

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(COURT-I)

CP (IB) No. 307/KB/2022

Chemico International Private Limited v. Cygnet Industries Limited

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Chemico International Private Limited (*“Operational Creditor”*), represented by **Shri Krishna Kumar Tantia (Director)**, authorized through a Board Resolution dated 31st October, 2022¹ seeking to initiate Corporate Insolvency Resolution Process (*“CIRP”*) against Cygnet Industries Limited (*“Corporate Debtor”*).

3. It is submitted that Part-I of this petition contains particulars of the Operational Creditor. Part-II of this petition contains particulars of the Corporate Debtor.
4. Part-IV of the petition contains details of operational debt for an amount of Rs.1,10,98,763.08,- (Rupees One Crore Ten Lakhs Ninety Eight Thousand Seven Hundred and Sixty Three and Eight paise only) which includes Rs. 87,74,191.08,- (Rupees Eighty Seven Lakhs Seventy Four Thousand One Hundred and Ninety One and Eight paise only) as Principal Amount along with 21% Interest per annum. Interest calculated till 31 August 2022 is Rs. 23,24,572,- (Rupees Twenty Three Lakhs Twenty Four Thousand Five Hundred and Seventy Two only) as on 28.05.2021.
5. The Corporate Debtor was incorporated on 15 June, 2015 having CIN: U74900WB2015PLC206720, under the Companies Act, 1956. Its Authorized Capital is Rs. 10000000000 and Paid-up Capital is Rs.9265368760. Therefore, this Bench has jurisdiction to deal with this petition.
6. The present petition was filed on 1st November 2022 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.1,10,98,763.08,- (Rupees One Crore Ten Lakhs Ninety Eight Thousand Seven Hundred and Sixty

¹ Annexure N of the Petition

Three and Eight paise only) which includes Rs. 87,74,191.08/- (Rupees Eighty Seven Lakhs Seventy Four Thousand One Hundred and Ninety One and Eight paise only) as Principal Amount along with 21% Interest per annum. Interest calculated till 31 August 2022 is Rs. 23,24,572/- (Rupees Twenty Three Lakhs Twenty Four Thousand Five Hundred and Seventy Two only) as on 28.05.2021. The Corporate Debtor is said to have not made any payment for the last two purchase orders being nos. 4500036800 dated 5 May 2021 and 4500036840 dated 11 May 2021.

Brief facts of the case:

7. The Operational Creditor intends to initiate insolvency proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor. The debt amount of Rs. 1,07,11,381.55 (Principal along with Interest) remains unpaid after the statutory 10-day period from the demand notice on July 22, 2022. As per the Operational creditor, the Corporate Debtor's reply consists of mere denials, admitting the debt's existence. Notably, no dispute was raised by the Corporate Debtor before the issuance of Section 8 notice by the Operational Creditor.
8. On or about December 2020, the Corporate Debtor had approached the Operational Creditor for purchasing of coal from the Operational Creditor².
9. After detailed discussions and negotiations, the Corporate Debtor issued several purchase orders³ between January 2021 till May 2021 for an amount of Rs. 5,97,25,000/-.
10. The Operational Creditor supplied goods without objection from the Corporate Debtor, issuing invoices with a 21% interest clause⁴ for late

² Annexure C of the Petition

³ Annexure D of the Petition

⁴ Annexure H of the Petition

payment between January 31, 2021, and May 14, 2021. The Corporate Debtor did not dispute the interest component, as they paid 157 nos. of invoices but failed to paid 35 nos. of invoices.

