

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB) No.1579/MB/C-IV/2019**

Under section 9 of the Insolvency &  
Bankruptcy Code, 2016

*In the matter of*

**Vitson Steel Corp Private Limited**  
[CIN: U51420KL2012PTC032061]  
...Operational Creditor

Versus

**Capacit'e Infracorjects Limited**  
[CIN: L45400MH2012PLC234318]  
... Corporate Debtor

**Order pronounced on : 28.04.2020**

***Coram:***

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)  
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

***Appearances:***

For the Operational Creditor : Mr Abhay Kumar Jain a/w Ms  
Divya Momaya, Authorised  
Representative  
For the Corporate Debtor : Mr Shyam Kapadia, a/w Ms  
Anaisha Zachariah and Ms  
Ragini Jaitha i/b Crawford  
Bayley & Co, Advocate

**ORDER**

***Per: Rajasekhar V.K., Member (Judicial)***

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 ("**IBC**") by **Vitson Steel Corp Private Limited** ("**the Operational Creditor**") [CIN: U51420KL2012PTC032061], a company within the meaning of section 2(20) of the Companies Act, 2013 and represented by its Manager, Mr AH Quadri, on the basis of a Board Resolution dated 20.03.2019 seeking to initiate Corporate Insolvency Resolution Process ("**CIRP**") against **Capacit'e Infraprojects Limited** ("**the Corporate Debtor**").
2. The Corporate Debtor is a listed public company limited by shares and incorporated on 09.08.2012 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is L45400MH2012PLC234318. Its registered office is at No.605-606, Shrikant Chambers Phase-I (6<sup>th</sup> Floor), Adjacent to RK Studios, Sion-Trombay Road, Mumbai 400 071, in the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 10.04.2020 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹13,84,122.00 (Rupees thirteen lakh eighty-four thousand one hundred and twenty-two only) as principal and ₹60,81,842.00 (Rupees sixty lakh eighty-one thousand eight hundred

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

and forty-two only) as interest as on 16.04.2017, which is the date of default.

4. The case of the Operational Creditor is that the Operational Creditor supplied to the Corporate Debtor JSW Neo Steel TMT Bars Fe 500D, pursuant to purchase orders placed by the Corporate Debtor (para 1 at page 3 of the Petition). However, payment of a principal sum of ₹13,84,122/- along with interest of ₹60,81.842/- calculated @ 24% per annum from 20.10.2017 to 06.03.2019 and GST amounting to ₹10,94,731/- @ 18% on the interest component is due and payable by the Corporate Debtor (para 1 at page 3 of the Petition).
5. Invoices have been placed on record as **Exhibit '7'** at pp.27-29. The invoices do not provide for interest in case of delayed payments. Bank statements are attached as **Exhibit '16'** at pp.49-86. The total debt due and payable to the Operational Creditor is ₹74,65,964.00 (Rupees seventy-four lakh sixty-five thousand nine hundred and sixty-four only), plus GST of ₹10,94,731/- as mentioned at pages 3 and 24-26 of the Petition.
6. The Operational Creditor had served a Demand Notice in Form 3 dated 26.02.2019 to the Corporate Debtor (**Exhibit '5'**, pp.16-23) in terms of section 8 of the IBC. The Corporate Debtor has sent a reply dated 12.03.2019, wherein they have stated that as per the terms of the purchase order placed upon the Operational Creditor, all payments except a sum of ₹13,84,129.37 has been paid. The interest component of 24% per annum is neither tenable nor payable, since it

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

was never contracted for. The reply has been annexed at **Exhibit '8'** at pp.30 of the Petition.

7. Mr. Shyam Kapadia, learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.
8. In its reply dated 19.09.2019, the Corporate Debtor has submitted as follows:-
  - (a) The petition is defective since the bank certificate as mandated by section 9(3)(c) has not been attached to the petition. (*para 6.1 at page 90-91 of the Reply*);
  - (b) Subsequent to receipt of the Demand Notice, the Corporate Debtor has made payment of a sum of ₹15.00 lakh to the Operational creditor on 05.03.2019. Further, in its email date 12.03.2019, the Corporate Debtor has categorically stated that all payments have been made and that the interest calculated at 24% per annum was unilateral and not contracted for (*para 6.2.1 at page 9 of the Reply*);
  - (c) The Operational Creditor has failed to comply with its statutory liabilities in not depositing GST on the invoices. This has been brought to the notice of the Operational Creditor vide email dated 19.08.2019. The GST liability amounts to ₹15,36,986/-. However, the same has not been paid so far (*para 6.2 at page 91-92 of the Reply*);
  - (d) Almost the entire claim is towards interest and is, therefore, outside the scope of the IBC (*para 6.3 at page 92 of the Reply*);
  - (e) The interest on the two ta invoices bearing Nos.JSW/B2B/PJ/0455 dated 23.12.2017 and JSW/B2B/PJ/

