In the National Company Law Tribunal
Kolkata Bench, (Court-II), Kolkata

CP(IB) No. 284/(KB) /2021

An Application under Section 9 of Insolvency and Bankruptcy Code, 2016;

In the Matter of:

Sri Dinesh Kumar Bihani

… Applicant / Operational Creditor

And

Vijeta Projects & Infrastructures Limited

….Respondent / Corporate Debtor

Date of Hearing: 03.10.2023

Date of Pronouncement of order: 17.11. 2023

Coram:

Smt Bidisha Banerjee	:	**Member (Judicial)**
Shri Arvind Devanathan	:	**Member (Technical)**

Counsel appeared physically / through video Conferencing

1. Ms. Meenakshi Manot, Adv.] For the Operational Creditor / Applicant
2. Mr. Abhishek Jain, Adv.
3. Mr. Piyush Jain, Adv.

1. Mr. Sourojit Dasgupta, Adv.] For the Corporate Debtor /Respondent
2. Ms. Amrita Panja, Adv.

ORDER

Per Bidisha Banerjee, Member (Judicial):

1. Heard the Counsel on both sides.
2. This is an application preferred under Section 9 of the IBC, 2016 by the Operational Creditor / Applicant Sri Dinesh Kumar Bihani seeking to initiate CIRP against the Corporate Debtor / Respondent namely Vijeta Projects & Infrastructures Limited.
3. **Brief facts of the case:**
   a. The Operational Creditor has submitted that it is engaged in the business of wholesaling and marketing of TMT Bars, TMT Coils, G.P. Coils etc. The

Corporate Debtor is inter alia, engaged in business of civil engineering and construction of irrigation and water supply projects, including dams, barrages, pump house and canals, transportation projects, including roads, railways, bridges and tunnels etc.

b. For the purpose of executing projects at Jamui, Mazaffarpur etc. (hereinafter referred to as "Projects Sites") the Corporate Debtor made verbal enquiries to the Operational Creditor for supply of different varieties of TMT Bar and TMT Coil (hereinafter referred to as the "said goods").

c. That pursuant to such enquiry made by the Corporate Debtor, the Operational Creditor made over quotations and the Corporate Debtor agreed to the terms and conditions towards the supply of the said goods placed orders to the Operational Creditor for supply. Pursuant to such order, the Operational Creditor supplied the goods. The Corporate Debtor placed further orders between May, 2018 to June, 2018 and the Operational Creditor supplied the goods in accordance with the terms and conditions agreed upon between the parties.

d. The Corporate Debtor was never dissatisfied with the quality and quantity and specifications of the goods delivered. That Operational Creditor duly raised invoices for the supplied goods during the period 21.05.2018 to 13.06.2018. The Invoices provided for payment of interests @ 24% Per Annam and further interests on default.

e. The Operational Creditor requested the Corporate Debtor for release of payments due towards the supply, the parties maintained a running a continuous account. The Corporate Debtor made payments that the

Corporate Debtor made payment of 20 lakhs on 17.07.2019 and thereafter failed to make payments towards the sums due and payable to the Operational Creditor.

f. That the Operational Creditor through its Advocate issued notice under Section 8 of the IBC on 14.04.2021, seeking upon the Corporate Debtor to make payment within 10 (ten) days of receipts of the said notice failing which Corporate Insolvency Resolution Process would be initiated. The said notice was duly received by the Corporate Debtor on 20.04.2021. But the Corporate Debtor neither replied nor made payments thereto.

g. That the total amount of due is 11,41,48,734/- (Rs. 85,25,619/- on account of principal and Rs. 56,23,115/- on account of agreed interst @ 24% p.a. calculated from calculated upto 31st March, 2021.).

4. In terms of part of IV of the Petition, the total amount of debt is Rs. 11,41,48,734/- (Rs. 85,25,619/- plus Rs. 56,23,115/-) calculated upto 31.03.2021. the interest has been calculated upto 31.03.2021 presumably covering the 10(A) period which starts from 25.03.2020 upto 24.03.2021.

5. Ld. Counsel for the Operational Creditor Ms. Meenakshi Manot at the time of hearing would submit that post filing of this application, the Corporate Debtor has paid the entire amount towards principal which is Rs. 85,25,619/- and the amount in default is the balance of Rs. 56,23,115/- towards interest.

6. Ld. Counsel for the the Coprporate Debtor submits that the Corporate Debtor has expressed its inability to made payments. That default is towards admittedly interest component. Further, the interest component of Rs. 56,23,115/- major part of which accrued during the 10(A) period.

7. Ld. Counsel Mr. Sourojit Dasgupta appearing for the Corporate Debtor has fairly conceded to the inability of his client to make any further payment towards the interests component.

