

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**BENGALURU BENCH**  
**(Exercising powers of Adjudicating Authority under**  
**The Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No.212/BB/2022**  
**U/s. 9 of the Insolvency and Bankruptcy Code, 2016**  
**R/w Rule 6 of the Insolvency and Bankruptcy (Application to**  
**Adjudicating Authority) Rules, 2016**

**IN THE MATTER OF:**

**M/s Starworth Infrastructure & Construction Ltd,**

A Company incorporated under the  
Provisions of Companies Act 1956  
And having its registered office at  
#39, Ulsoor Road,  
Bangalore 560042

... **Petitioner/Operational Creditor**

**Versus**

**M/s. Ozone Realtors Pvt. Ltd,**

A Company registered under the provisions  
Of the Companies Act, 1956  
Having its registered office at  
38, Ulsoor Rd, Yellappa Garden,  
Bengaluru, Karnataka 560042.

... **Respondent/Corporate Debtor**

**Order delivered on: 31.01.2024**

**Coram:** Hon'ble Shri K Biswal, Member (Judicial)  
Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

**PRESENT:**

For the Petitioner : Shri. Anandarama with Ms. Nandita Das  
For the Respondent : Shri Perikal. K. Arjun

**ORDER**

**Per: Manoj Kumar Dubey, Member (Technical)**

1. The present petition is filed on 16.11.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC/Code**'), r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by M/s Starworth Infrastructure & Construction Ltd (for brevity '**Operational Creditor/Petitioner/OC**') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s Ozone Realtors Pvt Ltd (for brevity '**Corporate Debtor/Respondent/CD**') on the ground that the CD has committed a default for a total outstanding amount of Rs.1,38,50,178/- (Rupees One Crore Thirty Eight Fifty Thousand One Hundred and Seventy Eight Only) being the principal and interest @ 24% as per the provisions of MSME Act to be paid to the OC/Petitioner.
  
2. Brief facts of the case which are relevant to the issue in question and as narrated by the Petitioner are as follows:
  - i. The Corporate Debtor had engaged the services of the Operational Creditor for civil and finishing works in the project, Ozone Polestar at Nagavara, Bengaluru vide Letter of Award/Work Order dt.07.08.2020 for a sum of Rs.32,50,85,498/-. Subsequently, the contract sum was revised on 23.06.2021 to Rs.33,50,76,469/-. The OC raised the following invoices which have also been mentioned in Part IV Form No. 5:
    - a) Tax Invoice no - SICL/KA/20-21 dt.22.12.2020 for Rs.31,16,188/-
    - b) Tax Invoice no - SICL/KA/20-21/134 dt.06.02.2021 for Rs.27,32,317/-
    - c) Tax Invoice no.- SICL/KA/21-22/27 dt.17.06.2021 for Rs.31,04,969/-
    - d) Tax Invoice No- SICL/KA/21-22/35 dr.9.07.2021 for Rs.25,35,714/-
    - e) Tax Invoice No-SICL/KA/21-22/105 dt.28.10.2021for Rs.1,30,942/-
    - f) Tax Invoice no-SICA/KA/21-22/177 dt.15.02.2022 for Rs.59,00,000/-
  - ii. After reconciliation, the total amount due to be paid by the CD was worked out to Rs.1,38,50,178/- along with the interest of 24% as per the MSME Act from the date the amount fell due till the date of payment. Additionally, vide email dt.20.12.2021 sent by Mr. Bhaskaran Group CEO of the CD, the respondent has admitted its liability of outstanding dues. The CD failed to pay the amount pursuant to which the OC issued the Notices dt.27.04.2022 in Form No. 3 & Form No. 4 as per Section 8 of the Code, demanding payment of amount in

default i.e. Rs.1,38,50,178/- along with interest. In response, the CD has issued a reply by email dt.09.05.2022 stating that they need not pay the amount demanded.

