

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP (IB)/311/MB/2023

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

Mr. TUSHAR HARSHADRAI MEHTA,
2701, Vishwahans CHS, Sector 35D,
Kharghar, Navi Mumbai-410 210.

..... Applicant/ Operational Creditor

Versus

**SAMARTH SOFTECH SOLUTIONS
PRIVATE LIMITED,** having its registered
office at: - 908/909, 09th Floor, Mahavir
Icon, Plot No. 89-90, Sector 15, CBD
Belapur, Navi Mumbai- 400 614.

.....Corporate Debtor

Order Delivered on :- 22.03.2024.

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances (in Hybrid Mode):

For the Operational Creditor: Adv. Vinay K. Jain a/w Adv. Pallavi
Tikariha and Adv. Mohana Sharda appeared
through VC.

For the Corporate Debtor: Adv. Aamir Zafar Khan.

ORDER

Per: - Shri. Anil Raj Chellan, Member (Technical).

1. This Company petition is filed by Mr. Tushar Harshadrai Mehta (hereinafter referred to as "Operational Creditor"), who was a former Director of the Corporate Debtor, praying for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s. Samarth Softech Solutions Private Limited (hereinafter referred to as the "Corporate Debtor") under Section 9 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Company Petition was filed on 03.04.2023 claiming an outstanding amount of INR 1,06,03,252/- (Rupees One Crore, Six Lakhs, Three Thousand, Two Hundred and Fifty-Two Only), out of which the principal amount is INR 77,76,159/- and interest thereon computed by the Applicant @ 18% p.a. is INR 28,27,093/- only. The principal claim of the Applicant is comprised of remuneration and commission payable by the Corporate Debtor to the Applicant for the

services rendered by the Applicant as a technical director of the Corporate Debtor.

3. The details of the transactions leading to filing of this Application as averred by the Operational Creditor in his application are as follows:
 - a) The Corporate Debtor passed a board resolution on 20.10.2017 for payment of remuneration to the Operational Creditor, a former technical director of the Corporate Debtor. The aforementioned board resolution resolved to pay Operational Creditor a salary of INR 1,05,952/- per month along with a commission of 4% on net payments (excluding all taxes and penalties) received to the Corporate Debtor from IT/Electronics technology-based projects. In accordance with the terms of the aforesaid board resolution, the Corporate Debtor was required to pay salary to Operational Creditor from January, 2017 to March, 2019. Further, the following mutual decisions were made between the Corporate Debtor and the Operational Creditor in April, 2019:
 - (i.) To stop fixed remuneration salary from April, 2019.
 - (ii.) Payment of 2% on Annual Turnover of Corporate Debtor to Operational Creditor.
 - (iii.) Payment of an additional 1% as commission on the net amount (after deduction of Penalty and GST received from IHMCL).
 - b) The Applicant resigned on 26.02.2021, and since the Corporate Debtor failed to make the payment; as a standard practice, the Corporate Debtor is liable to pay the principal outstanding amount

along with simple interest @ 18% p.a. calculated till 31.03.2023.
However, interest is payable till the date of realisation of dues in full.

c) Break-up of the Claim is given in the Table below:

<u>Sr. No.</u>	<u>Particulars</u>	<u>Amount</u>
1.	Total Salary payable to Operational Creditor till March, 2019	31,77,288/-
2.	4% Commission payable till March, 2019	96,44,694/-
3.	2% Commission payable from April, 2019 to February, 2021	70,40,905/-
4.	1% Commission payable from April, 2019 to February, 2021	15,91,043/-
	TOTAL	2,14,53,930/-
	Less: Payments received from the Corporate Debtor for the period from May, 2017 till December, 2023	(1,36,77,771/-)
	Total Amount Due (in principal)	77,76,159/-
	Add: Interest @ 18% p.a.	28,27,093/-
	Claim Value	1,06,03,252/-

d) Despite several reminders and follow-ups for the release of payment, the Operational Creditor did not receive his rightful dues and being aggrieved by such non-payment, the Operational Creditor had sent a Demand Notice dated 11.03.2023 in Form 3 u/s 8 of the Code, to which the Corporate Debtor has replied vide Reply dated 20.03.2023 refusing its liability to pay.

e) Hence this application.

