

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI**

**CP (IB) No.3340/MB/2019**

*[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. SIDDHARTH ENTERPRISES**

[IN:09AKMPK478914261]

56/57, Kahoo Kothi

Kanpur-208001 (UP)

**...Operational Creditor**

*VERSUS*

**M/S. SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED**

[CIN: U45200MH1943PTC003812]

70 Nagindas Master Road

Fort, Mumbai – 400023

Maharashtra

**...Corporate Debtor**

**Pronounced: 12.03.2024**

**CORAM:**

**HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)**

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

**Appearances: Hybrid**

For Operational Creditor : Adv Prasad Pathare

For Corporate Debtor : Adv Amir Arsiwala

**ORDER**

***[Per: SANJIV DUTT, MEMBER (TECHNICAL)]***

**1. BACKGROUND**

- 1.1 This Application bearing C.P.(IB) No.3340/MB/2019 was filed by M/s. Siddharth Enterprises, the Operational Creditor on 12.09.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of M/s. Shapoorji Pallonji And Company Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is a proprietary concern of Ms. Sadhana Kanodiya and is engaged in wholesale business of electrical items. The Corporate Debtor is engaged in the business of providing construction services.
- 1.3 Upon receipt of Purchase Orders from the Corporate Debtor, the Operational Creditor supplied various electrical items and goods for its various projects as specified in the Purchase Orders from July, 2016 to February, 2018. Invoices were subsequently raised and duly delivered to the Corporate Debtor. Initially, the outstanding amount of operational debt prior to the issuance of Demand Notice under Section 8 of the Code was Rs.18,82,448.64. However, the Corporate Debtor made partial payments leaving an outstanding amount of Rs.2,49,237/- towards the principal debt.

Besides, the Operational Creditor has claimed Rs.10,25,953.94/- towards interest on the overdue amount of invoices in the Application.

- 1.4 The Operational Creditor issued a Demand Notice on 07.05.2019 to the Corporate Debtor, as required under Section 8 of the Code demanding release of payment of the outstanding operational debt. Despite issuance of the notice, the Corporate Debtor failed to make payment of the entire operational debt due to the Operational Creditor. Consequently, the Operational Creditor filed the present Application seeking the commencement of the CIRP in respect of the Corporate Debtor.

## **2. AVERMENTS OF OPERATIONAL CREDITOR**

- 2.1 The Operational Creditor submits that goods of total value of Rs.74,80,757/- were supplied and delivered to the Corporate Debtor between 20.07.2016 and 28.02.2018. Invoices were raised by the Operational Creditor against purchase orders issued by the Corporate Debtor. The first purchase order is dated 20.07.2016 and the first invoice is dated 22.07.2016. The last purchase order is dated 16.02.2018 and the last invoice was raised on 28.02.2018. As per the terms of the Purchase Order, payment was to be made within thirty days from the date of receipt/acceptance of the material at site. The Corporate Debtor had from time to time paid a sum of Rs.66,24,262/-, although none of the invoices was settled within the agreed credit period. An amount of Rs.8,56,495/- (Rs.74,80,757/- minus Rs.66,24,262/-) remained due and outstanding despite e-mail reminders to the Corporate Debtor. It is submitted that out of the said amount of

Rs.8,56,495/-, the Corporate Debtor made further payments aggregating to Rs.6,07,258/- on 01.06.2019 after issuance of the Demand Notice.