3. It is submitted that the Petitioner has preferred the instant petition due to the failure on the part of the CD to pay the debt amount due to the petitioner despite several requests and demands.
4. The Respondent/Corporate Debtor vide Diary No. 2124 has filed the statement of objection on 18.04.2023 wherein the CD primarily contends that the debt amount stated to be at Rs.1,38,50,178/- owed to the Petitioner does not meet the threshold requirement of Section 4 of the Code and there is a pre-existing dispute pertaining to the operational debt between the parties i.e., the proceedings under Section 138 of the Negotiable Instrument Act.
5. Further, the CD has also filed the Written Submissions on 04.12.2023 vide Diary no. 6050 and Additional Written Submissions vide Diary dt.6562 on 29.12.2023 which are similar to each other. The main contention in the Written Submissions are the following:
  - a) The Date of Default as per the amended Petition is 22.12.2020, which falls in the period specified under the provisions of Section 10A of the Code, 2016 and therefore is liable to be dismissed. Moreover, the first two Invoices are specifically dated 22.12.2020 and 06.02.2021 and therefore are specifically hit by the provisions of Section 10A of the Code and should not be considered for the purpose of this Petition u/s 9 of the I&B Code, 2016.
  - b) There are pre-existing disputes on account of the arbitration proceeding invoked vide Arbitration Notice dated 14.12.2023. Further, there is another application filed by the Petitioner before the District Legal Services Authority, which is in respect of the Petitioner's Invoices.
  - c) The Invoice for Rs.59,00,000/-, being the last Invoice, related to "idle charges" for the Work Order No.1 dated 22.09.2017. This work was already completed and No Claim Certificate was issued on 13.06.2019 by the Petitioner. Therefore, the same cannot be considered with the other Invoices which are related to Work Order No.2. On exclusion of the same, the threshold requirement is not fulfilled.
  - d) If the mobilisation advance of Rs. 35,00,000/- paid to the Petitioner at the time of issuance of Work Order No.2 is deducted from the last two Invoice Nos. RA-04 and RA-05, again the threshold requirement will not be fulfilled.
  - e) The Petitioner has also added interest wherein there is no Agreement for charging of interest and no mention of the same in either the Work Order or the Invoices, therefore, the

interest cannot be added for fulfilling the threshold requirement.

6. This Tribunal vide Order dt.05.06.2023 observed that in Part IV Column No.2 of Form No.5 filed with the petition, the Petitioner has not stated the specific date of default. In response to the same, the Petitioner filed revised Form No.5 vide diary no.3119 dt.14.06.2023. Vide order dt.26.09.2023 this Tribunal noted that the date of default under the amended Form No.5 filed by the Petitioner is mentioned as 28.12.2020 which falls under the period specified by Section 10A of IBC. Thus, the petitioner was directed to file an explanation which was filed on 03.10.2023.
7. The Petitioner in the memo dt.03.10.2023 contends the amount in default is occasioned on account of the failure of the CD to make payment in respect of 6 invoices and the date of default in respect of each invoice is as under:

Sl.No.	Invoice	Date of Default
a	Invoice No-SICL/KA/20-21 dt22.12.2020 (Invoice submission date 8.12.2020)	<b>28.12.2020</b>
b	Invoice No-SICLKA/20-21/134 dt6.2.2021	<b>26.02.2021</b>
c	Invoice No-SICL/KA/21-22/27 dt17.06.2021	<b>07.07.2021</b>
d	Invoice No-SICL/KA/21-22/35 dt.9.07.2021	<b>29.07.2021</b>
e	Invoice No-SICL/KA/21-22/105 dt.28.10.2021	<b>18.11.2021</b>
f	Invoice No-SICL/KA21/177 dt.15.02.2022	<b>07.03.2022</b>

8. It was further submitted that *“aforesaid date of default has been calculated on the basis of clause 4.3 of the LOA/Work Order dt.07.08.2020 which provides that 75% of the bill value shall be released within 20 days of submission of bill. Without prejudice it is submitted that only bills Sl.No (a) and (b) come within the period stipulated under section 10A of IBC, 2016. The total amount in default in respect of the other bills namely bills at Sl.no. (c) to (f) supra is above the threshold limit of Rs.1crores. Thus, the principal amount in default even after excluding the period under Section 10A is above the threshold limit. Further in respect of the aforesaid 4 bills falling outside the scope of Section 10A, the CD is liable to pay in an amount of Rs.25,87,249 as on 30.09.2022.”* Thus, the Petitioner has now claimed different dates of default for each of the six invoices; whereas in Form no.5 filed on 14.06.2023 the same was stated to be 28.12.2020 in respect of the Petition.
9. In the written submissions filed by the Petitioner on 27.12.2023, it is stated that the contention of the Respondent that the mobilisation

advance should be deducted from the last two Invoices and not the first two Invoices is misconceived. Referring to the earlier correspondences, it is claimed that the mobilisation advance has to be adjusted against the first two Invoices only. It is further stated that the Invoices for “idle charges” amounting to Rs. 59,00,000/- is related to Work Order No.2 only which was also admitted by the Respondent in the e-mail dated 20.12.2021 filed at Page 91 of the Company Petition. In this e-mail, the period up to August, 2021 was mentioned for the “idle charges” whereas Work Order No.1 was for the period up to March, 2019 only. Finally, it was contended that the Corporate Debtor has admitted its liability vide e-mail dated 20.12.2021 and also issued a Cheque towards first instalment, which was dishonoured due to insufficiency of the funds.

