

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.550 of 2023**

[Arising out of order dated 26.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III in CP (IB) No. 245(ND)/2021]

**IN THE MATTER OF:**

**Mr. Anuj Sharma**

S/o Shri Kidar Nath Sharma  
R/o House No. M-12, Second Floor,  
West Patel Nagar, Delhi-110008.

**...Appellant**

**Vs.**

**Rustagi Projects Pvt. Ltd.**

Having its Registered Office at  
Office No. 16, Khatau Building, 1st Floor,  
Alkesh Dinesh Mody Marg, Fort,  
Mumbai-400023, Maharashtra.

**Soni E Vehicle Private Limited**

Through Interim Resolution Professional,  
Mr. Rajan Chakraborti.  
Off: 1/22, Second Floor,  
Asaf Ali Road,  
New Delhi- 110002.

**...Respondents**

**Present:**

**For Appellant: Mr. Aditya Nayyar, Advocate.**

**For Respondents: Mr. Hamid Ahmad and Mr. Sunny Gangwar,  
Advocates for Respondent No.1.**

**Mr. Ranjan Chakraborti and Mr. Vinay Kumar,  
Advocates.**

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## **J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal by Suspended Director of the Corporate Debtor has been filed challenging the order dated 26.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III by which order, Section 9 application filed by the Operational Creditor (Respondent herein) has been admitted. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- i. Corporate Debtor and Operational Creditor entered into Distributorship Agreement dated 20.07.2016. The Distributorship Agreement contained Terms of Payment and Delivery. The Corporate Debtor was engaged in the manufacturing, market training, sale, purchase, imports, exports, distribution or otherwise dealing in all types of battery-operated vehicle, batteries, its parts and accessories including those manufactured / sold by other manufacturers / companies.
- ii. The Operational Creditor issued various purchase orders and made certain payment from time to time. Purchase Order contained a condition that "Delivery should be done within 90 days, otherwise advance shall be returned along with interest @18% p.a". Appellant – Operational Creditor made certain advance payments.

- iii. The Operational Creditor sent emails dated 16.06.2018 demanding an amount of Rs.58,49,800/-. Further email was sent on 26.07.2018 demanding amount of Rs.60,24,800/- which included interest of Rs.7,80,000/-.
- iv. Operational Creditor issued a demand notice under Section 8 dated 21.12.2020 claiming Principal Amount of Rs.56,63,061/- with interest amount of Rs.66,03,801/- and expenses totalling to Rs.1,34,69,435/-. Demand Notice was served on the Corporate Debtor but no reply was filed.
- v. An application under Section 9 was filed by the Operational Creditor claiming total operational debt of Rs.1,34,69,435/-. Adjudicating Authority issued notice on 09.08.2021. The Corporate Debtor appeared on 10.01.2022 and prayed for two weeks' time to file reply in the matter which was allowed. Again on 14.02.2022, two weeks' time was allowed to file reply. Thereafter, several dates were fixed, on which adjournment was sought by the Corporate Debtor on ground that judgment of this Tribunal in "*M/s. Jumbo Paper Products Ltd. vs. Hansraj Agro fresh Private Limited*" is pending in the Hon'ble Supreme Court for consideration, which adjournment was allowed.
- vi. I.A. No. 1891 of 2022 was filed by the Corporate Debtor praying for dismissal of the Company Petition filed by the Operational

Creditor. I.A. No. 1891 of 2022 filed by the Corporate Debtor came to be dismissed for non-prosecution on 21.10.2022.

- vii. On 13.12.2022, learned counsel for the Operational Creditor appeared but neither Corporate Debtor appeared nor filed any reply. Corporate Debtor was directed to proceed ex-parte.
- viii. Matter was heard by the Adjudicating Authority on 29.03.2023 and order was reserved. Adjudicating Authority vide the impugned order dated 26.04.2023 admitted Section 9 application. The Adjudicating Authority held in the order that debt and default is proved and Corporate Debtor failed to repay the amount. Hence, the application is admitted.
- ix. The Corporate Debtor has filed an I.A. on 03.03.2023 for recall of order dated 21.10.2022 and 13.12.2022 passed by the Adjudicating Authority. Aggrieved by the order dated 26.04.2023, this appeal has been filed.