- 2.2 The Operational Creditor in the present Application has claimed the amount in default to be an aggregate sum of Rs.12,75,190.54 (Twelve lakhs seventy-five thousand one hundred and ninety rupees and fifty-four paise). This comprises a principal operational debt of Rs.2,49,237/- (Rs.8,56,495/- minus Rs.6,07,258/-) and further interest of Rs.10,25,953.54/- up to 06.05.2019. It is submitted that the Corporate Debtor is liable to pay further interest at the same rate of 24% per annum from 06.05.2019 until the date of payment or realisation.
- 2.3 The Operational Creditor relies on its status as an MSME Enterprise and thus holds the Corporate Debtor liable to pay interest on delayed payments and unpaid invoices. Moreover, the terms of all invoices stipulate that interest as mentioned therein shall be payable if payment is delayed beyond the credit period. Additionally, the Corporate Debtor never raised objections to these terms rendering them a binding contract.
- 2.4 Despite follow-ups and numerous emails, no payment was made by the Corporate Debtor. In one email exchange dated 24.02.2018, the Corporate Debtor explicitly admitted its financial difficulties and inability to pay.
- 2.5 The Operational Creditor further submits that a Demand Notice dated 07.05.2019 was served on the Corporate Debtor on 14.05.2019 seeking payment of outstanding operational debt of Rs.18,82,450/-. Subsequently, Rs.6,07,258/- was paid by the Corporate Debtor on 01.06.2019 after the receipt of the Demand Notice. The Corporate Debtor responded to the Demand Notice *vide* its letter dated 20.05.2019, contending that there was

a failure to comply with the contractual obligations as set out in the Purchase Orders and, therefore, nothing remained due and payable to the Operational Creditor from the Corporate Debtor. However, the Corporate Debtor failed to specify which portion or clause of the contract the Operational Creditor had violated, rendering its allegations devoid of material particulars and specifics.

- 2.6 All allegations of the Corporate Debtor regarding the supply of defective materials and goods by the Operational Creditor are vague and devoid of material particulars. The Corporate Debtor has not made any specific allegations stating that certain goods in a particular unpaid invoice have been materially defective. Therefore, the allegation of the Corporate Debtor cannot be termed as dispute between the parties. The Corporate Debtor has paid up the entire principal amounts of 89 out of 97 invoices raised by the Operational Creditor. Therefore, the Corporate Debtor cannot claim that there is an existing dispute between the parties regarding the said invoices.
- 2.7 The Operational Creditor contends that since 2020, CareEdge Ratings (a leading credit rating agency) has reported the Corporate Debtor as a financially stressed company.
- 2.8 The Operational Creditor submits that to date, there has been no reconciliation of accounts between the parties, as asserted by the Corporate Debtor. Further, the Operational Creditor had previously disclosed during oral arguments that it had filed an application before the Micro and Small Enterprises Facilitation Council (MSEFC) but did not pursue it further.
- 2.9 The Operational Creditor submits that all unpaid invoices mentioned in the statement of account of the Corporate Debtor (Pages 540-546 of the

Application) were within the limitation period at the time of filing the present Application. It is also pertinent to note that the Corporate Debtor made substantial payments after receiving the notice under Section 8 of the Code, thus extending the limitation period for the Operational Creditor concerning the invoices as per the provisions of the Limitation Act, 1963.

### **3. CONTENTIONS OF CORPORATE DEBTOR**

- 3.1 The Corporate Debtor in its Affidavit-in-Reply has denied all allegations and contentions of the Operational Creditor and opposed the present Application on various grounds.
- 3.2 The Corporate Debtor submits that all payments due to the Operational Creditor have been remitted. The Corporate Debtor has placed on record a reconciliation statement indicating that nothing remains due and payable by it to the Operational Creditor. Further, it claims that the present Application, along with the Demand Notice dated 07.05.2019 served upon the Corporate Debtor, lacks detailed information regarding the transactions between the parties, rendering the Application incomplete and liable to be rejected.
- 3.3 The Corporate Debtor contends that the Operational Creditor has combined purchase orders from six different projects to meet the threshold requirements. The Corporate Debtor argues that claims arising from different purchase orders/ agreements, with varying amounts and dates of default, cannot be consolidated for alleged default. As the causes of action are separate, the Corporate Debtor seeks the dismissal of this Application.

