dated 06.03.2021. It has been pointed out by the Corporate Debtor that the entire material was to be lifted

between the period from 23.01.2021 to 07.02.2021, but despite the material being available for lifting, the Operational Creditor only lifted part of the material not for any fault of the Corporate Debtor. After 07.02.2021, when the Corporate Debtor received the letter dated 10.02.2021 from the Molasses Controller and Excise Commissioner, *inter alia* directing to cease the sale of balance quantity of molasses, which was followed up by another order dated 28.02.2021 from the said authority, whereby the permission granted to the Operational Creditor for lifting the molasses stood revoked by the designated authority for the fault and misdeeds of the Operational Creditor itself. Therefore, the reasons for non-supply of molasses to Operational Creditor were stated to be squarely attributable to its own fraudulent actions, whereby it admittedly violated the terms of the export. After receiving the letter dated 10.02.2021 from the Molasses Controller and Excise Commissioner, as contended by the Corporate Debtor, it was in no position whatsoever to permit the Operational Creditor to lift the

molasses, and in this regard, failure of the Operational Creditor to lift the molasses in the time period agreed i.e. by 07.02.2021 has been specifically mentioned, for which the Operational Creditor should only be responsible for non-fulfilling the terms and conditions of the purchase order with the Corporate Debtor. Though the Corporate Debtor has claimed that he held the balance stock of molasses on oral request of the Operational Creditor but the same has been denied by the Operational Creditor as already discussed in previous paras. There is no other evidence available to show that the balance quantity of molasses was held back by the Corporate Debtor on the request of the Operational Creditor, but it has been clearly stated that the Operational Creditor has not lifted the molasses within the time period stipulated in purchase order, and thereafter its supply was stopped due to an order by the Molasses Controller and Excise Commissioner because of violation of certain terms and conditions pertaining to export as approved by the Molasses Controller and Excise Commissioner.

- 5.** The Corporate Debtor has also claimed about destruction of the stock of molasses in an accidental fire. The salvage value of the molasses destroyed in fire pertaining to the Operational Creditor, has been computed as Rs.13,13,886/- and the same has been paid to the Operational Creditor. In its reply, the Corporate Debtor has held the Operational Creditor responsible for the damage incurred by the Corporate Debtor due to non-lifting of molasses by the Operational Creditor as per the terms of the purchase order, and hence, the Operational Creditor is stated to be *ex-facie* guilty of breach of contract resulting into significant financial losses to the Corporate Debtor.
- 6.** By referring to the above incidents and there being a breach of contract by the Operational Creditor, the Corporate Debtor has raised the issue relating to pre-existing dispute, which has also been mentioned by it in a reply dated 11.06.2022 sent by it in response to notice U/s 8. In support of its argument, the Corporate Debtor

has relied on the decision of Hon'ble Supreme Court in case of ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018 1 SCC 353)***, wherein it has been held that whenever there is an existence of real dispute, the provision of I & B Code, 2016 cannot be invoked.

7. Against the above reply/ counter affidavit filed by the Corporate Debtor, a rejoinder affidavit has been filed by the Operational Creditor on 06.03.2023. In this rejoinder, the plea of the Corporate Debtor as there being a pre-existing dispute has been vehemently countered by the Operational Creditor stating that it has not raised any of the objections, as are being projected as pre-existing dispute in its reply, prior to the receipt of the demand notice dated 31.05.2022, and hence, in view of the Operational Creditor, it is simply a moonshine defense raised by the Corporate Debtor as an afterthought to escape the liability of payment. However, nothing has been commented by the Operational Creditor about not

lifting the molasses from the Corporate Debtor as per the terms of purchase order by dated of 07.02.2021 as pointed out by the Corporate Debtor in its reply and thereafter, the Corporate Debtor was not in a position to supply the molasses to the Operational Creditor due to ban imposed by the Molasses Controller and Excise Commissioner vide its letter dated 10.02.2021.

- 8.** Though in its rejoinder, the Operational Creditor has not denied the cancellation of permission to the Operational Creditor to lift the molasses from the Corporate Debtor except stating that the said averments is wrong and misleading because nowhere in the said letter any reason for revocation was recorded. However, the facts remain that because of the order of Molasses Controller and Excise Commissioner stopping the supply of molasses to Operational Creditor, the Corporate Debtor was not in a position to supply the balance quantity of molasses to Operational Creditor, which he failed to take delivery as per the terms of the purchase order to be taken by the

dated of 07.02.2021. As regard to the operational debt having gone below the threshold limit of Rs.1 Crore after payment of Rs.13,13,886/- by the Corporate Debtor after issuance of notice U/s 8, and the operational debt being only Rs.94,88,845/- on the date of filing of application U/s 9, the Operational Creditor has stated in its rejoinder that the Corporate Debtor having done wrong, should not be allowed to take advantage of its own wrong and plead bar of the threshold requirement to escape the proceedings under the Code, which are otherwise maintainable.