4. Reply and Contentions of the Corporate Debtor:

- i. The Corporate Debtor agrees that the Operational Creditor was appointed as an employee with the Corporate Debtor on 08.11.2017 at the designation of Additional Director and the mutually agreed remuneration was fixed at INR 1,07,952/- for which a board resolution was passed. The Operational Creditor was entrusted with the responsibility of handling operations of the Corporate Debtor such as toll automation, parking automation, automated traffic survey projects, and solid waste management.
- ii. In the wake of Covid-19 pandemic, the Corporate Debtor was unable to make payments to the Operational Creditor as all the projects were stalled during the pandemic, causing a huge impact on the revenue of the Corporate Debtor. Instead of taking up the responsibility to pull out the company from the financial crisis, the Operational Creditor resigned from his post on 01.03.2021.
- iii. An amount of Rs. 1,24,96,906/- has already been paid to the Operational Creditor till date and there is no outstanding as on date which remains to be paid. The break-up of the amount paid is as under:

<u>Sr. No.</u>	<u>Particulars</u>	<u>Amount</u>
1.	Agreed Remuneration (08.11.2017 to 28.02.2021)	44,00,843/-
2.	Amount paid till date (incl. TDS)	40,82,672/-
3.	Advances paid for services	72,03,404/-
4.	Paid on request as loan	4,46,000/-

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5.	Paid against expenditure for which no receipts are available	7,64,830/-
	TOTAL (Sr. No. 2 to 5)	1,24,96,906/-

- iv. The interest claimed by the Applicant/Operational Creditor in the instant Petition @ 18% p.a. is not supported by any agreement/clause whatsoever. Interest at the above-rate has been claimed and computed only for the purpose of inflating the claim so as to reach the minimum threshold of rupees one crore for filing an application u/s 9 of the Code. There is no basis for claiming such interest as neither there is a provision in the appointment letter to claim interest nor it has been otherwise agreed in any of the communications or correspondences between the parties hereto for levy of interest. If the interest component is excluded for the reasons stated hereinabove, then the present petition is not maintainable u/s 4 of the Code.
- v. The Board Resolution and the Appointment Letter, both dated 08.11.2017, do not mention payment of any commission at the rate of 2% or additional 1%. Hence, the claim in this regard does not arise and the Corporate Debtor is not liable to pay the same. It is pertinent to note that there was only a verbal discussion in April, 2019 for a payment of 2% commission on the annual turnover of the company and 1% commission on the net amount received for traffic survey projects. However, the said verbal discussion did not culminate into any agreement. Further, there were no invoices raised by the Operational Creditor towards the commission charges in order to substantiate his claim.

ANALYSIS AND FINDINGS

5. We have heard the learned Counsel for the Operational Creditor and the Corporate Debtor and we have carefully examined the records.
6. Counsel for the Applicant submits that his client was a technical director of the Corporate Debtor appointed for a remuneration which comprised of fixed salary and variable commission and since the same have not been paid to the Applicant despite repeated requests and reminders as well as the service of Demand Notice u/s 8 of the Code to the Corporate Debtor, the Corporate Debtor has chosen to ignore the demands of the Applicant and hence, the Applicant herein has been constrained to file the present petition. Counsel for the Applicant further submits that his client has computed interest at the rate of 18% p.a. on the arrears of remuneration as per the standard prevailing practice.
7. Per contra, Counsel for the Corporate Debtor has objected to the maintainability of the present petition for want of minimum threshold of Rs. 1 crore as stipulated u/s 4 of the Code. Ld. Counsel for the Corporate Debtor submits that interest of Rs. 28,27,094/- has been computed at the rate of 18% p.a. without there being any agreement between the Applicant and the Corporate Debtor with respect to interest. Counsel for the Corporate Debtor states that the Corporate Debtor never agreed to pay interest on arrears of remuneration. In support of the aforesaid contention, Ld. Counsel for the Corporate Debtor took us through the records and more particularly the Board Resolution dated 20th October, 2017 and Appointment Letter dated 08th November, 2017 to show that these documents appointing the

