

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

I.A. (IBC) 1053/KB/2023

And

C.P. (IB) 83/KB/2023

*A petition 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:

M/s Faith Mercantile Private Limited [CIN:U51909DL2002PTC113653],

..... *Operational Creditor*

-versus-

M/s Raja Udyog Private Limited [CIN: U15412WB2001PTC092881]

..... *Corporate Debtor*

Date of Pronouncement of the order: 24.04.2024

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Operational Creditor:

Mr. Ashutosh Gupta, Adv.

Mr.Gaurav rana, Adv.

For the Corporate Debtor:.

Ms. Manju Bhuteria, Adv.

Mr.Tanmoy Sett, Adv.

Mr. Durgesh Kumar Jha, Adv.

ORDER

Per: Coram

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **M/s Faith Mercantile Private Limited**, hereinafter referred to as “*Operational Creditor*” or “*Petitioner*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **M/s Raja Udyog Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 12.02.2001. The authorized share-capital of the company ₹51,50,00,000/- and the paid-up share capital of the company is ₹29,66,25,750/-.
4. The total amount claimed to be in due to the Operational Creditor, is Rs. 1,02,74,608/-. The date of defaults are mentioned to be various dates from 01.10.2021 to 31.01.2023.
5. The Operational Creditor has relied on the various documents in support of its claims, including:
 - a) Invoices along with payment received and outstanding dues, annexed as **Annexure A-6**;
 - b) Emails for demanding pending dues, annexed as **Annexure A-8**;
 - c) Demand Notice in Form 3; annexed as **Annexure A-9**.
6. **Submissions on behalf of the Operational Creditor:**
 - 6.1 The case of the Operational Creditor is that in May.2015, the Corporate Debtor approached the Operational Creditor for the purchase of Sugar used for manufacturing. The Operational Creditor supplied sugar to the Corporate Debtor for a total amount of Rs 7,79,57,799/-, out of which a sum of Rs 7,08,13,945/- was repaid by the Corporate Debtor, and a sum of Rs 71,43,854/- is still due and

- payable by the Corporate Debtor to the Operational Creditor. The payments from their side became irregular since Jan 2021.
- 6.2 The Operational Creditor has charged interest Rs 31,30,754/- at the rate of 2% per month i.e. 24% per annum on the delayed payment, due to irregular payments made by the Corporate Debtor according to agreed terms mentioned in invoices raised by the Operational Creditor upon the Corporate Debtor.
- 6.3 The Corporate debtor has issued various purchase orders¹ to the Operational Creditor from May 2015 to April 2022 seeking to avail the supplies of various materials mentioned aforesaid and thereupon, the Operational Creditor in furtherance of the purchase orders had supplied the requested materials to Corporate Debtor within the agreed time by understanding the essence of timely delivery of required materials by the Corporate Debtor.
- 6.4 Immediately after supplying of materials, the Operational Creditor used to raise its invoices², in accordance to the terms and conditions agreed between the parties which unequivocally bind the Corporate Debtor to make the timely payment of due amounts and Interest on delay payments.
- 6.5 In terms of the purchase orders issued by the corporate debtor from time to time it sought to avail 30 days credit period for risking the payments to the Operational creditor. Therefore, in terms of the invoices so raised, the payment was to be made by the Corporate debtor within 30 days of the invoice and beyond 30 days, Interest will be charged at 24% PA which was under the provisions of supply of goods and services and the same fell due in respect of the material supplied to the Corporate Debtor.
- 6.6 Since the Corporate Debtor made payments beyond the agreed period, the Operational Creditor charged interest on delay payments as per stipulated rate of interest i.e 24% per annum.

¹Annexure A-5

²Annexure A-6 (Colly)

- 6.7 The operational creditor sent emails³ on various dates demanding the due amount with interest from the corporate Debtor and subsequently visited the office of the corporate debtor at Patparganj Industrial Area Delhi-92. The corporate debtor assured payment and issued post-dated checks which became dishonoured on the due date.
- 6.8 However, upon realising that the Corporate Debtor had no intention of payment of outstanding dues, the Operational Creditor served a Demand Notice⁴ dated 22.02.2023 under Section 8 of the Insolvency and Bankruptcy Code, 2016 seeking payment of outstanding dues of Rs. 1,02,74,608/- inclusive of interest from January 2021 to January 2023.