2. We have heard Shri Aditya Nayyar, learned counsel for the Appellant and Shri Hamid Ahmad, learned counsel appearing for Respondent No.1 – Operational Creditor.

3. Learned counsel for the Appellant submits that the Adjudicating Authority has adjourned the matter twice taking note of the fact that judgment of this Tribunal in “*Jumbo Paper Products Ltd.*” is pending consideration before the Hon’ble Supreme Court. The Adjudicating Authority

ought to have awaited orders of the Hon'ble Supreme Court. It is submitted that according to own case of the Operational Creditor the Principal Amount due was only Rs.56,63,061/- and interest amount was of Rs.66,03,801/-. The amount of interest was not liable to be added and threshold of Rs.1 crore was not fulfilled whereas application was filed after 24.03.2020, hence, it deserves to be dismissed on this ground. The Corporate Debtor had filed an application on the ground that it does not fulfil the threshold, which application was unfortunately dismissed for non-prosecution since the counsel for the Corporate Debtor could not appear on 21.10.2022. Appellant has also filed an application for recall of the order dated 21.10.2022 as well as order dated 13.12.2022, where the Adjudicating Authority directed to proceed ex-parte to the Corporate Debtor, which application remained pending and could not be listed. It is submitted that submission of the Respondent that no vehicles were supplied is incorrect. It is submitted that Purchase Orders did not contain any clause for payment of interest and Purchase Orders annexed with Section 9 application were false. In the application which is filed by the Corporate Debtor being I.A. No. 1891 of 2022 ground of Section 10A was also taken since the demand notice was issued on 24.12.2020 and application was barred by 10A.

4. Learned counsel appearing for the Respondent No.1 submits that the reliance of the Appellant on the judgment of this Tribunal in "*M/s. Jumbo Paper Products Ltd. vs. Hansraj Agro fresh Private Limited*" has no application in the facts of the present case. There cannot be any dispute that after 24.03.2020 every application filed under Section 9 has to fulfil the threshold

of Rs.1 Crore. In the present case, by the demand notice and Section 9 application the operational debt claimed by the Appellant was more than Rs.1 Crore. The Purchase Order included condition that if the goods are not supplied within 90 days, the advance shall be refunded with 18% interest p.a. It is submitted that the debt includes both Principal and Interest, which position of law has been settled by this Tribunal by its judgment in **“Company Appeal (AT) (Ins.) No. 690 of 2022, Prashant Agarwal vs. Vikash Parasrampuriah & Anr.”**. It is submitted that the Operational Creditor sent various emails in 2018 itself demanding back the amount, which emails contain both claim for Principal Amount as well as the Interest. Various WhatsApp Chats were also annexed along with Section 9 application to indicate that the Operational Creditor has been demanding the refund from time to time. It is submitted that the Appellant has been dragging the proceedings before the Adjudicating Authority and out of 15 dates which were fixed before the Adjudicating Authority, the Appellant appeared only on few dates and despite taking time from the Adjudicating Authority on several occasions no reply was filed by the Corporate Debtor. The Corporate Debtor to avoid the payment to the Operational Creditor has been dragging the proceeding. The Adjudicating Authority has rightly proceeded ex-parte against the Corporate Debtor since neither he filed reply nor he appeared on the date fixed. It is submitted that the application filed by the Corporate Debtor to recall the order dated 21.10.2022 and 13.12.2022 were without any basis. The Corporate Debtor was not entitled for any indulgence in view of

the conduct of the Corporate Debtor during the entire proceeding which remained pending for two years.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. Part IV of the application which is 'Particulars of Operational Debt' provides as follows:

<b>PARTICULARS OF OPERATIONAL DEBT</b>		
1.	<b>TOTAL AMOUNT OF DEBT</b>	<p><i>The total amount of debt payable by the Corporate Debtor to Operational Creditor is <b>Rs.56,63,061 (Fifty Six Lakh sixty three thousand and Sixty One)</b> and the total amount of Interest due and payable on unpaid Operational Debt as on 25th December, 2020 is <b>66,03,801/ (Rupees Sixty Six Lakhs Three Thousand Eight Hundred And One/-) (Including GST 18%)</b> and such further Interest @ 18 as would be due for the payment after 25th December, 2020 till the date of realization of the unpaid Operational Debt <b>and expenses incurred towards the advertisement Rs.7,02,573/- legal charges of Rs.5,00,000/-.</b></i></p> <p><i>Hence, the Aggregate of total amount of unpaid Operational Debt due and payable by the Corporate Debtor to the</i></p>