10. We have considered the submissions and the arguments given by the respective Parties along with the documents on record.
11. As per Part-IV of Form-5, the amount of debt in default was Rs.1,38,50,178. The Form-3 accompanied with the Notice u/s 8 of the Code gives the list of the Invoices along with the balance due amount in respect of each of the Invoices so as to arrive at this figure of Rs.1,38,50,178/-, which is reproduced below for ready reference:

Date	Tax Invoice No.	Total Bill Amount (Rs)	Adhoc Due Date	Adhoc Due Amount (Rs)	Final Due Date	Final Due Amount (Rs)	Total Receivable (Rs)
22.12.2020	SICL/KA/20-21/144	31,16,187	11.01.2021	23,07,431	27.01.2021	7,69,144	30,76,574
06.02.2021	SICL/KA/20-21/134	27,32,317	26.02.2021	20,23,188	24.02.2021	6,47,396	26,97,584
17.06.2021	SICL/KA21-22/27	31,04,969	07.07.2021	22,89,257	27.03.2021	7,63,086	30,52,342
09.07.2021	SICL/KA/21-22/35	25,35,714	29.07.2021	18,69,552	27.03.2021	6,23,184	24,92,736
28.10.2021	SICL/KA/21-22/105	1,30,942	17.11.2021	98,207	17.12.2021	32,736	1,30,942
15.02.2022	SICL/KA/21-22/177	59,00,000			15.02.2022	24,00,000	24,00,000
		1,75,20,129		85,87,634		52,62,545	1,38,50,178
						Interest @ 24%	33,24,043
						<b>Total: INR</b>	<b>1,71,74,221</b>

12. However, the above pleadings clearly establish the fact that the first two Invoices are dated 22.12.2020 and 06.12.2021 and the date of default corresponding to these Invoices as explained by the Petitioner clearly fall under the excluded period u/s 10A of the Code. Therefore, the admission of the Petition will have to be decided on the basis of the last four Invoices which are dated 17.06.2021, 09.07.2021, 28.10.2021 and 15.02.2022, the date of defaults for which as indicated above are

after the specified period u/s 10A of the Code has expired. The total amount of default as per Form-5 filed with the Petition as well as the Form-3 enclosed with the Demand Notice u/s 8 of the Code is Rs. 1,38,50,178/-. On account of exclusion of the first two Invoices as stated above, the corresponding amount which is outstanding, being Rs. 30,76,574/- &Rs. 26,97,584/- only totalling to Rs. 57,74,158/- are to be excluded. Therefore, the remaining amount of the default remains at only Rs. 80,76,020/- out of the Principal amounts of the Invoices.

13. It has rightly been contended by the Respondent-Corporate Debtor that there is no Agreement for charging of interest pertaining to the outstanding amount and the same has not been mentioned either in the Work Order or in the Invoices. Therefore in such a case, no interest can be allowed to be added to the amount of invoice of Rs. 80,76,020/- for which the Respondent has also referred to various Judgments mentioned in the pleading. Further, the decision of *AVI Polymers Limited v. Hindustan Cables Limited, 2018 SCC OnLine NCLT 17335*, has also been relied upon by the Respondent, according to which, the Petitioner cannot levy interest on the basis of provisions of the Micro, Small and Medium Enterprises Development Act, 2006 for the purposes of alleged debt under Section 9 of the Act.
14. In view of the above discussion, we are of the considered view that the Petitioner has failed to fulfil the threshold requirement of Rs.1 Crore prescribed u/s 4 of the Code. Therefore, the Petition u/s 9 of the Code is not maintainable. Accordingly, **C.P. No. 212/BB/2022** is **hereby dismissed**.

-S/d-

**MANOJ KUMAR DUBEY**  
**MEMBER (TECHNICAL)**

-S/d-

**K. BISWAL**  
**MEMBER (JUDICIAL)**