8. We have heard the Ld. Counsel for the parties and considered their rival contentions.

9. Discernible facts:

a. The date of default is admittedly 31.07.2018 and default if any is towards as operational debt.

b. Last date of payment received by Creditor is 17.07.2019 which constitutes an acknowledgment of debt and extends the period of limitation to a further period of three years hence. (Article 137 of the Limitation Act).

c. **However, in Hydro Care Fluid Power Systems vs. Larsen & Toubro Limited**, the Hon'ble NCLAT held that the "*whole claim could not be said to be within limitation period where the acknowledgement of debt was made for only a part of the claim*."

This Petition filed in September, 2021 is thus within the prescribed limitation period.

d. However, the default as of now is only towards the interest component of Rs. 56,23,115/- which is below the threshold of one crore.

e. It is also evident that the major portion of the interest component accrued during 10A period as the CIRP suspension period (25.03.2020 to 25.03.2021).

f. It is evident that no written contract exists between the parties in regard to levying of interest @ 24% in case of any default in making payment by the Corporate Debtor. Whether, the said rate of interest could be levied is yet another question that requires to be answered.

g. The limitation therefore starts running thereafter i.e. from 18.07.2019 and in terms three years hence would presumably fall on 17.07.2022.

h. In Narayan Mangal Vs. Vatsalya Builders & Developers Pvt. Ltd. Hon'ble NCLAT held that "*interest payment that accrued during CIRP suspension period can be clubbed to cross the threshold of 1 (one) Crore."*

i. Wanbury Ltd. Vs. Panacea Biotech Ltd. (2017) inclaw.in 66 NCLT: It was held that "*the Adjudicating Authority found that in the definition of the term Operational Debt under 5(21) the word interest has not been mentioned. An appeal filed against this order was dismissed due to settlement, (2017) ibclaw.in 135 NCLAT."*

j. In Krishna Enterprises Vs. Gammon India Ltd. (2018) ibclaw.in 46 NCLAT: It was held that "*if the principal amount has already been paid and as per agreement no interest was payable, the applications under Section 9 on the basis of claims for entitlement of interest, were not maintainable. If for delayed payment appellant(s) claim any interest, it will be open to them to more before a court of competent jurisdiction, but initiation of Corporate Insolvency Resolution Process is not the answer*."

k. In Mr. Prashat Agarwal Vs. Vikash Parasrampuria (2022) ibclaw.in 509 NCLAT: It was held that since, "*interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for "right to payment" (Section 3(6) IBC) and therefore will form part of "debt" (Section 3(11) IBC). The total amount for maintainability of claim will include both* *principal debt amount as well as interest on delayed amount which was clearly stipulated in the invoice itself."*

l. In M/s. Plastofab Vs. Electroteknica Switchgears Pvt. Ltd. (2022) inibclaw.in 358 NCLT: It was held that "*in case of Operational Debts, the interest component cannot be clubbed with the principal debt to arrive at the minimum pecuniary threshold of Rs. 1 Crore."*

m. In M/s. Ingram Micro India Pvt. Ltd. Vs. M/s. Fbonline Tradking Pvt. Ltd. (2022)ibclaw.in679 NCLT: It was held that "*the interest to can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt or part of it."*

n. In Khatunaresh Impex Pvt. Ltd. Vs. Jindal (India) Ltd. (2022) ibclaw.in 950 NCLT: It was held that "*in absence of any contract / agreement for payment of interest between the Operational Creditor and Corporate Debtor, interest amount cannot be added to only to cross the threshold limit."*

o. In Gandhar Oil Refinery (India) Ltd. Vs. City Oil Pvt. Ltd. (2023) ibclaw.in 168 NCLT: It was held 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 iwth the principal amount due to hold the interest as a 'debt' so as crossover the threshold amount of 1 Crore."*

p. In North West Carrying Company, LLP Vs. Metro Cash and Carry India Pvt. Ltd. (2023) ibclaw.in 237 NCLT: It was held that "*in Order to club* *other charges such as interest, legal charges, balance cost of amortization and / or notice period rent with principal amount to meet threshold limit u/s 4 of IBC express stipulation has to be incorporated specifically in the agreement, the purchase order or the invoice and in the absence of the same, neither interest nor any other charges can be clubbed with the principal amount."*

10. In our considered opinion when the principal amount fell due before the Section 10(A) bar came into play. The interests that accrued during the 10(A) bar can be computed towards the principal to cross the threshold of one crore, but the principal amount being already repaid and the Operational Creditor having accepted such payment without demur can neither the interest can be clubbed to cross threshold limit of one crore nor their Petition can be maintained only for non payment of interest, when its way below the minimum threshold.
11. For the foregoing reasons, we would hold that the present application is liable to be rejected and accordingly this Petition is **rejected**.
12. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
13. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

Arvind Devanathan
Member (Technical)

Bidisha Banerjee,
Member (Judicial)

Signed on this the 17th day of November, 2023

M. Jana, PS