



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. I
KOLKATA**

Company Petition (IB) No. 153/KB/2023

A company petition preferred by Operational Creditor 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:

**Evergreen Construction (Durgapur) Private Limited
... Operational Creditor/ Petitioner.**

Versus

**GPT Casting Limited
... Corporate Debtor/ Respondent.**

Date of pronouncement: 20.12.2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

**For the Petitioner: Mr. Vinay Kumar Jain, Adv.
Mr. Mohana Sharda, Adv.
Mr. Ojal Agarwal, Adv.**

**For the Respondent: Mr. Rudrajit Sarkar, Adv.
Mr. Debangshu Dinda, Adv.
Ms. Arundhati Barman Roy, Adv.**

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court congregated through hybrid mode.
2. The Operational Creditor, Evergreen Construction (Durgapur) Private Limited, the Petitioner herein has preferred this company petition under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" against the Corporate Debtor, GPT Casting Limited, the Respondent herein praying for initiation of

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Corporate Insolvency Resolution Process, in short “CIR Process” in respect of the Corporate Debtor.

3. The total amount claimed to be in default is of Rs. 12,01,91,121/- which comprises of the outstanding **principal amount of Rs. 2,66,74,542/-** and a compound interest at the rate of 3 times the bank rate as notified by the RBI from time to time calculated till 30.10.2022, amounting to **Rs. 9,35,16,579/-**, further applicable till the date of realization of the due amount in full. **The date of default is claimed as on 02.10.2022.**

4. The fact in a nutshell is that the corporate debtor issued various work orders from 2007 to 2010 for construction work at Bankura District. In respect of one work order numbered as GCPL/RKS/ECPL/07/848, the corporate debtor provided extensions of validity of the contract from 2019 to 2021 and the last extension was given by the corporate debtor up to 31.12.2021. The copies of the Work Orders and the Extension letters are annexed at pages 47-67 to the company petition.

5. The Learned Counsel appearing on behalf of the Petitioner would submit that rendering the services pursuant to the work orders, the operational creditor has raised the invoices towards the corporate debtor, for a total amount of Rs. 38,41,96,568/-. Thereafter, a payment of Rs. 35,75,21,960/- was made by the corporate debtor against the principal amount and thus, the principal amount due and payable towards the operational creditor has become of Rs. 2,66,74,542/-. The copies of the invoices raised by the operational creditor are annexed at pages 68-966 to the company petition.

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6. The Learned Counsel for the Petitioner would further submit that after a continuous follow up, the corporate debtor has not paid the amount due and payable, therefore, the Operational Creditor issued a Demand Notice under Section 8 of the I&B Code on 04.11.2022, to which the corporate debtor issued a reply on 14.11.2022. The Petitioner claimed that after issuing Demand Notice, the corporate debtor has made only a part payment on 12.11.2022 of Rs. 22,17,589/- towards the repayment of debt.

7. The Learned Counsel for the petitioner would contend that the operational creditor is an MSME registered under MSMED Act, 2006, and as per Section 16 of the MSMED Act, the operational creditor is entitled to receive principal amount along with interest calculated at compound inters at three time of the bank rate notified by the Reserve Bank of India. In view of such, the Learned Counsel for the Petitioner would submit that the total amount of debt is Rs. 12,01,91,121/- after adjustment of all the part payments made by the corporate debtor. The total amount claimed to be in default includes a principal amount of Rs. 2,66,74,542/- and the compound interest at the rate of 3 times the bank rate as noticed by RBI in terms of Section 16 of the MSMED Act, amounting to Rs. 9,35,16,579/- calculated till 30.10.2022.

8. *Per contra*, Ld. Counsel appearing on behalf of the corporate debtor would submit that the claim of the Petitioner is barred by limitation and also hits Section 10A of the I&B Code. It is submitted that the Work Orders issued from 2007 to 2010. The Petitioner has claimed amount due and payable based on the invoices raised since 2010 to 2022. The amount claimed based on

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the invoices raised prior February 2020 is barred by limitation as the present company petition has been filed on 20.02.2020. Further, the invoices raised during Section 10A period i.e., March 25, 2020, to March 24, 2021, are not maintainable. In view of such, the present petition is not maintainable.