7 Submissions of the Corporate Debtor in I.A. (IBC) 1053/KB/2023:

- 7.1 The Corporate Debtor has submitted that the corporate debtor had been purchasing various raw materials, including sugar, from the operational creditor herein, since May, 2015. The Corporate Debtor made regular payments to the operational creditor without any delay or default. The Corporate Debtor is a creditable and a solvent company, and is being fraudulently and forcefully been dragged into Corporate Insolvency Resolution Process.
- 7.2 The corporate debtor never defaulted in making payments to the Operational Creditor, for its supplied goods. As such it was shocked to be served an application under section 9 of the Insolvency and Bankruptcy Code, 2016, alleging that the Corporate Debtor is liable to pay a sum of Rs.1,02,74,608/- to the Operational Creditor.
- 7.3 The operational creditor has alleged that an amount of Rs. 71,43,854/- fell due on account of unpaid supplies of goods and the remainder sum of Rs.31,30,754/- was due and payable on account of interest due to delayed payments. The instant petition has been filed in gross violation of section 4 of the Code.

³Annexure A-8

⁴Annexure A-8

- 7.4 Section 4 of the IBC, 2016, envisages that an application under Section 7 or 9 of the IBC, 2016, can be filed against the corporate debtor only when the minimum amount of such default is Rs.1,00,00,000/-. While fulfilling the threshold limit specified in Section 4 of the IBC, 2016, the quantum of interest cannot club with the principal amount in default.
- 7.5 There is no written agreement between the parties regarding payment of interest on delayed payment, if any. The alleged invoices upon which the operational creditor is seeking to rely upon are specifically denied by the corporate debtor. The corporate debtor denies the contents, veracity, validity en legality of the said purported invoices. It is stated that the purported invoices had not been acknowledged by the corporate debtor by any counter signature. The purported invoices had been raised at the whims of the operation creditor.
- 7.6 A credit bill or an invoice is a unilateral demand by the supplier, being the operational creditor herein, and is neither a bilateral agreement nor a promise by the purchaser, being the corporate debtor herein to pay such interest. Interest can be claimed on the basis of a provision in a bill or invoice, only if it is supported by a written agreement or a promise to pay interest.
- 7.7 The term ‘default’ refers to the term like non-payment of debt and debt becoming due and payable by the corporate debtor to its creditor. The term ‘debt’ means a liability or an obligation in respect of a claim of the corporate debtor to its creditor.
- 7.8 ‘Operational debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law and is payable to the Central Government or any State Government or any Local Authority. From the above definition of ‘operational debt’, it is evident that neither there is any provision nor there is any scope to include the interest to constitute as the operational debt.
- 7.9 The ledger statements enclosed with the Demand Notice by the operational creditor shows various transactions between the parties but does not show any

entries of interest which is paid or incurred at any point of time. It thus establishes that there was no understanding or agreement with regard to payment of any interest much the less at the rate of 24% per annum. Therefore, the demand notice and the said application under the provisions of the IBC is not maintainable, as the proceedings on behalf of the operational creditor are maintainable only when the default amount is more than Rs. 1,00,00,000/-.

- 7.10 Even the alleged emails annexed with the Demand Notice purportedly sent by the operational creditor to the corporate debtor do not show any claim of alleged interest to be payable by the operational creditor except the only purported email dated January 4, 2022 which clearly establishes that there was no agreement between the parties with regard to payment of interest on the sums allegedly due. The facts stated in the said application filed by the operational creditor are thus completely false and fabricated and the said application is liable to be dismissed on this short ground alone.

8 Analysis and Findings:

- 8.1 Heard the Ld. Counsel on behalf of the Operational Creditor and Ld. Counsel on behalf of the Corporate Debtor and perused the record.
- 8.2 It is noted that during the hearing on 09.10.2023, the Ld. Counsel appearing on behalf of the Corporate Debtor stated that the Corporate debtor did not want to file any Reply-Affidavit and requested that the demurrer application filed by the Corporate Debtor *i.e.* I.A.(IBC) 1053/KB/2023 be treated as the reply affidavit to the instant petition.
- 8.3 The Operational Creditor in its petition has claimed a total amount of Rs.1,02,74,608/- wherein the principal amount due is Rs.71,43,854/- and the interest component calculated @24% per annum amounts to Rs.31,30,754/-. It is of note that without clubbing such interest with the Principal amount, threshold as per Section 4 of the Code is not met. While the Operational Creditor has failed to bring forth any agreement between the parties which stipulates the charging of

interest in the event of delay or default in payment, the Operational Creditor has relied on the invoices issued by it in support of its claim.

- 8.4 The question that needs to be determined is whether the Operational Creditor should be allowed to club the interest component along with the principal amount claimed to be due, solely on the basis of such invoices.
- 8.5 In this regard, it is pertinent to note that the Hon'ble Karnataka High Court in the matter of *Jyothi Ltd. vs. Boving Fouress Ltd.*⁵, while deciding upon the issue of awarding interest as a 'debt' due along with principal amount, has held as follows:

“(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 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

⁵2000 SCC OnLine Kar 832

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.”
(Para 21)

8.6 Further, in ***Steel India v. Theme Developers Pvt. Ltd.***⁶, Hon’ble NCLAT observed that:

“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.”

