

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 1004/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Progility Technologies Pvt. Ltd.

Unit no. 1001, 10th Floor, Lodha Supremus, Wing- E, I Think Techno Campus, Kanjumarg (East),
Mumbai-400042
(Maharashtra)

.....Petitioner/Operational Creditor

Vs

Shapoorji Pallonji and Company Pvt. Ltd.

70 Nagindas, Master Road, Fort,
Mumbai-400023, Maharashtra

.....Corporate Debtor

Order Dated: 22.12.2023

Coram:

Reeta Kohli, Hon'ble Member (Judicial)
Madhu Sinha, Hon'ble Member(Technical)

Appearances in Physical Mode:

For the Petitioner: Adv. Anshul Kochar (PH)

For the Corporate Debtor: Adv. Rahul Chary (PH)

ORDER

Per: Madhu Sinha, Member (Technical)

This Company Petition is filed by **Progility Technologies Pvt. Ltd.** (hereinafter referred as “**the Petitioner/Operational Creditor**”) on 19.09.2022 seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) against **Shapoorji Pallonji and Company Pvt. Ltd.** (hereinafter called “**Corporate Debtor**”) by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “**Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs. 1,13,59,786/- (Rs. 88,27,012 on account of principal outstanding as on 30.08.2022 plus Rs. 25,32,773/- on account of interest on the aforementioned amount at the rate of 20% p.a. as on 30.08.2022).**

Brief Facts of the Case and Submission by the Petitioner:-

1. The present petition has been preferred by the Petitioner submitting that the claim amount of Rs. 88,27,012/- along with the interest @ 20 % making the total claim as Rs. 1,13,59,786/- is due and payable to it by the Corporate Debtor. The date of default in the present case is **06.05.2021**.
2. The case of the Petitioner is that the Corporate Debtor had failed to pay eleven invoices raised by the Operational Creditor under the Purchase Order No. 4200402193 dated 20.09.2019 and later revised on 18.12.2020. The said Purchase Order was issued by the Corporate Debtor for supply of network component for their project at IITGNL Noida to Operational Creditor.

3. In addition to the Amended Purchase Order, an independent and totally separate work order being Work Order No. 3700082979 dated 17.03.2021 was also issued by the Corporate Debtor for installation of their networking component for the project.
4. The details of the eleven invoices as per the terms and conditions provided under the Amended Purchase Order dated 18.12.2020 are as follows:

- Invoice No. 2722100007 dated 18.04.2021 for Rs. 13,73,340/-
- Invoice No. 2722100060 dated 30.04.2021 for Rs. 11,07,312/-
- Invoice No. 2722100067 dated 30.04.2021 for Rs. 14,04,393/-
- Invoice No. 2722100128 dated 24.05.2021 for Rs. 4,45,979/-
- Invoice No. 2722100132 dated 25.05.2021 for Rs. 5,17,360/-
- Invoice No. 2722100150 dated 27.05.2021 for Rs. 59,76,762/-
- Invoice No. 2722100448 dated 31.05.2021 for Rs. 12,328/-
- Invoice No. 2722100192 dated 31.05.2021 for Rs. 1,10,62,601/-
- Invoice No. 2722100440 dated 31.05.2021 for Rs. 2,72,215/-
- Invoice No. 2722102142 dated 29.12.2021 for Rs. 4,46,748/-

- Invoice no. 2722102274 dated 13.01.2022 for Rs. 20,231/-
5. Since the Corporate Debtor made late and irregular payments of all the eleven invoices raised by the Operational Creditor therefore interest at the rate of 20% per annum on the amounts raised under all eleven invoices raised between 18.04.2021 till 13.01.2022 was levied by the Operational Creditor in consonance with the terms of the Invoices.
 6. The Operational Creditor had sent various emails dated 08.07.2021, 20.07.2021, 11.10.2021 and 09.02.2022 to the Corporate Debtor for making payment but in vain.
 7. It is the case of the Operational Creditor that the liability for an amount of Rs 1,50,00,000/- was admitted by the Corporate Debtor vide its email dated 09.02.2022.
 8. On 22.09.2021, 24.12.2021 and 22.02.2022, the Corporate Debtor further released a payment of Rs. 45,00,000, 20,00,000 and 20,00,000/- towards the Amended Purchase Order.
 9. As no payments towards the Default Amount were forthcoming the Operational Creditor sent a Demand Notice dated 30.08.2022 under in Form 3 Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Corporate Debtor vide its reply dated 09.09.2022, denied any liability towards the Operational Creditor and hence this petition.