9. Further, the Ld. Counsel for the corporate debtor would submit that there are disputes raised by the corporate debtor with respect to the work done by the operational creditor much prior to the issuance of the demand notice dated 04.11.2022, and the same would be evident from the Letter dated 14.02.2020 (annexed at page 969 to the petition), Email dated 26.02.2020 (annexed at page 971 to the petition)), Email dated 10.09.2020 (annexed at page 975 to the petition), Email dated 20.11.2020 (annexed at page 981 to the petition) and Email dated 26.10.2021 (annexed at page 993 to the petition), which indicate the pending reconciliation of accounts between the parties. It is contended that pendency of reconciliation of accounts, amount pre-existence of disputes. Reliance is placed on the judgment rendered by the Hon'ble NCLAT ***in East India Udyog Ltd. v. SPML Infra Limited*** in Company Appeal (AT) (Insolvency) No. 256 of 2023, judgment dated 23.03.2023, para 12; and the decision passed by this Adjudicating Authority on 07.05.2024, in ***Bechman Coulter India Pvt. Ltd. v. AVS Medical Instrument Private Ltd.*** in Company Petition (IB) No. 210/KB/2023, para 34 and 35.

10. Ld. Counsel for the Respondent would further submit that the corporate debtor much prior to the issuance of demand notice raised the objections and/or disputes regarding the quality of work done by the operational creditor and the same would be



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apparent from email dated 05.05.2021 (annexed at page 59 to the Reply Affidavit) and 13.03.2021 (annexed at page 60 to the Reply Affidavit), reproduced hereunder:

Mrinal Mallick
DGM
GPT Castings Limited
M - 9732007745

From: Mrinal Mallick
Sent: Wednesday, May 5, 2021 5:44 PM
To: Evergreen Construction <evergreen_construction@rediffmail.com>
Subject: production data For April_21

Dear Mr Bhattadji/ Mr Raghavji

please find the details of production analysis during the period April_2021, lot of shifts was stop for production exclusively for shortage of your workmen which is highlighted by red indication called LP (labour Problem)

please be informed that , no compensation amount towards Core Workers should be entertained during that period. please not to submit any supplementary bills for the said period.

also, today up to 2PM production was running & after that all the workers stop their work without any reason.

you are now requested to please look into the matter to continue production from tomorrow onwards by single shift due to present covid pandemic situation.

hopefully it will continue by double shift as early as possible.

Regards,
M MALLICK
PH-9732007745

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Fw: Problem facing regarding OVERSIZED JK Inserts (JK-3451 & JK-3452)

From: "Mrinal Mallick" <mmallick@gptgroup.co.in>

11/20/23 16:03

To: "Sukhen Mukherjee" <s.mukherjee@gptgroup.co.in>

Thanks & Regards ,

Mrinal Mallick
DGM
GPT Castings Limited
M - 9732007745

From: Mrinal Mallick <mmallick@gptgroup.co.in>

Sent: Saturday, March 13, 2021 1:44 PM

To: Evergreen Construction <evergreen_construction@rediffmail.com>

Cc: Ashish Dasgupta <dasgupta.ashish46@gmail.com>; mbsen1955@gmail.com <mbsen1955@gmail.com>

Subject: Re: Problem facing regarding OVERSIZED JK Inserts (JK-3451 & JK-3452)

Dear Sir,

please not to make any arguments in this regard , several time I have discussed with you & your grinders also to improve quality of Grinding & everybody knows the fact.
your grinding team are doing intentionally bad performance specially for JK Inserts.

first you please arrange to improve the quality issue of grinding, then you discuss other issue .