- 3.4 In its letter dated 04.06.2019, the Corporate Debtor claims to have informed the Operational Creditor that outstanding dues of Rs.6,07,258/- pertaining to the High Level Cancer Institute project and BEL project had been paid on 01.06.2019 with no further amount owed to the Operational Creditor. Then there were certain invoices in respect of which deductions had been made after ascertaining the quality of the material and the balance amounts had been transferred to the Operational Creditor.
- 3.5 Moreover, the Corporate Debtor alleges pre-existing dispute regarding the quality of materials supplied by the Operational Creditor which was raised before the issuance of the Demand Notice. The Corporate Debtor also asserts that it raised concerns regarding the quality and quantity of goods provided in various invoices. The Corporate Debtor has furnished copies of various e-mails evidencing pre-existence of dispute regarding the quality of goods supplied which ought to have been disclosed by the Operational Creditor in its Affidavit in accordance with the provisions of Section 9(3)(b) of the Code. The Operational Creditor has instead submitted general affidavit without any details of the Corporate Debtor's e-mails disputing the quality of certain materials supplied.
- 3.6 The Corporate Debtor submits that the present Application suffers from wrongful calculation of claims in so far as several invoices alleged by the Operational Creditor to be due were actually paid by the Corporate Debtor. Specific reference is made to invoice numbers 61, 53, 59, 78, 81, 72, 63, 64, 66, 70, 75, and 91 raised between the period 25.10.2017 and 28.02.2018.

3.7 According to the reconciliation statement prepared by the Corporate Debtor, there are no outstanding dues for the mentioned projects. The Corporate Debtor denies acknowledging any interest payments and points out that several invoices did not mention any interest component for delayed payment. Additionally, the Corporate Debtor argues that the claim of interest alone does not fall under the definition of 'Operational Debt' under the Code. When the principal amount has already been paid, application under Section 9 of the Code on the basis of the clause for entitlement for interest is not maintainable, as the Operational Creditor has to approach a court of competent jurisdiction for any relief. Reliance is placed on the judgments of Hon'ble NCLAT in cases of ***Krishna Enterprises v. Gammon India Limited 2018 SCC OnLine NCLAT 360*** and ***S. S. Polymers v. Kanodia Technoplast Limited [Company Appeal (AT) Insolvency No.1227 of 2019]*** wherein it has been held that interest cannot be claimed as a matter of right when there is no agreement between the parties for the same. Additionally, the Hon'ble Karnataka High Court in ***Jyothi Limited vs. Bouving Fouress Limited (2001) 3 Comp LJ 413*** held that a clause for interest contained in an invoice is a unilateral act which cannot bind the counterparty in the absence of a clear agreement or acknowledgment. Moreover, the Hon'ble NCLAT in its judgment dated 17.01.2022 in ***Amsons Communications Private Limited v. ATS Estates Private Limited [(2021) SCC OnLine NCLAT 223]*** held that if interest is not agreed upon, then it cannot form a part of "operational debt". Therefore, the imposition of interest at the rate of 2% in the invoices, not mentioned in the Purchase Orders and solely unilateral in terms of the invoices, is not applicable to the Corporate Debtor.

- 3.8 It is contended that the Operational Creditor is indulging in forum shopping, highlighting a previous legal notice demanding payment issued by the Operational Creditor's advocates. It asserts that an application under Section 7 or Section 9 of the Code is not meant for debt recovery. Further, the Corporate Debtor alleges that the Operational Creditor had failed to disclose that it had approached the Micro and Small Enterprises Facilitation Council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), thereby engaging in forum shopping. It relies on judgement of **S. S. Engineering v. Hindustan Petroleum Corporation Limited 2022 SCC OnLine SC 1385** wherein the Hon'ble Supreme Court while explaining the scope and object of the Code, has held that NCLT cannot act as a debt recovery forum.
- 3.9 The Corporate Debtor is a financially viable and stable company which does not have to be admitted to CIRP merely for recovery of interest unilaterally charged by the Operational Creditor through these invoices.
- 3.10 The Corporate Debtor submits that it had expressed willingness to reconcile statements and also engaged in working out amicable settlement with the Operational Creditor, as directed by this Tribunal. However, it alleges that the Operational Creditor has repeatedly demanded amounts beyond what was claimed, including advocate fees and filing fees, which are not part of the original claim. Thus, it is contended that the Corporate Debtor merely intends to use this forum for recovery of claims settled or disputed. In light of the above, it is prayed that the case against the Corporate Debtor ought to be dismissed with costs.

