

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA**

**Company Petition (IB) No. 158/KB/2022**

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

**IN THE MATTER OF:**

**Apar Industries Limited (CIN: L91110GJ1989PLC012802)**

**... Operational Creditor/ Applicant.**

***Verses***

**City Oil Private Limited (CIN: U23201WB2003PTC095799)**

**... Corporate Debtor/ Respondent.**

**Date of Hearing: January 12, 2023.**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCE:**

**For the Operational Creditor:            Mr. Debasish Lahiri, Adv.**

**ORDER**

***Per: D. Arvind, Member (Technical)***

1. This Court is congregated through hybrid mode.
2. Heard the Learned Counsels for both parties.
3. This Application has been preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by **Apar Industries Limited**, hereinafter referred to as the "Applicant" or "Operational Creditor" against **City Oil Private Limited**, hereinafter referred to as the "Respondent" or "Corporate Debtor" seeking a direction to initiate Corporate Insolvency Resolution Process, for brevity "CIRP" in respect to Corporate Debtor herein.

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***Factual Matrix:***

4. The total amount claimed to be in default is **Rs. 1,54,92,104/-** in which the principal sum is Rs. 1,00,15,995/- only along with an interest amount of Rs. 54,76,109/- calculated @ 24% per annum from 13.07.2019 till 16.12.2021, 13.07.2019.
5. **The date of Default is claimed on 13.07.2019** since as per payment terms mentioned in the invoices the payment has to be made within 45 days of delivery of goods by the Operational Creditor. The first invoice is dated 29.05.2019.

***Applicant's submissions:***

6. The Learned Counsel, Shri Debasish Lahiri appearing on behalf of the Operational Creditor submits that the Operational Creditor had entered into an agreement with the Corporate Debtor for the supply of the "Power Oil" brand of lubricant. Per such agreement, the Operational Creditor had agreed to supply the "Power Oil" brand of lubricant to the Corporate Debtor in terms of their requirements from time to time as per the specifications and requirements of the Corporate Debtor.
7. It is submitted that upon agreement between both parties, it was decided that arising out of a single consignment purchase order will be issued upon the Operational Creditor. Under the same, the Corporate Debtor had issued purchase orders arising out of the same consignment with specifications mentioned therein upon the Operational Creditor.
8. It is stated that the first purchase order being Purchase Order Number COPL/AIL/02/19-20 dated 11.05.2019 was issued by the Corporate Debtor upon the Operational Creditor for the supply of 150 KL of "Power Oil Lube 12". Further, the second purchase order

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arising out of the same said consignment being Purchase Order Number COPL/AIL/04/19-20 dated 02.07.2019 was issued by the Corporate Debtor upon the Operational Creditor for the supply of 125KL (@ Rs.51/- per Ltr.) of Power Oil Lube 12 and supply of 25 KL (@ Rs.53/- per Ltr.) of Power Oil Lube N-100. Under the receipt of the said purchase order dated 02.07.2019, the Operational Creditor delivered the consignment to the Corporate Debtor and such delivery was also accepted by the Corporate Debtor without raising any dispute and /or objection regarding the quantity and quality thereof.

- 9.** Further, it is stated that upon successful completion of delivery of the goods arising out of the two purchase orders dated 11.05.2019 and 02.07.2019. The Operational Creditor issued invoices from time to time upon the Corporate Debtor which were duly received and acknowledged by the Corporate Debtor. As per the said invoices, the Operational Creditor had supplied materials worth a sum of Rs. 1,11,75,564/- only between the period from 29th May 2019 till 31st July 2019. Out of the aforesaid amount, the Corporate Debtor has made payment a sum of Rs. 11,46,634/- on diverse dates, 30.11.2021 being the last date of payment. The total principal outstanding amount due and payable by the Respondent to the Applicant is Rs. 1,00,15,995/-.
- 10.** It is claimed that the Corporate Debtor has at all times admitted its liability in terms of the transaction. Despite, such admission of liability the Corporate Debtor has failed to pay the outstanding operational debt due to the Operational Creditor. Time and again the Operational Creditor had sent requests and reminder emails to the Corporate Debtor for payment of the outstanding dues but the Corporate Debtor failed to clear the outstanding dues of a sum