8.7 In ***SS Polymers vs. Kanodia Technoplast Limited***⁷, the Ld. NCLT New Delhi bench has also held that :

“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.”

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

⁷ CP(IB)121/ND/2019

- 8.8 Furthermore, this Adjudicating Authority has in previously decided matters has held the view that for interest to be claimed as a part of the total debt due, the parties must have previously agreed to such levying of interest.
- 8.9 In ***Gandhar Oil Refinery (India) Limited v. City Oil Private Limited***⁸, this Adjudicating Authority has held as follows:

“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.”

- 8.10 In ***Chemico International Private Limited vs. Cygnet Industries Limited***⁹, this Adjudicating Authority has gone a step further to hold that :

“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

⁸ C.P. (IB) No. 150/KB/2021

⁹ CP (IB) No. 307/KB/2022

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.”

- 8.11 In the instant matter, it is seen that while the Operational Creditor has included the stipulation of the chargeable interest in the invoices, the ledger account of the Corporate Debtor in the books of the Operational Creditor for the period of 01.01.2021 to 11.02.2023 does not reflect such interest to be due. Additionally, from the emails¹⁰ issued by the Operational Creditor demanding the overdue payments, it can be seen that the said demands did not include any demand for interest. Such emails were sent from 09.02.2021 all the way upto 02.04.2022. It is only in the demand notice dated 22.02.2023 issued under section 8 of the Code that the Operational Creditor for the first time mentioned the interest component being due.
- 8.12 It is clear that the neither has the Operational Creditor ever made any claims towards payment of such interest, not has the Corporate Debtor acknowledged to such interest being due. As such, the stipulation in the invoices that interest will be chargeable upon delay in payment, by itself will not constitute a valid agreement/contract.
- 8.13 It is seen that the Operational Creditor has relied upon the decision of Hon’ble Bombay High Court in the matter of ***Jatin Koticha vs. VFC Industries Pvt. Ltd.***¹¹, wherein while discussing the validity of non-signed invoices as valid agreements, the Hon’ble High Court held that as follows:

“6. Now it is clear that there is no written contract signed by both the parties relied on by the plaintiff. It is not the requirement of the law that it should be a written contract signed by both the parties. What is necessary is that the suit should be based on a written contract. That, one can find in this case, in the form of invoices

¹⁰Annexure A-8

¹¹2007 SCC OnLine Bom 1092

which were raised on the defendants along with delivery of the goods in pursuance of each purchase order. The invoices, as stated above, contained the terms and conditions. There is a clear parole acceptance of the invoice on the part of the defendants. The defendants accepted delivery of the goods along with the invoice without any demur or suggestion that they do not accept any of the terms whether pertaining to the rate, price, quantity etc. It makes no difference therefore that the invoices are not signed by both the parties. I am of view that the invoices must be treated as a written contract and the suit based on such invoices is a suit based on the written contract.....

[...]

13. It was next contended on behalf of the defendants that there is no stipulation as to the interest in the contract. Having held that the written contract in this case are the invoices, it must be held that there is a stipulation for interest in view of the specific term in the invoice that interest at the rate of 21% p.a. will be charged on over due payments. Hence, the suit is decreed in the sum of Rs. 4,39,585/- i.e. the principal amount plus interest at the rate of 21% p.a. till the filing of the suit. The defendants are liable to pay future interest however at the rate of 18% per annum on the principal sum of Rs. 3,82,096/- from the date of filing of the suit till realisation and/or payment and costs. Decree be drawn up accordingly. Summons for judgment and the suit stands disposed of accordingly.”

- 8.14 However, the law laid down in ***Jatin Koticha*** (supra) does not apply to the instant matter wherein the conduct of the Operational Creditor, subsequent to issuance of such invoices, clearly contradicts stipulation therein. If anything, the conduct of the Operational Creditor i.e failure to mention the interest in the ledger and failure to claim the same in its demand letters ranging from 09.02.2021 upto 02.04.2022,

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indicates that lack of intent of the Operational Creditor in levying such interest and the waiver of right to do so. Further it cements the contention of the Corporate Debtor that the parties had no prior consensus with regards to levying of such interest.

- 8.15 In light of the aforesaid precedents, the fact and circumstances of the case, it is clear that in the instant matter, the interest component cannot be clubbed along with the principal amount due. As such, the amount payable by the Corporate Debtor is Rs.71,43,854/- i.e less than the minimum threshold of Rs, 1,00,00,000/-
- 8.16 C.P. (I.B) No. 83/KB/2023 is accordingly *rejected*. I.A. No. 1053/KB/2023 shall stand disposed of.
- 8.17 Needless to mention, the Petitioner is at liberty to pursue any other remedy available to them under any other law.
- 8.18 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)

Signed on this, the 24th day of April, 2024

SM(LRA)