#### 4. **ANALYSIS AND FINDINGS**

Upon due consideration of the pleadings as well as written submissions along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor and Corporate Debtor, our findings in the matter are as under:-

4.1 It is well-settled that while considering an application under Section 9 of the Code, the Adjudicating Authority will have to determine-

- (i) Whether there is an 'operational debt' as defined under Section 5(21) exceeding the threshold limit under Section 4 of the Code;
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid and
- (iii) Whether there is existence of a dispute between the parties or the record of pendency of a suit or arbitration proceeding filed before the receipt of the Demand Notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected [*Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353*]. It is also a settled proposition of law that an application under Section 9 of the Code has to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) are satisfied.

4.2 It is also well-settled that an application under Section 9 of the Code, *inter alia*, requires strict proof of debt and default. The Applicant must prove with credible evidence and materials that there is an 'operational debt' owed to it by the Corporate Debtor and that there has been a default in payment of such debt on the date on which it fell due and payable. Coming to the facts of the present case, it is observed that while the Operational Creditor claims the amount of operational debt in default to be Rs.12,75,191/- (rounded off) including interest as per the Application, the Corporate Debtor provides a reconciliation statement and claims that all payments due to the Operational Creditor towards principal debt have been remitted and there is no amount due and payable to the Operational Creditor any more. It is noticed from the record that a total of 97 invoices were raised by the Operational Creditor against purchase orders issued by the Corporate Debtor aggregating to Rs.74,80,757/- out of which payments of Rs.66,24,262/- were made by the Corporate Debtor from time to time, leaving an outstanding principal amount of Rs.8,56,495/- and overdue interest charges of Rs.10,25,954/- (rounded off) prior to the issuance of the Demand Notice on 07.05.2019. Subsequently, the Operational Creditor issued the Demand Notice to the Corporate Debtor demanding payment of outstanding dues of Rs.18,82,449/- (Rs.8,56,495+Rs.10,25,954).

4.3 After receipt of the Demand Notice, the Corporate Debtor its reply dated 20.05.2019 disputed the quantum of debt. The Corporate Debtor then made further payments of Rs.6,07,258/- on 01.06.2019 against the bills related to the High Level Cancer Institute project and BEL Project. These payments were evidenced by bank transactions which the Operational Creditor

acknowledged and adjusted. After making these payments, there was no amount left due and payable by the Corporate Debtor to the Operational Creditor whereas the latter still claims outstanding principal dues of Rs.2,49,237/- (Rs.8,56,495 - Rs.6,07,258) from the Corporate Debtor. In this connection, it is noticed from the record that the present Application does not contain any authentic and credible documents supporting the alleged debt. For example, the Operational Creditor has not placed on record its bank statement or certificate from the bank showing that any payments made by the Corporate Debtor in respect of the alleged operational debt of Rs.2,49,237/- were not credited to its bank account during the relevant period. Nor has it furnished ledger account of the Corporate Debtor as per its books of account evidencing alleged amount of Rs.2,49,237/- due from the Corporate Debtor. Nor has it produced any record of debt and default, if any, available with the information utility. Moreover, it has not pointed out any defect or discrepancy in the reconciliation statement furnished by the Corporate Debtor demonstrating that it had made payments against all the invoices raised by the Operational Creditor.