- 9.** It has been further contended that if the Corporate Debtor is allowed the benefit of the threshold stipulated under the Code, which is evidently being attempted to be obtained by the Corporate Debtor by perpetrating fraud, the very objective of the Code, which is rehabilitation and revival of a sick company by early detection of insolvency, would stand defeated. However, no evidence has been produced to show that the Corporate Debtor is a sick

company. It is rather the Corporate Debtor in its reply, has shown that it is a solvent company and in the operation as going concern having about 1130 number of employees/ staff/ labour and 40,000 farmers are dependent on them, having turn over in 100 of crores with substantial value of assets.

- 10.** In its rejoinder, the Operational Creditor has also raised a point stating that if the dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same, and if does not, the CIRP must be commenced with respect to the Corporate Debtor. However, nothing has been commented by the Operational Creditor on the plea taken by the Corporate Debtor that the proceeding under I & B Code, 2016, is not a recovery proceeding and it cannot be invoked for recovery of any disputed outstanding amount against a solvent company when the outstanding dues has gone below the threshold limit on the date of filing of the present Application.

11. We have considered all the submissions made before us by the Operational Creditor and Corporate Debtor as discussed above and also heard the Ld. Counsels representing the Operational Creditor and Corporate Debtor.

12. We have also gone through the written submissions filed by both the parties. In the written submissions also, they have raised the similar contentions, which are already discussed in the above paras. However, one additional written submission on the issue of threshold has been filed by the Corporate Debtor on 21.12.2023, raising following points :-

a. The notice U/s 8 was issued on 31.05.2022 by the Operational Creditor. Later, the present petition was filed on 20.08.2022 making an application for initiation of present insolvency proceeding.

b. When notice U/s 8 was issued, the operational debt was Rs.1,08,02,731/- and after issuing of the said demand notice, payment of Rs.13,13,886/- was

made, and hence on the date of filing of petition U/s 9, the outstanding operational debt was Rs.94,88,845/- only.

- c.** U/s 9 of I & B Code, 2016, the Operational Creditor is entitled to file an application for initiation of Corporate Insolvency Resolution Process (CIRP) provided the quantum of default/ debt is Rs.1 Crore or above as is mandated U/s 4 of the I & B Code, 2016, and there is no pre-existing dispute between the Operational Creditor and Corporate Debtor.
- d.** Section 5(11) of I & B Code, 2016 clarifies that initiation date for CIRP process is the date when the application is made by a Financial Creditor, or Operational Creditor, or Corporate Applicant.
- e.** In the event, the Operational Creditor does not meet the minimum threshold of Rs.1 Crore as is mandated U/s 4 of the Code to maintain a petition U/s 9 before the NCLT, the Operational Creditor is

not left remediless and it is open for the Operational Creditor to approach appropriate fora and can agitate its alleged right of recovery under appropriate law.

- f.** In support of its contention raised on threshold in the written submission, following judgments have also been referred

The Hon'ble National Company Law Appellate Tribunal (Chennai Bench) in the case of ***Metal's & Metal Electric Pvt. Ltd. vs. Goms Electricals Pvt. Ltd. (Company Appeal (AT) (CH) (INS) No.243 of 2021) (Para – 20 –22, 24, 25)*** observed as under:-

“A mere running of the eye of the ingredients of Section 9 of the I&B Code makes it lucidly clear that the date of initiation of ‘Corporate Insolvency Resolution Process’ shall be on the date on which an application is made. To put it precisely, ‘the date of default’ is not to come into ‘operative play’ and the same ought not to be taken into account for anything but computing the period of limitation.

In this connection, it is to be relevantly pointed out that a litigant has no vested right to choose a particular ‘Forum’, although he has an ‘actionable right’. It cannot be gain said that a change in ‘Law’

is a 'procedural one' and a 'Litigant' is to adhere to the letter and spirit of the 'Law', without any deviation whatsoever, in the considered of this 'Tribunal'."