Applicant as an employee director of the Corporate Debtor, never provided for payment of any interest whatsoever. Further, the learned Counsel contends that the Applicant has computed interest at an exorbitant rate of 18% p.a. only with a view to inflate his claim so as to bring the petition above the prescribed minimum threshold of Rs. 1 crore. Counsel for the Corporate Debtor contended that the Corporate Debtor never agreed to pay any commission to the Petitioner and the verbal discussions between the parties with respect to payment of commission from April, 2019 onwards never really fructified and culminated into any agreement or contract for payment of commission at the rates of 1% and 2% as claimed by the Applicant. Thus, the Ld. Counsel for the Corporate Debtor prays for dismissal of the petition.

8. We have heard the parties at length, took note of the aforesaid submissions and gave our careful consideration to the matter in hand.
9. In the present petition, we find that the amount claimed to be in default is INR 1,06,03,252/-. As per the working annexed by the Operational Creditor at Annexure 5 to the Petition, the principal value of claim is Rs. 77,76,158/- and interest thereon computed by the Applicant at the rate of 18% p.a. comes to Rs. 28,27,094/-. Since the present petition has been filed on 03.04.2023, the minimum threshold limit of Rs. 1 crore u/s 4 of the Code is applicable vide Notification No. S.O. 1205(E), dated March 24, 2020. It is also well settled position in law that where the contract provides for payment of interest, both principal and interest can be considered to determine whether the threshold set out u/s 4 of the Code is met. However,

where there is no such contractual clause stipulating payment of interest or where the liability in respect of the interest is disputed, then in such cases, the interest portion cannot be considered for determining whether the threshold set out u/s 4 of the Code is met. The Hon'ble NCLAT has held in Krishna Enterprises v/s. Gammon India Ltd. [vide Order dated 27.07.2018 in Company Appeal (AT)(Insolvency) No.144 of 2018] as follows:

“4. It is submitted that the ‘debt’ includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement interest is payable to the Operational or Financial Creditor then debt will include interest, otherwise, the principle amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor.” (Emphasis Supplied)

10. In the present matter, admittedly, there is no agreement between the parties hereto with respect to interest. Further, nothing has been placed on record to show that the Corporate Debtor is liable to pay interest to the Applicant/Operational Creditor on account of delay in payment of remuneration. Further, the Corporate Debtor too has denied and disputed its liability to pay interest for want of any agreement between the parties in respect thereto. Hence, the interest amount of INR 28,27,093/- cannot be taken into account while ascertaining the quantum of default to see if the minimum threshold prescribed u/s 4 of the Code is met or not. We agree with the Counsel for the Corporate Debtor that interest at such an exorbitant rate of 18% p.a. has been computed by the Applicant only to meet the prescribed minimum threshold. If the afore-stated interest amount is excluded, then the principal amount of alleged default of INR

77,76,159/- is not sufficient enough to maintain this petition u/s 4 of the Code and hence, on this ground alone, the instant Petition is liable to be dismissed.