we can't effort this type of hues losses which is presently going on at our works,

regards

M Mallick

11. Ld. Counsel for the Respondent would claim that the operational creditor has adjusted the amount of Rs. 22,17,589/- paid by the corporate debtor with the interest which could not be done by the operational creditor as there was no written agreement between the parties to pay any interest. Further, the operational creditor has been registered as an MSME on 25.03.2021, thus, he cannot claim an interest at the rate of three time of the bank rate for the invoices raised since 2010. Reliance is placed on the judgment rendered by the Hon'ble Apex Court in **Gujarat State Civil Supplied Corporation Limited v. Mahakali Foods Pvt. Ltd.** reported in (2023) 6 SCC 401 at para 51 which says that:

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*“51. Following the above stated ratio, it is held that a party who was not the “supplier” as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. **The same cannot operate retrospectively.** However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an Arbitral Tribunal under the MSMED Act, 2006.”*

(Emphasis Added)

12. Ld. Counsel for the Respondent further contended that the petition could not have been filed under Section 9 of the Code based on of the Demand notice on 14.11.2022, ignoring the sanctity of the payments made by the corporate debtor. The explanation to sub-section 2 of Section 8 of I&B Code states that a demand notice means a notice served by Operational Creditor to the Corporate Debtor demanding payment of operational debt in respect of which default has occurred. Since the part payments have not been taken into account and no fresh Section 8(1) notice was issued before filing Section 9 Application for the amount which got reduced by virtue of the payments made by the corporate debtor, the amount shown in Section 8(1) notice is not in consonance with Section 9 Application filed by the operational creditor. Reliance is placed on the judgment dated 12th July 2023, passed by the NCLT New Delhi Bench in

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CP(IB)/660/ND/2020, in the case of ***Entertainment Network India Ltd vs Praise Communications Pvt Ltd.***

13. We have heard the rival contentions and perused thoroughly the documents on record. On the last occasion, i.e., 10.09.2024, we would note that on 21.08.2024, the Ld. Counsel for the corporate debtor was present and had already made his submissions. We also note that both the parties have filed the written note of submissions in terms of our Order dated 21.08.2024 and 10.09.2024. Now, we would proceed to consider the matter on its merits and arguments advanced by both parties.

14. We find that the Work Orders were issued from 18.09.2007, 01.03.2010, 25.06.2010 and the corporate debtor issued several extensions in respect of the work order dated 18.09.2007 and the last extension was up to 31.12.2021. The Operational Creditor has raised its claim based on the invoices issued since 2010 to 2022. This Petition has been filed on 20.02.2023. We find that the invoices raised prior to February 2020 is barred by Limitation. Further, the Invoices raised during March 24, 2020, to March 24, 2021, hits by the provisions of Section 10A of the Code.

15. We further note that there is pre-existing dispute regarding the quality of work done by the operational creditor and the same would be apparent from email dated 05.05.2021 and 13.03.2021, referred above.

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16. Section 5(6) of the Code defines a “dispute” includes a suit or arbitration proceedings relating to (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty. The Hon'ble Apex Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*** reported at **(2018) 1 SCC 353**, held that the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility – So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application – A “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the **inclusive** definition contained in Section 5(6).

17. Further, the issue relating to the Interest, we find that there was no written agreement between the parties to pay any interest. The definition of “operational debt” under Section 5(21) of the I&B Code refers 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 definition under Section 5(21) does not include any provision of ‘interest’ with the ‘debt’. The Hon’ble NCLAT in ***Krishna Enterprises v. Gammon India Ltd.*** reported at **2018 SCC OnLine NCLAT 360** held that:

“4. It is submitted that the ‘debt’ includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement interest is payable to the Operational or Financial Creditor then debt will include

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interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor.”

(Emphasis Added)

18. Further, the Coordinate Bench of Chandigarh NCLT in **Wanbury Ltd. v. Panacea Biotech Ltd.**, reported at **2017 SCC OnLine NCLT 475**, observed that:

“18. There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’. Under section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term ‘operational debt’ under section 5(21) the word ‘interest’ has not been mentioned.”