The Hon'ble National Company Law Appellate Tribunal in the case of ***HylineMediconz Private Limited vs. Anandaloke Medical Centre Private Limited in (Company Appeal (AT) (Insolvency) No.1036 of 2022) (Para – 1, 2, 8, 10–14, 24 – 26)***

observed as under :-

"10.The default is thus condition precedent for initiating CIRP. The minimum amount of default as has been prescribed under Section 4 of the Code has a purpose and object. The object is that unless there is a minimum amount of default, no person should be permitted to initiate CIRP. When the amount of default was amended from Rupees One Lakh to Rupees One Crore, the object was that no application for initiation of CIRP be filed unless the threshold is fulfilled.

11. The initiation date is thus the date of which financial creditor, corporate application or operational creditor makes an application to the adjudicating authority. Part II of the Code is applicable only when minimum amount of default of Rupees One Crore is fulfilled after 24.03.2020. Thus, right to initiate the CIRP after 24.03.2020 is only on the condition that minimum default is of Rupees One Crore. There is no right to initiate CIRP after 24.03.2020 when minimum default is not Rupees One Crore.

“13. There is no right to initiate an application under Section 9 on 24.03.2020 or thereafter if the minimum default of Rupees One Crore is not fulfilled. Thus, crucial date to find out applicability of the threshold is the date when application to initiate CIRP is made.....When the legislative scheme indicate that application for CIRP can be filed only after fulfilling the minimum threshold limit applicable w.e.f. 24.03.2020, no other interpretation of Section 4 can be given.”

The Hon’ble National Company Law Tribunal
(Delhi Bench) in the case of **Udit Jain vs. Apace Builders and Contractors Pvt. Ltd. (IB-894 / (ND) / 2020) (Para-7, 8)** observed as under :-

“Since the instant application filed under section 9 of the Code, which is the subject matter of our consideration was filed on 11.06.2020, even though the statutory demand notice U/s 8 was sent on 17.02.2020, only the date of filing needs to be considered and not the date of sending the Demand Notice. Therefore, the threshold limit of Rs. 1 crore of debt will be applicable in the present case. Hence for the above-mentioned reasons the present Application is not maintainable.”

The Hon’ble National Company Law Appellate Tribunal in the case of **M/s Netfinity Solutions vs. M/s KarvyDigiKonnnect Limited in (Company Appeal (AT) (Insolvency No.1067 of 2022) (Para - 8 - 13, 15, 17 - 20, 26)** observed as under :-

“15. Initiation of proceeding under Section 9 by filing an Application to the Adjudicating Authority has to be made by Operational Creditor which must comply with the requirement of Section 4. Part II of the oide which deals with Insolvency Resolution and Liquidation for Corporate Person applies only when minimum amount of default is Rs. 1 Crore (w.e.f. 2th March, 2020). Thus initiation of an Application under Section 9 has to confirm to the requirement under Section 4.

19. We do not find any support from the statutory scheme. When it was decided to change the threshold for initiating Insolvency Resolution Process against a Corporate Debtor, no Applicant can be heard in saying that even if he does not fulfil the threshold of Rs. 1 Crore, he should be permitted to initiate CIRP. Threshold of Rs. 1 Crore is statutorily fixed for all Application to initiate CIRP after 24 March, 2020 irrespective of any exceptions.....

22 The Application is further conditioned with compliance of threshold of Rs. 1 Crore as laid down in Section 4.”

The Hon’ble National Company Law Tribunal
(New Delhi Bench) in the case of **M/s BLS Polymers Limited vs. M/s RMS power Solutions Private Limited (IB-340 / (ND) / 2021 (Para – 3 – 5, 7, 10 – 13)** observed as under :-

“In the light of the aforesaid Judgments on the issue, we are of the considered view that the present Petition is not maintainable since, it does not meet

the minimum threshold limit of Rs. 1 (one) Crore as stipulated under Section 4 of IBC, 2016.”

Admittedly, in the present case, the Operational Debt as is claimed by the Operational Creditor is Rs.94,88,845 (since an amount of Rs.13,13,886/-has already been paid out of the total amount Rs.1,08,02,731 claimed before the institution of the present petition) which is less than the mandatory minimum threshold of Rupees One Crore which is necessary to maintain a petition under the Insolvency and Bankruptcy Code, 2016. Pertinently, the ledger filed by the Operational Creditor along with the present petition also indicates that the amount sought to be recovered from the Corporate Debtor is less than the minimum threshold of Rupees One Crore. (Ledger at Pg. 103 of the Petition).