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of Rs. 1,54,92,104/- which includes interest. The corporate debtor by its letters dated 24.01.2020 and 29.06.2020 has stated that due to their financial instability, they are trying to liquidate the operational creditor's legitimate dues and explained the financial stringent condition of their company.

- 11.** Further, it is stated that the Operational Creditor had issued a notice under Section 8 of the I&B, 2016 dated 21st December 2021 in Form 3. As is evident from the postal receipts and track report, the said notice of demand was returned with the reason stated in the track report as “door Locked”. However Operational Creditor in order to complete the service had also sent the scanned copy of the said FORM 3 along with all annexures to the Respondent by email dated 13.01.2022. However, the Corporate Debtor despite having received the said notice has neither replied to the same nor raised any dispute to the unpaid operational debt. It is submitted that the corporate debtor deliberately neglected and avoided paying said balance amount till date.

***Respondent’s submissions per contra:***

- 12.** In the Reply Affidavit filed by the Respondent, it has been submitted that the Corporate Debtor has been doing business with the Operational Creditor since last couple of years and as per their mutual agreement, it was agreed between them that the corporate debtor would procure the oil products from the Operational Creditor and supply the same to the entities as would be identified and referred by the representatives of the Operational Creditor and in pursuance of such understanding and under their instruction, the Corporate Debtor purchased the products from the

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Operational Creditor and delivered the same to their identified entities without any complaint whatsoever.

- 13.** It is claimed that the said entities who have been selected by the Operational Creditor have failed and/or neglected to pay the dues despite repeated requests and follow-ups. Whenever they were requested to pay the dues, they always used to reply that these were the internal affairs between them and the Operational Creditor and that they would deal with it internally and set off their dues payable to the corporate debtor in their books of accounts through book adjustment. However, no action has been taken by them. They also made an allegation that the products supplied by the operational creditor through Corporate Debtor were all defective both qualitatively and quantitatively. The Corporate Debtor has also issued legal notices to such customers but none of them has responded. The Copies of the said notices are annexed as Annexure-B.
- 14.** Further, it is claimed that the Operational Creditor has not disclosed any details and documents as to whether they, being the supplier of the goods, have paid the applicable GST on the invoices raised on the Corporate Debtor to the concerned authority or not. It is claimed that in the absence of any supporting documents to gain eligibility for claiming "Input tax", the GST credit is uncertain and vague and the Operational Creditor is barred from claiming GST as well as interest on account of GST, in the absence of proof of payment of GST to Government.

***Counter submissions by the Applicant:***

- 15.** The Learned Counsel for the Applicant has submitted in counter to the reply of the Respondent that the alibi of reasonable time to

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lodge a complaint and stories of stranger customers and middlemen by relating the Operational Creditor is a downright falsehood with an ulterior motive to misguide the learned Tribunal.

- 16.** We have considered the rival contentions of both parties and perused the documents placed before us. Before considering the merits of the application, we would note that on the last three occasions, despite service of notice, none appeared for the Corporate Debtor. However, the Corporate Debtor has filed its Reply Affidavit. This matter has been reserved for order on December 06, 2024, and it is recorded in the daily proceedings that none for the Corporate Debtor was present on that occasion. It is noted that this matter is pending since 2022, hence, we proceed to consider this application based on available resources/ documents.