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

0464 dated 27.12.2017 would work out to only a few lakh rupees even assuming that interest was payable (which it was not) (*para 6.4.4 at page 94 of the Reply*);

- (f) Although the tax invoices have been raised by the Operational Creditor in December 2017, the interest has been levied and calculated from 20.10.2017 onwards. There is no explanation for this calculation (*para 6.4.5 at page 94-95 of the Reply*);
- (g) The Corporate Debtor was not aware of the status of the Operational Creditor as a MSME registered under the MSME Act. This fact came to light only after the petition was amended pursuant to the orders dated 07.08.2019 (*sic* 13.08.2019) of this Tribunal (*para 7.4 at page 96 of the Reply*);
- (h) The Corporate Debtor is a solvent, profit-making company enjoying a high net worth of ₹298.80 crore as at 31.03.2017, which increased to ₹843.13 crore as at 31.03.2018 (*para 8 at page 97 of the Reply*).

9. We have heard the arguments of both sides and perused the records.

**Findings**

- 10. The calculation of the claim is at pp.21-22 of the Petition. There is a total of ninety-two invoices mentioned therein. Out of these, a total of fifty-nine invoices are fully paid, leaving a balance of thirty-three invoices which have not been paid. From the calculation sheet annexed at pp.24-26 of the petition, it is clear that the claim is not restricted only to the two invoices which have been attached at pp.27-29 of the petition, but to other invoices as well. Thus, there is no clarity on the quantification of the claim of the Operational Creditor

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

11. The invoices attached to the petition are only two - (1) Invoice No.JSW/B2B/PJ/0455 dated 23.12.2017 for ₹11,04,544.00; and (2) Invoice No.JSW/B2B/PJ/0464 dated 27.12.2017 for a sum of ₹8,55,954.00. The credit period is supposed to be forty-five days as mentioned in the purchase order at p.27 of the petition. If that be so, it is difficult to understand how the date of default can be taken as 16.04.2017 as mentioned at p.3 of the petition. Further, the sum total of the two invoices works out to ₹19,60,498/- only, whereas the computation of claim at pp.21-22 lists out ninety-two invoices from 02.03.2017 to 27.12.2017 for which interest is being claimed now. There is no provision for interest in the invoices or in the purchase order. In other words, there is no contractual rate of interest.
12. If the Operational Creditor is an MSME registered under the MSME Act, 2006, the interest component is covered under section 16 of the said Act. Section 17 of the said Act details the mode of recovery due. In such cases, a reference to the Micro and Small Enterprises Facilitation Council may be made under section 18(1) of the Act.
13. In the original petition, interest was being claimed at the rate of 24% per annum based on "industry practice." However, in the revised petition, the Operational creditor has stated that it is entitled to claim interest at three times the bank rate compounded at monthly rests.
14. Mr Shyam Kapadia, learned Counsel for the Corporate Debtor, has repeatedly submitted during the course of hearing that the corporate debtor is ready and willing to make full payment of the principal

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

amount that may be due. However, this was not accepted by the learned Authorised Representative for the Operational Creditor.

15. This is a petition wherein there is a mismatch in the facts stated in the petition and in the statement of claim attached at pp.24-26 of the petition as regards invoices, the date of default and the interest component. Further, as regards interest, the fact of the Operational Creditor being an MSME has never been brought to the notice of the Corporate Debtor at any point of time until 13.08.2019, when the Bench posed the question to the learned Authorised Representative for the Operational Creditor as to how the claim for interest @ 24% is even sustainable.
16. Mr. Shyam Kapadia, learned Counsel for the Corporate Debtor also brought to our notice that in so far as the invoice No.JSW/B2BPJ/0455 dated 23.12.2017 is concerned, there seem to be two different invoices – one placed at p.28 of the revised petition, and the other at pp.132-133 of the rejoinder. While the claim amount and the material particulars are the same, at least one of them appears to have been typed. No reason has been given for the same invoice appearing in two different formats.
17. Mr Abhay Kumar Jain, learned Authorised Representative for the Operational Creditor, drew our attention to a decision dated 11.09.2019 of the Hon'ble NCLAT in *P Vijay Kumar v Priya Trading Company & others*,<sup>1</sup> wherein it has been stated in para 7 as follows:

