

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

**PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 19.04.2022 AT 10.30 AM**

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.49/9/AMR/2020		9 of IBC	Macawber Beekay Pvt Ltd Vs BGR Energy Systems Ltd

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP (IB) No.49/9/AMR/2020 is dismissed, vide separate orders.



**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD**

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CP (IB) No. 49/9/AMR/2020

**In the matter of 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
AND**

**In the matter of
M/s.BGR ENERGY SYSTEMS LIMITED**

Between:

M/s. Macawber Beekay Private Limited,
Having its Registered Office at Beekay House,
C-450-451, sector 10, Noida - 201301.

...Operational Creditor

AND

M/s. BGR Energy Systems Limited,
Having its Registered office at Plot No.A-5,
Pannamgadu Industrial Estate,
Ramapuram Post, Sullurpet Taluk,
Nellore District, Andhra Pradesh – 524401.

...Corporate Debtor

Date of Order: 19.04.2022

CORAM:

Justice TelaproluRajani, Member Judicial.

Appearance:

For Operational Creditor : Mr. Ch.Pushyam Kiran &
Ms.Neha Akkineni, Advocates.

For Corporate Debtor : Mr. T.V.P.SaiVihari, Advocate.

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ORDER

1. This Application is filed by M/s. Macawber Beekay Private Limited, (“hereinafter referred to as Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. BGR Energy Systems Limited (“hereinafter referred to as Corporate Debtor”) for the default committed by the Corporate Debtor in discharging the debt due to the Operational Creditor.
2. The facts, briefly, as per the Petition are as follows:

Contracts were awarded to MBPL, to supply, erect, test and commission the Mill Reject Handling System and/or Ash Handling Systems by the Corporate Debtor. By virtue of a Scheme of Arrangement duly approved by the High Court of Allahabad, the EPC business of the said erstwhile Macawber Beekay Private Limited was transferred to BSBK Enviro Systems Private Limited. The erstwhile Macawber Beekay Private Limited got amalgamated with another company and Macawber Beekay Private Limited is no longer in existence w.e.f. 30.11.2015. The name of BSBK Enviro Systems Private Limited was changed to Macawber Beekay Private Limited.

The Operational Creditor had duly executed all the works under the contracts entrusted by the Corporate Debtor and there is no dispute. However certain payments that were due to be made by the Corporate Debtor were not made. A letter was issued on 21.09.2017

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to the Corporate Debtor seeking the release of the outstanding amount. Subsequent to the said letter, a meeting was convened on 19.04.2018, to discuss about the payments in detail and in the said meeting the Corporate Debtor stated that it would verify the amounts due. Thereafter, the Operational Creditor again requested the Corporate Debtor through a letter dated 18.08.2018 to release the outstanding amounts. Thereafter both the parties had a meeting on 19.09.2018, to amicably resolve the issue of outstanding payment and release of Bank Guarantees. In the said meeting, the Corporate Debtor accepted its liability and agreed to release the amount of Rs.9.8 Crores in three instalments. As per the terms of the MoM, the Corporate Debtor released all the Bank Guarantees but failed to comply with the time schedule for payments. By October, 2019 the Corporate Debtor made a payment of Rs.6.30 Crores in 12 instalments, at its convenience, which is not in accordance with the terms of MoM. Still an amount of Rs.3,50,00,000/- was due. The Operational Creditor sent several letters and E-mails. But the Corporate Debtor did not make any payment. A demand notice was issued on 25.10.2019, calling upon the Corporate Debtor to pay the principal due amount and the interest. No reply was issued. However, subsequent to receiving the demand notice, the Corporate Debtor, through telephonic conversation, assured the Operational Creditor to release the remaining payment. However, the Corporate Debtor released only Rs.1.5 Crore. After the issuance of the demand notice, the Operational Creditor sent letters requesting the Corporate Debtor

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to release the remaining amounts. Rs.2 Crores is still outstanding along with interest. Hence, this Petition seeking for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

3. The Corporate Debtor filed counter, admitting that the Corporate Debtor issued the purchase orders mentioned in the Application and further contended that both the parties have reconciled the accounts and on 19.09.2018 the Corporate Debtor released Bank Guarantees and accepted to pay an amount of Rs.9.8 Crores and there is no specific clause in the MoM with regard to the payment of interest on delayed payments. A demand notice was issued by the Operational Creditor and the Corporate Debtor paid Rs.1.5 Crores immediately. The same was adjusted towards the agreed amount as per the MoM. Subsequently this Petition was filed. The Corporate Debtor paid the entire amount of Rs.2 crores which was due. The Corporate Debtor informed the Operational Creditor that since, the principal amount is paid, the claim for interest is not tenable since, the settlement agreement does not provide for the same. An E-mail was sent by the Operational Creditor to the Corporate Debtor admitting that as per MoM, the contractual provisions do not provide for payment of interest. But highhandedly the interest amount is claimed. Hence, the Petition is liable to be dismissed.