Submissions by the Corporate Debtor:

1. In response to the contentions of the Petitioner, the Counsel for the Corporate Debtor vehemently argued that the present petition is not maintainable on various grounds, the first being existence of a pre-existing dispute. The existence of a pre-existing dispute is evident from the following:

- The Corporate Debtor vide emails dated 07.07.22, 22.07.22, 29.03.22 and 06.01.22 intimated the Operational Creditor about the delayed and incomplete work by the Operational Creditor.
 - Furthermore, emails were sent by the Corporate Debtor on 17.03.22, 14.03.22, 07.03.22, 02.03.22, 27.11.21, 12.07.21, 30.07.21 and 09.07.21 regarding non supply of goods and manpower not reaching the site.
 - The emails dated 08.12.22 and 20.09.22 categorically intimating the Operational creditor about rejection of invoice on account of non-supply and installation of license key.
 - Further, the Respondent is entitled to liquidated damages as the work was not completed within the contractually stipulated period of 10 weeks. The Work Order stipulates that the Respondent shall be entitled to liquidated damages of 0.5% of the total contract value for every week of delay, subject to a cap of 5% of the total contract value.
2. The second contention of the Corporate Debtor pertains to the fact that claimed amounts are not due. The Petitioner has also claimed an amount of Rs. 15,34,446/- as being due and payable towards the 20% slab payable after successful installation. However, the Petitioner has not raised any invoice pertaining to the installation component of the Work Order, which is clear from the following:
- The Purchase Order in its Scope of Work clearly states that “Separate Work Order will be issued for the installation part”. Each and every invoice bears the reference to the Purchase Order under which it was issued. Each and every invoice states it relates only to Purchase Order No. 4200402193. Indeed, a Work Order bearing reference number 3700082979 was issued for installation.

- Therefore, it is clear that the Petitioner has not raised any invoice against installation at all, since any such invoice would have to be raised under Work Order No. 3700082979. Admittedly, no such invoice has been raised under that Work Order, and therefore any purported claim towards installation cannot form a part of the present petition. The Petitioner has also sought to rely upon a purported admission of liability in the form of an email dated 09.02.2022. However, this is far from an admission. Reference may be had to the trailing email on the same page dated 11.01.2022 in which the Petitioner itself notes that only an amount of Rs. 88 lakhs is claimed as outstanding by them. However, the purported admission relates to an amount of Rs. 150 lakhs. This is because it is not an admission at all but is in relation to a larger set of dealings between the Petitioner and the Respondent. Furthermore, there were disputes between the parties both before as well as after this email and therefore it cannot be taken to be an unqualified admission of liability, as is sought to be portrayed by the Petitioner.
3. The third contention raised by the Corporate Debtor is that the levy of interest at the rate of 20% is not mentioned in the Purchase Order and is only in unilateral terms of invoices which is not applicable to the Corporate Debtor. The Corporate Debtor relied on several judgements in this regard namely:-
- The High Court of Karnataka in the case of **Jyoti Limited v. Fouress Limited [(2001) 3 Comp LJ 413]** has clearly held that a clause for interest contained in an invoice is a unilateral act which cannot bind the counter-party in the absence of a clear agreement or acknowledgment.