---

<sup>1</sup> Company Appeal (AT) (Insolvency) No.204/2019

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

*"Now coming to the issue as regards the unpaid liability in respect whereof the 'Operational Creditor' alleged default, be it seen that as per the settled law on the subject dispute in regard to the quantum of liability does not defeat triggering of the Corporate Insolvency Resolution Process so long as the amount claimed to be in default is payable in law and in fact..."*

18. While we are in respectful agreement with this decision, it is clear that in the present case, the Corporate Debtor was kept completely in the dark as to the MSME status of the Operational Creditor even after the filing of the present petition. Therefore, there was, to that extent, suppression of material fact when the Demand Notice dated 25.02.2019 (pp.17-20 of the petition) was issued.
19. Mr Shyam Kapadia, learned Counsel for the Corporate Debtor, placed on record a decision dated 11.08.2017 of the Hon'ble NCLAT in the matter of *Wanbury Limited v Panacea Biotech Limited*,<sup>2</sup> in support of his claim that interest claim does not fall under "operational debt." This was a matter taken in appeal from a decision dated 18.04.2017 of the NCLT Chandigarh Bench which held that the definition of the term "operational debt" under section 5(21) of the Code does not include "interest."
20. The petition itself is based primarily for interest, since the Corporate Debtor was ready and willing even during the course of hearings to pay the full amount of the principal sum outstanding, if any. Further, there is no clarity with reference to the claim itself in the present petition, as stated in paras 10 and 11 *supra*. Therefore, we are not

---

<sup>2</sup> 2017 SCC OnLine NCLAT 238

convinced that this is a fit case for initiation of CIRP against the Corporate Debtor.

21. We may record here that the Operational Creditor has repeatedly spurned the offer of the Corporate Debtor to make payment of the principal sums due. However, in the interest of justice and because the Corporate Debtor has, during the course of hearings, repeatedly expressed its intention to settle the principal sum due, we hereby direct the Corporate Debtor to make payment of the principal sum due within a period of fifteen days from the date of pronouncement of this order. We leave it to the wisdom of the Operational Creditor to accept such principal sum due from the Corporate Debtor
22. As regards interest, in case the Operational Creditor is so advised, it may make a reference to the Council constituted in terms of section 18(1) of the MSME Act, 2006.
23. The Counsel for the Corporate Debtor also relied upon the decision dated 14.08.2018 of the Hon'ble Supreme Court in ***K Kishan v Vijay Nirman Company Private Limited***,<sup>3</sup> wherein it was held as under: -

*“17. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of, say, two lakhs of rupees, cannot possibly jeopardise an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the arbitral award*

---

<sup>3</sup> 2018 SCC OnLine SC 1013

*passed against it, and the mere factum of challenge would be sufficient to state that it disputes the award. Such a case would clearly come within para 38 of **Mobilox Innovations** (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of rupees two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the code, at least in so far as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.”*

24. The object of the Code is not advanced by surprising the Corporate Debtor with a claim for interest firstly by claiming that it was as per “industry practice” and thereafter making a pitch that it was as per MSME Act, when the Operational Creditor was confronted with a question posed by this Bench as to how the claim for interest was sustainable when neither the purchase order nor the invoices carried a provision therefor. In the present case, the claim for interest has been brought against the Corporate Debtor even though it was never put on notice that the Operational Creditor was registered under MSME Act.
25. For the reasons stated above, the present petition fails and therefore, the same is rejected.
26. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other forum shall not be prejudiced on grounds dismissal of the present petition by this Adjudicating Authority.

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

CP (IB) No.1579/MB/C-IV/2019

---

27. Let a copy of this order be communicated to the parties in terms of the provisions of section 9(5)(ii) of the IBC.

Sd/-  
Ravikumar Duraisamy  
Member (Technical)

Sd/-  
Rajasekhar V.K.  
Member (Judicial)

28.04.2020