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4. Rejoinder is filed by the Operational Creditor, contending that while the contracts under the minutes of the meeting dated 19.09.2018 do not contain a clause for payment of interest, there is no clause barring payment of interest in the event of delay in payment. Hence, he seeks for the Petition to be allowed.
5. Heard the arguments of both sides and perused the written submissions filed by the either side. There is no dispute that the principal amount that is due to the Operational Creditor is paid before and after the issuance of the demand notice and there is no dispute that there is no clause of interest in the Minutes of Meeting (MOM) at 19.09.2018 which recorded a settlement between the parties. The only question that remains to be decided is;

“Whether the Application under Section 9 of IBC can be continued for mere claim of interest.”

The definition of the operational debt is as under;

“Section 5 (21) of IBC: *"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*

The financial debt is defined as under;

“Section 5 (8) of IBC: *"financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-*

There is a clear difference between the financial debt and operational debt. While the Financial Debt includes interest, the Operational Debt does not include interest. The question of awarding interest under Interest Act or other enactments would arise only when there is an Operational Debt. When admittedly there is no Operational Debt, whether the claim Petition filed for both the Operational debt and the interest can be allowed to be continued inspite of the operational debt being discharged by the Corporate Debtor. The Counsel for the Corporate Debtor relied on several judgments in support of the contention that the claim for interest cannot be allowed when the operational debt stands discharged. The judgment of the NCLT, New Delhi in *SS Polymers Vs. Kanodia Technoplast Limited in Company Petition No. IB-121/ND/2019* held that “not every interest can be treated as a debt. If in terms of the agreement, interest is payable to the Operational or 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.” With regard to the prayer of the Operational Creditor that Section 3 of the Interest Act, 1978 can be invoked for allowing a claim for interest, the Counsel relies on the judgment of the Hon’ble Supreme Court in *Consolidated Construction Consortium Limited Vs. Hitro Energy Solutions Private Limited in MANU/SC/0152/2022* wherein the Supreme Court relying on the judgments in *Mobilox and Swiss Ribbons* held that “in any proceedings for the recovery of any debt



or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period.”

The Counsel contends that the proceedings under IBC are not recovery proceedings, therefore application of Interest Act does not arise. NCLAT in ***Ranjeet Singh and others Vs. Karan Motors private Limited and others in MANU/NL/0346/2021*** observed that “if on delayed payment, the Applicant claims any interest, it will be open to it to move a Court of competent jurisdiction for recovery of interest. But initiation of the CIRP is not the answer. The law is well settled that unless there is a specific covenant as to payment of interest in the agreement, interest cannot be claimed for an operational debt if in terms of any agreement interest is payable to the operational or financial creditor then debt includes interest and otherwise the principal amount is to be treated as debt which is the liability in respect of the claim which can be made from the Corporate Debtor”. NCLAT in ***Krishna Enterprises and others Vs. Gammon India Limited MANU/NL/0359/2018*** held that “when principal amount is already paid and as per the agreement no interest was payable, the applications under Section 9, on the basis of claims for entitlement of interest, are not maintainable.” It also held that if

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for delayed payment the appellant claims any interest it will be open for it to move a court of competent jurisdiction, but initiation of CIRP is not answer. A judgment of a Bench of NCLT Hyderabad between *Vattam Steels Vs. Lahari Infra Projects (India) Private Limited* was relied upon wherein it was held that the application under I&B Code is not a tool for recovery and with regard to the claim of the Operational Creditor to interest which is not even quantified, the Petitioner should seek its remedy before competent court of law. With regard to the judgment that was relied upon by the Operational Creditor's Counsel rendered by NCLAT in *Narendrabhai Shah, Director Pioneer Globex Private Limited Vs. Lim Fa Pte Limited in MANU/NL/0399/2021*, wherein the NCLAT did not intend to interfere with the order of the Adjudicating Authority therein and which held that since there was nothing to show that it was agreed that there would be no charging of interest, interest can be allowed, the Counsel submits that the said judgment did not consider the NCLAT judgment in *Krishna Enterprises*, since, it was not brought to its notice and hence, the judgment in Narendrabhai Shah suffers from *per incuriam*. Moreover that is not a case on the same factual situation as this case. A debt was still due in the said case, unlike in this case where the principal amount is paid.