11. Further, we find that the Operational Creditor has not produced any document on record to show that he was entitled to commission from the Corporate Debtor at the rate of 2% on annual turnover and at the rate of 1% on the net amount received from Indian Highway Management Company Ltd after deduction of GST and Penalty. The Board Resolution passed on 20th October, 2017 does provide for payment of commission at the rate of 4% on net payments received by the Corporate Debtor from IT/Electronics technology based projects. However, the aforementioned Board Resolution and even the Appointment Letter dated 08.11.2017, both do not provide for 2% and 1% commission as referred to above. We also observe that the Applicant has not shown or placed on record any invoice or bill raised by him against the Corporate Debtor towards the commission at the rates of 2% and 1%. Moreover, the Corporate Debtor has seriously contested the claim of commission by the Applicant by stating in its affidavit-in-reply that the Corporate Debtor never agreed to pay any sort of commission to the Applicant, though there were mere verbal discussions for the same in April, 2019 which never really culminated into a valid and enforceable contract. Mere workings annexed by the Applicant showing computation of commission do not substantiate his claim against the Corporate Debtor. Therefore, in the given facts and circumstances of the case, we are unable to hold that the Applicant/Operational Creditor was entitled to such commission and hence, the claim of the Applicant to the extent of such commission

cannot be treated as an operational debt and therefore, no question in respect of default thereof arises.

12. On perusal of the 'Brief Note of Calculation' given by the Applicant to assist the Tribunal, we find that 2% commission to the tune of Rs. 18,47,508/- computed on turnover of Rs. 9,23,75,425/- in respect of which the default has been purportedly committed by the Corporate Debtor during the period from April, 2020 to February, 2021 is squarely covered by Section 10-A of the Code and therefore, the alleged default to the tune of Rs. 18,47,508/-, even if it were to be treated as operational debt for the sake of argument, the same cannot be considered for initiating CIRP as the said default took place in the period covered under Section 10-A of the Code. Even otherwise, as discussed above, the instant Petition filed u/s 9 of the Code does not meet the minimum threshold of Rs. 1 crore which is required u/s 4 of the Code to trigger CIRP against the Corporate Debtor.

13. As per the working provided by the Applicant-Operational Creditor at Annexure-5 to the Application, it is seen that as against the net payable upto March, 2019 of Rs. 21,66,424/-, a sum of Rs. 24,22,213/- has been already paid. The working further provides that as against the net payable (from March, 2019 to 14th January, 2021) of Rs. 86,31,947.29/-, a sum of Rs. 6,00,000/- have been received in aggregate till date; thereby creating a total principal outstanding of Rs. 77,76,158/- (21,66,424-24,22,213+86,31,947-6,00,000). The net payable of Rs. 86,31,947.29/- is comprised of the amount claimed by the Applicant from the Corporate Debtor towards the commission at the rates of 2% and 1%. Hence, even as per the case of the Applicant,

the fixed monthly salary has been paid in full and the principal amount outstanding of Rs. 77,76,158/- from the Corporate Debtor is only in respect of commission at the rates of 2% and 1%. As observed by us hereinbefore, the Applicant has failed to substantiate his claim of commission at the rates of 2% and 1% with any documentary evidence and therefore, we are unable to treat it as operational debt. The Applicant has also failed to show if there was any agreement between him and the Corporate Debtor in respect of the interest which he seeks to claim from the Corporate Debtor. Further, there is no invoice or bill on record showing the interest clause. Hence, the interest of Rs. 28,27,093/- claimed by the Applicant from the Corporate Debtor cannot be treated as an 'operational debt' as defined u/s 5(21) of the Code and thus, it cannot be taken into account while reckoning the quantum of default to see if minimum threshold prescribed u/s 4 of the Code is met.

14. In the light of the above findings and foregoing discussions, we conclude that the instant Application of the Applicant has on all counts failed to meet the minimum threshold of INR 1,00,00,000/- (Rupees One Crore) as required u/s 4 of the Code to initiate Corporate Insolvency Resolution Process of the Corporate Debtor. Hence, the instant Petition deserves to be dismissed and we, accordingly, pass the following orders:

ORDER

- i. **CP(IB) No. 311/MB/2023 is hereby dismissed;**
- ii. Parties to bear their own costs;

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- iii. Accordingly, the instant application u/s 9 of the Code stands disposed of.
- iv. Let the File be consigned to records

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**