“19. Anyhow, to resolve the issue, it would be relevant to refer to the documents on record and the agreement, if any, between the parties. In the present case, admittedly, the amount being paid by the applicant/petitioner from time to time was being regularly adjusted towards the principal only and the interest has accumulated for the amount claimed by the petitioner. Even the invoices filed along with the winding up petition, do not contain any clause of payment of interest. It is only now with the present application that ‘operational creditor’ has attached Tax Invoices’ [Annexure A-4 (colly)] containing the clause of payment of 24% p.a. towards the interest in case the payment is not made within 3 days. These Tax Invoices were not part of the petition before the Hon'ble High Court. It is not the version of the petitioner that the Credit Invoices or Tax Invoices bear the signatures of the representative of the respondent Company. The term of ‘interest’ is thus only a unilateral act of the petitioner/applicant.”

(Emphasis Added)

19. Further, the NCLT Mumbai in **M/S. Siddharth Enterprises v. M/S. Shapoorji Pallonji and Company Private**

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Limited reported in (2024) **ibclaw.in291 NCLT** has taken a view that:

“4.5 As regards the claim of interest made by the Operational Creditor, it is noticed from the record that neither the purchase orders nor several invoices contained any interest liability for delayed payment. The claim of interest so made rests primarily on the status of the Operational Creditor as an MSME enterprise. It is true that MSME Act specifically states that interest shall be paid on delayed payments irrespective of whether there is an express agreement or not to that effect. However, it is now settled in the context of the Code that if interest is not agreed upon between the parties, it cannot form a part of ‘operational debt’ within the meaning of Section 5(21) of the Code and that no such interest can be claimed in an application under Section 9 of the Code. The correct forum for such claims is the MSEFC. It is settled that NCLT is not a forum to resolve the disputes pertaining to interest claims of a MSME entity. As stated above, the Operational Creditor has already made an application before MSEFC in this behalf. For the purpose of this Application, the claim of the Operational Creditor for treating the interest amount of Rs.10,25,954/- (rounded off) as part of ‘operational debt’ is found to be legally untenable and is accordingly rejected.”

(Emphasis Added)

20. Further, this Adjudicating Authority in **M/s. Vedic Projects Pvt. Ltd. v. Sutanu Sinha, Resolution Professional of Simplex Projects Limited** in I.A. (IB) No. 1033/KB/2023 in CP (IB) No. 56/KB/2019 Order dated 06.08.2024, has observed that:

“104. Hence, we are of the considered opinion that the interest element cannot be clubbed with the principal amount and cannot be treated as a debt under Section 5(21) of the I&B Code. The imposition of interest component with the principal amount unilaterally sans having any clause of payment of interest in the agreement cannot be come within the ambit of the definition of “Operational Debt” under I&B Code.



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105. However, concerning the Section 16 of MSMED Act, which caters to that where any buyer fails to make payment of the amount to the supplier, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at **three times** of the bank rate notified by the Reserve Bank of India. We are of the view this is not the appropriate forum to consider the issue pertaining to the interest as claimed by the Applicant under MSMED Act.

106. In terms of the view above, we are of the considered opinion that the RP, having an administrative and facilitative role under the I&B Code and its Regulations, has not committed any error by rejecting the interest amount from the principal amount as nowhere in the agreement or work order mentions the clause of payment of interest.”

(Emphasis Added)

21. Thus, in absence of any written agreement between the parties containing a clause of payment Interest, we are unable to include the interest part with the principal amount claimed to be in default.

22. In view of above, we are of the considered opinion to dismiss the present company petition on the following ground that:

- a) The claim of the operational creditor is barred by limitation and hits the provision of Section 10A of the Code.
- b) There are disputes relating to the quality of work prior to the issuance of demand notice dated 04.11.2022.



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c) Sans any written agreement containing a clause of payment of interest, it cannot be clubbed with the principal amount claimed to be in default.

23. The present company petition being C.P. (IB) No. 153/KB/2023 is **dismissed**.

24. The **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the companies are registered with by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

25. Urgent certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

**Balraj Joshi
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This order is signed on 20th Day of December 2024.

Bose, R. K. [LRA]