There is no counter argument offered for the said submission made by the Corporate Debtor's Counsel. As regards the judgment relied upon by the Operational Creditor's Counsel, rendered by the

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NCLT in *P.K.Vaduvammal Vs. Jaydev Constructions Private Limited*, the Counsel for the Corporate Debtor submits that the said judgment was referred to the 3rd member and the 3rd member held that “ on perusal of the record and hearing of the Counsel for the Operational Creditor, it is seen that the findings recorded by the Hon’ble Judicial Member is based on the interpretation of the relevant provisions of the Sale of Goods Act and distinguished the judgment of the NCLAT stating that in the said case the issue involved was about the payment of interest only, whereas, in the present case the issue involved is for payment of principal and interest. Therefore, the judgment cited above cannot be made applicable to the case on hand. In view of it, I concur with the finding recorded by the Hon’ble Judicial Member.” The Counsel submits that in the present case also admittedly the entire principal amount was paid and the alleged interest alone is in dispute and even if the ratio of the said judgment is applied, the present petition is liable to be dismissed, since it is only interest which is in dispute. Judgment of NCLT, Hyderabad in *Shri Shri Krishna Rail Engineers Pvt Ltd VS Madhucon Projects Limited in CP (IB) No.305/9/HDB/2017* is also rendered on different set of facts. The issue before me is not whether the Operational Creditor is entitled for interest on delayed payment. The issue is whether an application under Section 7 of IBC can be prosecuted only for interest. Hence the said judgment would not help in deciding this issue. So, also the judgment of the Supreme Court in *Assam State Electricity Board & Others vs Buildworth Pvt. Ltd.* in

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Civil Appeal No.484 of 2008, judgment of NCLT, Ahmedabad in ***Lim Fa Ple Ltd. VS Pioneer Globex Pvt. Ltd (CP (IB) No.82/NCLT/AHM/2018)*** and the judgement of NCLT, Hyderabad in CP (IB) No.305/9/HDB/2017 in ***Shri Shri Krishna Rail Engineers Pvt Ltd VS Madhucon Projects Limited.***

Though the common practice is that the amount paid towards discharge of a debt would be appropriated towards interest first, in the written arguments of the Operational Creditor it is clearly admitted that the Corporate Debtor had paid the principal amount and that he did not pay the interest, which would show that the amount paid was consciously appropriated towards the principal. Moreover, when there is no agreement for interest and when interest is not quantified by any court or other forum, appropriation cannot be done towards interest.

The Counsel for the Operational Creditor however seeks this Tribunal only to invoke the provisions of Interest Act to grant interest even in the absence of any agreement between him and the Corporate Debtor. It can be seen that an application under Section 9 of IBC is principally for taking the Corporate Debtor into CIRP which has become an insolvent. Failure of the Corporate Debtor discharging the debt is a pre-condition for initiation of CIRP against it. If there is an agreement for payment of interest on the debt, the same can be considered while allowing the claim for the principal amount. But



when the Corporate Debtor discharges the debt, it would be showing that it is not an insolvent. Hence, declaring the Corporate Debtor as insolvent by ordering CIRP only because of the default in paying of interest which is not agreed upon, would be against the spirit of IBC. The Operational Creditor would nevertheless have the right to claim and recover interest if it is permitted under any other law, by moving an appropriate forum. NCLT does not decide the amount that is due to the Operational Creditor. The only test to admit an application under section 7 IBC is whether a debt above the threshold limit is due and whether the Corporate Debtor has defaulted in repayment. When by the date of admission the operational debt in terms of Section 5 (21), which does not include interest, stands discharged, the interest alone which remains under the claim amount, does not qualify for an operational debt, for the default of which alone CIRP can be ordered. NCLT is not a forum for recovery so as to decide the due amount. When admittedly the principal amount is paid, operational debt ceases to be in existence and consequently application under section 9 becomes invalid. Recently NCLAT while adjudicating an appeal filed in the matter of *Rajesh Kedia v Phoenix ARC Pvt. Ltd.*, has held that the quantum of debt is not to be considered at the stage of admission of a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC"). The only requirement for admitting a petition under Section 7 of IBC is that the minimum outstanding debt should be more than the threshold amount provided for Under the IBC. The actual amount of 'Claim' is to be ascertained by the

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Resolution Professional after collating the 'Claims' and their verification, which comes at a later stage.

To what result:

Hence, considering the clarity of the law which settled that an application under Section 9 of IBC cannot be maintained or continued for a mere claim of interest, this application is liable to be dismissed.



**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

Swamy Naidu