***Analysis and Findings:***

- 17.** It is evident that the Operational Creditor has issued and delivered the invoices from 29th May 2019 to 31st July 2019 along with the transport receipt of the lorry, which are annexed at Pages 42-55 to the Application. In the invoices referred to by the Operational Creditor herein, 18% GST has been levied along with a clause that interest will be recovered at 24% on bill not paid on due date.
- 18.** We are of the considered view that mere adducing interest clause in the invoices by the Operational Creditor is not enough to claim the interest amount along with the principal amount payable by the Corporate Debtor. To fortify our view, we would rely upon the decision passed by the Learned NCLT, New Delhi Bench in the case of ***Rohit & Company v. Twenty First Century Wire Rods Ltd.***

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order dated **14.09.2023**, reported in **(2023) ibclaw.in 627 NCLT** that:

“7. ... it is observed that merely citing the interest rate in the invoices by itself wouldn't render it legally binding for the Corporate Debtor, ...”

**(Emphasis Added)**

- 19.** We would further refer to the decision passed by this Adjudicating Authority to strengthen the view in the case of **Mr. Sanjay Sharma, Partner of M/s. Ma Jagadamba Enterprises v. M/s. Super Iron Foundry Private Limited** in **Company Petition (IB) No. 314/KB/2022** decided on **November 30, 2023** that:

“15. [...] Further mere mention in invoices about the interest component is not sufficient to hold that interest is payable by the Corporate Debtor. [...]”

**(Emphasis Added)**

- 20.** Thus, if we deduct the 24% interest part from the total amount claimed to be in default (i.e., of Rs. 1,54,92,104/-), then the principal amount claimed to be in default becomes of Rs. 1,00,15,995/-.
- 21.** Further, the Corporate Debtor in its Reply Affidavit has alleged that the Operational Creditor has not disclosed any details and/or documents as to whether they, being the supplier of the goods, have paid the applicable GST on the Invoices raised on the Corporate Debtor to the concerned authority or not. We have also examined the documents placed before us and find that no record has been annexed to the application or in the rejoinder filed by the Operational Creditor, substantiating payment of GST to the Government. Hence, if we deduct the GST amount mentioned in the invoices at the rate of 18% from the total amount, then the net amount due after deducting GST, would become of Rs. 82,13,115/-

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which is less than the threshold financial limit as prescribed under Section 4 of the I&B Code, 2016 to file an application under Section 9 of the Code.

- 22.** Further, The Applicant has claimed the Date of Default on 13.07.2019 and this Application has been filed on 06.04.2022. It is evident that the Operational Creditor had supplied materials worth a sum of Rs. 1,11,75,564/- only between the period from 29.05.2019 to 31.07.2019 and out of the aforesaid amount, the Corporate Debtor has made part payment of Rs. 11,46,634/- on various occasions and the last payment was made on 30.11.2021. For the purpose of determining, whether the claims are time-barred or not, we find that there are serious challenges regarding the mode of payment, i.e., whether the payment is made 'invoice-wise' basis or on 'ad-hoc' basis. Further, this is fundamental to decide whether Section 59 or Section 60 of the Indian Contract Act, 1872 applies and accordingly the time-bar aspect. At this juncture, it would be appropriate to go through Section 59 and Section 60 of the Contract Act, 1872, which are reproduced in verbatim as below:

**Section 59: Application of payment where debt to be discharged is indicated.** — *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.*

**Section 60: Application of payment where debt to be discharged is not indicated.** — *Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its*

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*recovery is or is not barred by the law in force for the time  
being as to the limitation of suits.*

- 23.** In the absence of specific averments to this effect, we are not able to determine whether Section 59 or Section 60 of the Contract Act, 1872 would be applicable, as this is relevant to decide the point of limitation particularly when the invoices are of 2019.
- 24.** Hence, in terms of forgoing discussions, we don't have any hesitation to **dismiss** the application filed by the Operational Creditor. No Costs.
- 25.** An urgent certified copy of this order, if applied for with the Registry, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind  
Member (Technical)**

**Bidisha Banerjee  
Member (Technical)**

**This Order is signed on the January 12, 2024.**

Bose, R. K. [LRA]