		<i>Operational Creditor as on 25th December, 2020 is <b>Rs 1,34,69,435/- (Rupees One Crore Thirty Four Lakhs Sixty Nine Thousand Four Thirty Five Only).</b></i>
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7. In Part IV at Serial No.2 'amount claimed to be in default and the date on which the default occurred' is mentioned as follows:

2.	<i>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</i>	<i>The total amount of debt payable by the Corporate Debtor to Operational Creditor is <b>Rs.56,63,061 (Fifty Six Lakh sixty three thousand and Sixty One)</b> and the total amount of Interest due and payable on unpaid Operational Debt as on 25th December, 2020 is <b>66,03,801/ (Rupees Sixty Six Lakhs Three Thousand Eight Hundred And One/-) (Including GST @ 9% and CGST @ 9%)</b> and such further Interest @ 18 as would be due for the payment after 25th December, 2020 till the date of realization of the unpaid Operational Debt <b>and expenses incurred towards the advertisement Rs.7,02,573/- legal charges of Rs.5,00,000/-.</b></i>  <i>Hence, the Aggregate of total amount of unpaid Operational Debt due and payable by the Corporate Debtor to the</i>
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	<p><i>Operational Creditor as on 25th December, 2020 is <b>Rs 1,34,69,435/- (Rupees One Crore Thirty Four Lakhs Sixty Nine Thousand Four Thirty Five Only).</b></i></p> <p><i>The computation of amount of default and date of default has been attached herewith as <b>ANNEXURE XIII.</b></i></p> <p><i>Date of Default:- 26/7/2018 and its continues one</i></p>
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8. The claim of the Operational Creditor as reflected from Part IV of the application indicate that total claim is more than Rs.1 Crore which include the Principal Amount of Rs.56,63,061/- and interest. The Operational Creditor has brought on record the Purchase Orders dated 05.05.2017, 06.05.2017, 14.08.2017 and 12.11.2016. We may refer to Purchase Order dated 06.05.2017 where following terms and conditions have been mentioned:

***“TERMS & CONDITIONS:***

- 1) Delivery should be done with in 90 days, otherwise advance shall be returned along with interest @ 18% p.a.*
- 2) Transportation cost extra at actual.*
- 3) All bills should be sent to Rustagi projects Pvt Ltd. Kalyan address only.”*

9. We may also notice the emails which have been sent by the Operational Creditor to the Corporate Debtor demanding the payment. The

emails which have been sent by the Operational Creditor, which have been brought on the record along with the Reply filed in this Appeal, indicate that the claim contains Principal Amount as well as interest as was due on the date when email was sent. It is useful to extract one of the emails dated 26.07.2018 sent to the Corporate Debtor, which is to the following effect:

***“Re: Demand of Rupees 60,74,800 till date or E-Loaders of Equivalent amount in lieu thereof:***

*From: Rajesh Yadav ([rajesh@rustagi.info](mailto:rajesh@rustagi.info))  
To: [anuj.sh99@gmail.com](mailto:anuj.sh99@gmail.com)  
Cc [jai.bagga@gmail.com](mailto:jai.bagga@gmail.com); [vikrampugalia@rediffmail.com](mailto:vikrampugalia@rediffmail.com);  
[sgupta34@yahoo.co.in](mailto:sgupta34@yahoo.co.in); [sonilvehicle@gmail.com](mailto:sonilvehicle@gmail.com);  
[info@sonivehicle.com](mailto:info@sonivehicle.com); [sonicustomer@ gmail.com](mailto:sonicustomer@ gmail.com)  
Date: Thursday, July 26, 2018, 03:18 PM GMT+5:30*

*Dear Sir*

*Given below is the detail of amounts outstanding against your account in our books till today.*

*We request you to take immediate steps to return / refund our amount with Interest or you can send us the E-loaders of equivalent amount till 31st July' 2018 and oblige.*

<i>Initially Paid to you</i>	<i>: 50,00,000/-</i>
<i>Interest Till 31/07/2018</i>	<i>: 7,80,000/-</i>
<i>Returned 88 Batteries Refund</i>	<i>: 2,94,800/-</i>
<i>Total Till date:-</i>	<i>:60,74,800</i>