11. The Corporate Debtor failed to make payments for the last two purchase orders (nos. 4500036800 dated May 5, 2021, and 4500036840 dated May 11, 2021), despite receiving the goods without objection or protest
12. No complaints or protests have been documented from the Corporate Debtor regarding the quality or quantity of the goods received.
13. On April 11, 2022, the Operational Creditor issued a notice demanding payment of INR 89,30,700.05, the acknowledged ledger account of the Corporate Debtor. Despite the notice, no response was received from the Corporate Debtor.
14. Subsequently, on June 4, 2022, the Operational Creditor, through its advocates, issued a legal notice to the Corporate Debtor, demanding Rs. 1,07,11,381.55, inclusive of interest calculated until May 31, 2022. The legal notice was duly received by the Corporate Debtor.
15. No Reply was given by the Corporate Debtor to the Legal Notice issued.
16. The Operational Creditor issued a Form 3 Notice on 22 July 2022 claiming for the unpaid due amount, to which the Corporate Debtor issued a reply without denying the outstanding amount.
17. The Corporate debtor furnished a reply to Section 8 notice on 29th July 2022 wherein for the first time the Corporate Debtor raised an issue of defective nature of goods received. Also, the provision of interest in the invoices was controverted in the said reply.

Reply by the Corporate Debtor: -

18. The Corporate Debtor in para 'c' and 'd' of the Reply Affidavit has mentioned that the Tribunal lacks pecuniary jurisdiction to entertain the matter as the interest of 21% per annum claimed by the Operational Debtor is not per the contract entered into between the parties.
19. In para 'e' the corporate debtor submits the Purchase orders collectively marked "R-1" and alleges that there is no special terms and conditions mentioned for any contractual obligations.
20. In para 'f' the corporate debtor points out that the Clause 2 of the General Terms and Conditions states that general terms and conditions exclusively apply to any goods or service contract entered into by the buyer, overriding any other terms unless expressly agreed in writing. In case of inconsistency, the order-specific terms prevail for the respective general clause, emphasizing the dominance of the general terms unless a written exception exists.
21. In para 'g' the corporate debtor points out that the Clause 17 of the General Terms and Conditions shall prevail where it is stated that the payment will be made within 60 days from the date of receipt of materials at buyer's warehouse and interest for any reason shall not be applicable to the buyer. Thus, the interest amount of Rs. 23,24,572/- is not permissible as the purported interest amount claimed by the Operational Debtor is unilateral and cannot be enforced.
22. In para 'h' the corporate debtor mentions that the Operational debtor knew that they were not entitled to any interest which is evident from **Annexure-I** of the petition as there is no claim of any interest. The first time the claim for interest comes from the Ld. Advocate for the

Operational Creditor by way of their purported Demand Notice, which is *de hors* the contractual terms.

23. The Corporate debtor in Para 6 mentions that the goods received pertaining to the above-mentioned purchases were defective in nature and could not be utilized and thereby substantial losses were suffered by them, thereby the right to claim such losses lies with them before appropriate forum.
24. The corporate Debtor vehemently deny to the claims that they are habitual defaulter and that they are marred with debts or has several other creditors in the market.

Rejoinder on behalf of the Operational Creditors

25. The Operational Creditors are of the opinion that the invoice issued was latter in time and a subsequent counter offer to the Purchase order, which in fact is an offer in itself. The Corporate Debtor's acceptance of the invoice, supply of goods, and partial payment affirm the counter offer's terms, establishing it as the binding contract. Consequently, the invoice terms, including the interest provision, take precedence over the Purchase Order terms.
26. They further mention that the issue or discrepancy regarding the lower quality of the materials supplied were resolved with the corporate debtor as they have issued debit notes against the comparatively lower quality of material.

Analysis and Findings:

27. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
28. The principal question that arises here is :
- Can 'interest' be combined with the principal debt to meet the threshold limit of Rs. 1 Crore limit for filing a petition under Section 9 of the Code?**

29. In the instant case no agreement demonstrating that interest is payable has been presented by the Operational Creditor except a mention on the invoices that a 21% interest shall be charged on delay payments.
30. The imposition of 21% interest condition is solely a unilateral condition on the invoice, with no agreement or commitment from the Corporate Debtor.
31. It is evident that without combining this interest with the principal amount, the threshold under Section 4 of the Code is not met.
32. On this issue we rely on NCLT Kolkata bench judgement In ***Gandhar Oil Refinery (India) Limited v. City Oil Private Limited***⁵ where it has been inter-alia held that :
- “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.”*
33. The NCLAT, in ***Steel India v. Theme Developers Pvt. Ltd***⁶, emphasized that interest should be an actionable claim, enforceable if properly agreed upon between parties.
- “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.”*

⁵ C.P. (IB) No. 150/KB/2021

⁶ Company Appeal (AT) (Insolvency) No. 1014 of 2019

34. In *Pavan Enterprises v. Gammon India*⁷, the NCLAT stated that if interest is payable to the Operational or Financial Creditor as per an agreement, it is included in the debt.