- 4.4 In view of the above, we find that the documentary evidences attached by the Operational Creditor with the Application are not adequate to substantiate the existence of operational debt as claimed to be due and payable by the Corporate Debtor, although these indicate business transactions between the parties. Hence, it is not possible to determine whether any debt to the tune of Rs.2,49,237/- was due and payable by the Corporate Debtor to the Operational Creditor or to conclude whether the

Corporate Debtor has committed a default in payment of such outstanding operational debt. The Operational Creditor thus fails to discharge the onus cast upon it in this behalf.

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.

4.6 Upon examining the e-mail correspondences exchanged between the parties prior to the issuance of the Demand Notice dated 07.05.2019, it is observed from the record that the Corporate Debtor had raised disputes regarding the poor quality of goods such as LED lights, Earth Leakage Circuit Breaker (ELCB), Miniature Circuit Breaker (MCB) etc, supplied and

the delay in repair/replacement of defective goods by the Operational Creditor. These disputes were raised by the Corporate Debtor through emails dated 05.03.2018, 23.03.2018, 02.05.2018 and 05.07.2018 addressed to the Operational Creditor. For instance, the Operational Creditor was informed *vide* e-mail dated 02.05.2018 that the Corporate Debtor was issuing debit note of Rs.2,15,040/- at purchase rate for all 32 pieces of defective LED lights. Further, by an email dated 07.05.2018, the Operational Creditor had acknowledged the existence of such dispute by agreeing to replace/repair the LED lights and ELCBs. Even in its reply to the Demand Notice dated 20.05.2019, the Corporate Debtor has referred to the “*poor quality of materials*” delivered by the Operational Creditor and adverted to the facts relating to “*delay in repair/replacement of defective works*” which had been suppressed by it in the Demand Notice. It was categorically stated the said reply of the Corporate Debtor dated 20.05.2019 “*should be treated as notice of dispute under Section 8(2) of the Code*”.

- 4.7 In view of this, there is no valid basis for the Operational Creditor to claim in the Affidavit in support of the Application that the Corporate Debtor has failed to bring to notice of the Operational Creditor the existence of any dispute or pendency of a suit or arbitration proceedings filed before the service of the Demand Notice and that the Operational Creditor has not received notice of dispute from the Corporate Debtor regarding the pending amount. It is also noticed that the Affidavit under Section 9(3)(b) of the Code submitted by the Operational Creditor is a general affidavit without any affirmation about the notice of dispute given by the Corporate Debtor relating to a dispute of the unpaid operational debt. Considering the above

facts and circumstances, we find that the Corporate Debtor has made out a case of pre-existing dispute with the Operational Creditor that arose well before the receipt of the Demand Notice. Such dispute is found to be duly supported by concrete and credible evidence which is not vexatious or frivolous and grounds for which are real and not spurious, illusory or hypothetical.

- 4.8 It is well-established that the Code cannot be used as a recovery mechanism or as a substitute for debt enforcement procedures. In this connection, it is now recognised that NCLT is not a debt collection forum and that it is not the object of the Code that CIRP should be initiated to penalise solvent companies for non-payment of disputed dues claimed by an Operational Creditor.
- 4.9 In view of aforesaid discussions, it clearly emerges that the Operational Creditor has failed to establish the existence of an operational debt exceeding the prescribed threshold limit under Section 4 of the Code due and payable by the Corporate Debtor but remaining unpaid which is the *sine qua non* for admission of an application under Section 9 of the Code. Further, it is found that notice of dispute had been received by the Operational Creditor from the Corporate Debtor. In these circumstances, we are of the considered view that the present Application filed by the Operational Creditor under Section 9 of the Code deserves to be rejected.

### **ORDER**

**This Application** bearing C.P.(IB) No.3340/MB/2019 filed under Section 9 of the Code by M/s. Siddharth Enterprises, the Operational Creditor, for initiating

CIRP in respect of M/s. Shapoorji Pallonji and Company Private Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Operational Creditor to pursue such other remedies as may be available in accordance with law.

**Sd/-**  
**SANJIV DUTT**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**K. R. SAJI KUMAR**  
**MEMBER(JUDICIAL)**

Deepa/JNK