*Kindly make the Payment on priority.*

*Regards  
Rajesh Y  
Rustagi Projects Pvt Ltd.”*

10. Learned counsel for the Appellant before us has submitted that the Purchase Orders which was issued does not contain any condition for payment of interest. Copy of the Purchase Orders were part of the Section 9 application which clearly contain the condition of interest. Furthermore, in the email which was sent by the Operational Creditor in the year 2018, the amount of interest was also included. The Corporate Debtor did not file any reply to the Section 9 application although twice the time was taken for filing reply. On 10.01.2022, the Adjudicating Authority granted two weeks’ time to file reply by following order:

**“ORDER**

*Counsels for both sides are present. Counsel appearing on behalf of the Corporate Debtor seeks two weeks’ time to file reply in the matter. The time prayed for is granted.*

*List the matter on 14.2.2022.”*

11. Further on 14.02.2022, another order was passed granting two weeks’ time to the Appellant to file reply. Order dated 14.02.2022 is as follows:

**“ORDER**

*Mr. Hamid Ahamd Mir, Counsel for the Petitioner/ Operational Creditor is present. Mr. Mohit Arora, Counsel for the Corporate Debtor has also appeared and submits that he is yet to file Vakalatnama in the*

*matter. He is directed to do the needful within two days' time.*

*In addition, Counsel for the Corporate Debtor is also directed to file reply on behalf of his client within two weeks with a copy to be made available to Counsel for the petitioner. Counsel for the Operational Creditor to file rejoinder, if any, within a week.*

*List on 10.3.2022.”*

12. The Corporate Debtor chose not to file reply and filed an I.A. for dismissing the application under Section 9. I.A. which was filed by the Appellant was dismissed for non-prosecution. We may also look into the grounds taken in the I.A. for dismissing the Company Petition. In the I.A. the ground taken was that the interest component cannot be added in the Operational Debt. Further Section 10A of the Code was relied referring to Demand Notice dated 21.12.2020.

13. Learned counsel for the Operational Creditor has rightly relied on judgment of this Tribunal in **“Company Appeal (AT) (Ins.) No. 690 of 2022, Prashant Agarwal vs. Vikash Parasrampuriah & Anr.”**, where three Member Bench of this Tribunal held that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which is stipulated in the invoice has to be added. We may refer to Para 9 (vi) of the judgment, which is to the following effect:

*“9(vi) It is, therefore, clear from these facts that the total amount for maintainability of claim will include both principal debt amount as*

*well as interest on delayed payment which was clearly stipulated in the invoice itself. It is noted that the total principal debt amount of Rs. 97,87,220/- along with interest the total debt makes total outstanding as Rs. 1,60,87,838/-. Thus, the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 IBC read with notification No. S.O I205 (E) dated 24.3.2020 (Supra), and meets the criteria of Rs.1 crore as per Section 4 of IBC and Application is therefore maintainable in present case.*

*We concur with the orders of Adjudicating Authority on this issue also.”*

14. The above judgment of **“Prashant Agarwal”** clearly supports the submission of learned counsel for the Respondent that for calculating the amount for maintainability of the claim, for threshold purpose, both Principal Amount and Interest has to be calculated when the interest is stipulated between the parties.

15. The ground taken in the I.A. under 10A is clearly misconstrued since the default is being claimed by the Operational Creditor w.e.f. 26.07.2018 which was much before the 10A period. The mere fact that the Demand Notice was dated 21.12.2020 shall not have any effect on the maintainability of the application under Section 9 when default is committed on 26.07.2018 and admitted thereafter.

16. In the facts of the present case, we are satisfied that the Adjudicating Authority did not commit any error in admitting Section 9 application which clearly fulfils the threshold. The Corporate Debtor despite having been allowed time, failed to file reply and did not appear on the date when matter was fixed for hearing. The Adjudicating Authority rightly proceeded ex-parte against the Corporate Debtor when he chose not to file reply and failed to appear on the date fixed. No error has been committed by the Adjudicating Authority in admitting Section 9 application. There is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

**[Naresh Salecha]  
Member (Technical)**

**NEW DELHI**

**04<sup>th</sup> July, 2023**

*Archana*