FINDINGS AND ORDER

- 13.** The main issue before us in this application to be decided first is about meeting of the threshold limit for the maintainability of the application filed U/s 9.
- 14.** The undisputed fact is that the present application was filed on 20.08.2022. However, the notice U/s 8 was issued on 31.05.2022. When the notice U/s 8 was issued on 31.05.2022, the total outstanding debt was Rs.1,08,02,731/-, however, after issuance of notice U/s 8, the Corporate Debtor made payment of Rs.13,13,886/- claiming this amount to be salvage value of the stock of molasses kept for being supplied to the Operational Creditor, which it did not lift within the time period as per the purchase order stated to be lifted by 07.02.2021 and the same has not been disputed by the Operational Creditor either in its counter filed to the reply dated 11.06.2022 of the Corporate Debtor sent in response to the demand notice u/s 8 dated 31.05.2022 or in the rejoinder filed before us. However, the Operational

Creditor has disputed about the claim of damage of any stock of molasses in fire to arrive at the salvage value of Rs.13,13,886/- in view of the fact that the purchase order was earlier cancelled by the Corporate Debtor vide its letter dated 06.03.2023 and the incident of fire in which molasses is claimed to have got damaged was never informed to the Corporate Debtor before sending of notice u/s 8.

- 15.** We found that this purchase order was cancelled when the Operational Creditor has failed to lift the molasses by pre-agreed date of 07.02.2021 and thereafter, Molasses Controller and Excise Commissioner stopped supply of molasses to the Operational Creditor. The incident of fire has also been shown to have occurred attaching the necessary documents by the Corporate Debtor along with its reply. Though the Corporate Debtor could not explain as to why it kept the stock of molasses purportedly pertaining to Operational Creditor even after cancellation of purchase order except taking the plea that

it was kept on oral request of the Operational Creditor, which has been denied by the Operational Creditor. However, the payment of Rs.13,13,886/- by the Corporate Debtor to Operational Creditor has been undisputedly made and the Operational Creditor has also not denied having received this amount. Payment of Rs. 13,13,886/- has also been mentioned in part IV of the Application filed u/s 9. Nature of this payment being on account of salvage value of stock of molasses kept for being supplied to the Operational Creditor is though disputed, the amount of receipt by the Operational Creditor from Corporate Debtor has undisputedly taken place and this payment was made by the Corporate Debtor in lieu of the stock of molasses that could not be supplied against the advance received. The dispute is mainly on the amount of payment. As per the Operational Creditor, the entire amount of remaining advance of Rs. 1,08,02,731/ should have been refunded as the total quantity of molasses against this amount of advance was not supplied, however, as per the Corporate Debtor, it is

liable to refund only the amount pertaining to salvage value of molasses pertaining to quantity attributable to remaining amount of advance as that quantity of molasses got destroyed in a fire and the same has been refunded as computed by him to be Rs. 13,13,886/. Therefore, before filing of application U/s 9, the total outstanding operational debt has undisputedly gone below Rs.1 Crore i.e. Rs.94,88,845/- (Rs. 1,08,02,731 – 13,13,886).

- 16.** Now the issue to be decided is whether the threshold limit should be taken from the date on which the default has occurred i.e. on issuance of Section 8 notice, or on the date of filing of application U/s 9. In this regard, the Hon'ble NCLAT in case of ***Metal's & Metal Electric Pvt. Ltd. vs. Goms Electricals Pvt. Ltd. (Company Appeal (AT) (CH) (INS) No.243 of 2021)***, has held that, a mere running of the eye of the ingredients of Section 9 of the Code makes it lucidly clear that the date of initiation of CIRP shall be on the date on which an application is

made. To put it precisely, the date of default is not to come into operative play and the same ought not to be taken into account for anything but computing the period of limitation.

- 17.** In the matter of ***Jumbo Paper Products vs. Hansraj Agrofresh Pvt. Ltd. (Company Appeal (AT) (Ins) No.813 of 2021)*** dated 25.08.2021 also, it has been decided that the threshold limit of Rs.1 Crore will be applicable for application filed u/s 7 or 9 on or after 24.03.2020 even if default is of a date earlier than 24.03.2020. Though, this decision is presently under challenge before the Hon'ble Supreme Court on the point of date of applicability of the notification of MCA enhancing the threshold limit from Rs.1 Lak to Rs.1 Crore, however, with this decision of Hon'ble NCLAT also, it is quite evident that the threshold limit would be applicable on the date of filing of application, and not on the date on which the default has occurred.