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

35. *SS Polymers vs. Kanodia Technoplast Limited*⁸ clarified that not all interest can be treated as a debt; it depends on the agreement. If the agreement stipulates interest payable to the operational and financial creditor, then it is included in the debt; otherwise, the principal amount is considered the debt.

“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.”

scope to include the interest to constitute as the operational debt.”

36. Hon'ble High Court at Karnataka in *Jyothi Limited vs. Boving Fouress Limited*⁹ 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

⁷ Company Appeal (AT) (Insolvency) No. 148 of 2018

⁸ CP(IB)121/ND/2019

⁹ MANU/KA/1022/2000

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 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.”

37. The second question that arises for consideration is whether mentioning of the interest component in the invoices and subsequent action by the Corporate debtor on these invoices would mean a **novation of Contract?** **In view of the provision of the Contract act, a contract could be construed to also have been established based on the conduct of the parties. In the instant case it is clearly seen that** stated the Corporate

debtor has never taken cognizance of the note on the invoices neither has the operational creditor added the interest figures, albeit unilateral to the claim amount in the invoice. Therefore, by the conduct of the CD, it is clear that it had not accepted the interest component which therefore does not give rise to a *proper conduct* which is essential for a novation. A proper conduct necessarily means that any changes in the contract has to be communicated directly to the other party. This is clearly not the case.

38. The contention of the Corporate Debtor that since the interest was mentioned on the invoices which was never controverted by the Operational Creditor would mean that he has acquiesced to the condition and as such in totality the agreement should be seen as if having an interest clause.

39. In this conspectus it is pertinent to refer to Section 39 of the Indian Contract Act, 1872 states that

“When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.”

Thus, it is evident that since neither the Operational creditor has claimed any discreet amount towards the purported interest in the invoices, nor the CD acknowledged the provision thereof by its conduct or otherwise. Hence mere mentioning of a condition as a footnote without any causative or remedial ramifications can be considered to be a part of the agreement.

40. The main point of difference thus lies with the act of the parties. The Operational Creditor claims that the **Tax invoices would gain precedence over the Purchase orders as it is construed as a counter offer and the Corporate Debtor accepted the offer when the CD paid the other tax invoices and accepts and leaves a company stamp on the same.** On the other hand, this Bench finds that the Corporate Debtor issues **Purchase orders which clearly states the General Clauses of**

Contract where it is clearly stated in Clause 2 of the General Clauses that:

2. The general terms and conditions herein contained shall apply in its entirety to any contract to purchase goods/ service entered into by the buyer to the exclusion of all other terms and conditions including any which the seller may purport to supply, save insofar as such other terms and conditions are specially agreed to in writing by the buyer. In the event of any inconsistency in any clause between the 'Terms and Conditions' of this order and this "General terms and conditions", then the "Terms and Conditions" will prevail for that clause."

Thus, it is evident that the Purchase Order clearly states that if there are any special conditions given by either side it has to be accepted **in writing by the buyer** (in this case the Corporate Debtor). Since the Purchase order was first accepted by the Operational Creditor, they agreed to this clause by sending the required goods. So, if they eventually gave any counter offer in their Tax Invoices, they too had to get it accepted clearly in writing by the Corporate Debtor. Since there was neither any exclusive writing about the 21% p. a interest which was accepted by the Corporate Debtor there is no question of Counter Offer.

41. In the light of the above precedents the amount claimed in the petition does not meet the threshold amount mentioned in Section 4 of the IBC and accordingly **CP (IB) No. 307/KB/2022 is dismissed.**
42. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 19th day of January 2024.