- The Cuttack Bench of this Hon'ble Tribunal has reiterated this principle in the case of **Tirupati Conductors Pvt Ltd v. SR Associates Infrastructure Pvt Ltd [CP(IB)/6/2021]** in its judgment dated 25.10.2022 and held that interest unilaterally imposed through an invoice cannot bind the counter-party without an express agreement {see para 9 of judgment}.
- The Kolkata Bench of this Hon'ble Tribunal has reiterated this principle in the case of **Bajrang Steel Trading Company (India) Pvt Ltd v. Ramkrishna Engineering Pvt Ltd [CP(IB)/48/KB/2022]** in its judgment dated 03.05.2023 and held that interest unilaterally imposed through an invoice cannot bind the counter-party without an express agreement.
- Similarly, the Bengaluru Bench of this Hon'ble Tribunal has also ruled against unilateral imposition of interest in the case of **JR Metal Chennai Ltd v. NUDPL Ventures Pvt Ltd [CP(IB) No. 32 of 2022]** by judgment dated 07.02.2023.
- Judgment of NCLAT in the case of **Amsons Communication Pvt Ltd v. ATS Estates Pvt Ltd [Company Appeal (AT) (Ins) No. 540 of 2020]** through judgment dated 17.01.2022 {see para 13 of judgment} wherein it has clearly been held that if interest is not agreed upon then it cannot form a part of "operational debt".

If interest component of the amount of Rs. 25,32,773/- is removed from the entire default amount then the present petition will not meet the minimum monetary jurisdiction requirement of 1 crore of this Tribunal and hence deserves to be dismissed on the ground that it is barred under Section 4 of the Code.

4. The Corporate Debtor further submitted that the Petitioner has not annexed an affidavit as required under section 9 (3) (b) of the Code. That provision requires a petitioner to supply an “affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt”. The Petitioner claims to have annexed such an affidavit, which can be found in the Petition. However, nowhere in this affidavit is the statement that the Petitioner has not received any notice from the Corporate Debtor relating to a dispute of the unpaid operational debt. Indeed, the affidavit could not contain such an averment since there were numerous pre-existing disputes between the parties, as narrated above. Thus since the petition is incomplete it deserves to be dismissed.

Findings

1. The very first contention of the Corporate Debtor relates to the existence of a pre-existing dispute. On close perusal of emails dated 17.03.22, 14.03.22, 07.03.22, 02.03.22, 27.11.21, 12.07.21, 30.07.21 and 09.07.21 it can be categorically established that the Corporate Debtor had raised issues regarding the quality of goods and delayed/non supply of goods which are very much covered by the Amended Purchase Order dated 18.12.2020. These emails were sent much prior to the issuance of the Demand Notice dated 30.08.2022 by the Operational Creditor. Therefore, the occurrence of pre-existing dispute stands established.
2. The email dated 09.02.2022 sent by the Corporate Debtor to the Operational Creditor admitting a liability of Rs. 150 lakhs does not mention any reference of the Amended Purchase Order and hence this bench is of the view that it cannot be expressly

categorised as an admittance of debt for the purpose of this Petition.

3. In order to address the contention of the Corporate Debtor that the interest component to the default amount cannot be claimed by the Operational Creditor we closely perused the documentary evidence placed on record and found that the interest component of the default amount was not levied in consonance with the terms of the Amended Purchase Order dated 18.12.2020. Furthermore, no payment was made by the Corporate Debtor in any manner whatsoever towards the interest component and also they had not accepted the levy of the interest component in any implied or express manner. Thus the acceptance of the Corporate debtor toward the interest component is not proved. It is pertinent to note that without the interest component being added to the Default Amount the present petition does not satisfy the monetary threshold of this Tribunal in terms of section 4 of the Code.
4. The Bench has also taken into consideration that the Corporate Debtor is a solvent company and going concern and the Hon'ble Supreme Court in **M/s S.S. Engineers v. Hindustan Petroleum Corporation Ltd. & Ors. (173 SCL 477 (SC))** held that it is not the object of IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an Operational Creditor.
5. Therefore, in view of the occurrence of pre-existing dispute, non-admittance of liability by the Corporate Debtor, non-satisfaction of monetary threshold of this Hon'ble Tribunal, solvency of the Corporate Debtor and cited case laws we are of the considered opinion that the present petition is not fit to be admitted.

6. In conclusion thereof, C.P. No. 1004 of 2022 is rejected.

Sd/-

**MADHU SINHA
MEMBER (TECHNICAL)**

Sd/-

**REETA KOHLI
MEMBER (JUDICIAL)**

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