18. Many co-ordinate Bench of NCLT have also given similar decisions including one by Hon'ble NCLT, Delhi Bench in the case of ***Udit Jain vs. Apace Builders and Contractors Pvt. Ltd. (IB-894/ (ND) / 2020)*** dated 14.09.2022; holding as under :-

*"Since the instant application filed under section 9 of the Code, which is the subject matter of our consideration was filed on 11.06.2020, even though the statutory demand notice U/s 8 was sent on 17.02.2020, **only the date of filing needs to be considered and not the date of sending the Demand Notice.** Therefore, the threshold limit of Rs. 1 crore of debt will be applicable in the present case. Hence for the above-mentioned reasons the present Application is not maintainable".*

19. In the above decision also, it has been clearly held that only the date of filing of application needs to be considered and not the date of sending the demand notice. The above decision is fully supporting the contention raised by the Corporate Debtor that the threshold limit should be taken on the date of filing of the application, and not the date of sending the demand notice. As the amount of operational debt on the date of filing of application i.e. 20.08.2022 is only Rs.94,88,845/- below the threshold limit of Rs.1 Crore as

provided U/s 4 of the Code, we find that the present application filed by the Operational Creditor is not maintainable.

- 20.** In its application, while mentioning the operational debt in Part IV, the Operational Creditor has included interest @ 24% per annum, though the amount of interest has not been calculated. We have also considered, whether the interest to be calculated by the Operational Creditor would be includable while calculating the operational debt to meet the requirement of threshold or not. In this regard, we find that there is no express agreement between the Operational Creditor and Corporate Debtor for computing interest due to any delay in refund of the advance amount to be paid by the Corporate Debtor. In this regard, the Operational Creditor could also not produce any documentary evidence justifying charging of interest except stating that on the commercial side, the Operational Creditor claiming interest is quite normal

and justified, after all a business always runs keeping in mind the time value of money.

- 21.** This issue has been settled by the Hon'ble NCLAT in ***Prashant Agarwal Vs. Vikas Parasrampur*** (***Company Appeal (AT) (Ins) No.690 of 2022***) dated ***15.07.2022*** holding that both, the principal debt and interest on delayed payment will be considered to assess maintainability ***in case the interest was stipulated in invoice***. In a recent judgment, in case of ***North West Carrying Company, LLP Vs. Metro Cash and Carry India Pvt. Ltd. (CP (IB) No.133/BB/2022)*** dated ***25.05.2023*** after relying on the judgment in case of ***Prashant Agarwal (Supra)***, it has been again held that in order to club other charges with the principal amount express stipulation has to be incorporated specifically in the agreement, the purchase order or the invoice and in absence of the same, neither interest nor any other charges can be clubbed with the principal amount. In the present case, there is no agreement between the

Operational Creditor and Corporate Debtor for payment of interest on delay of refunding of advance money if any paid. In the purchase order also, no such condition has been stipulated. Therefore, Operational Creditor has not been found justified for including interest @ 24% per annum till the date of payment in the total amount of debt as mentioned in Part IV of the Application. There being no legally enforceable right to claim interest, therefore, the interest to be calculated @ 24% per annum shall not be included in the total amount of debt for computing the threshold limit as provided in Section 4 of I & B Code, 2016 for the purpose of admitting the application U/s 9.

- 22.** After deciding the issue relating to the threshold to be applied in the case of present application as being the date of filing of application and interest, if any being charged by the Operational Creditor on delay in refunding the advance earlier paid to the Corporate Debtor has not to be included in the amount of operational debt for the purpose of deciding the threshold for the application to

be admitted U/s 9, as discussed above, we hold that the present application is not maintainable as being below the threshold limit as mandated U/s 4 of I & B Code, 2016. Therefore, the present application filed by the Operational Creditor is liable to be dismissed on the issue of being below the threshold limit, hence, the same is hereby dismissed.

23. As the present application has not been found maintainable being below the threshold limit, we do not find it necessary to adjudicate on other issues like existence of pre-existing dispute etc.

24. Ordered accordingly.

-Sd/-

(Ashish Verma)
Member (Technical)

-Sd/-

(Praveen Gupta)
Member (Judicial)

2nd February, 2024

Typed by :
Kavya Prakash Sivastava
(Stenographer)