

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

CP (IB) No.133/BB/2022
& I.A No. 120 /2023
& I.A No. 125 / 2023
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

North West Carrying Company, LLP

Represented through its Partner

Harjeet Singh Sachdeva

Registered Office at:

1002, Pragati Tower, 26, Rajendra Place,

New Delhi – 110 008.

... Petitioner/Operational Creditor

Versus

Metro Cash and Carry India Pvt. Ltd,

26/3, Industrial Suburbsward #9,

A Block, Subramanyanagar

Bangalore- 560 055

... Respondent/Corporate Debtor

Order delivered on: 25th May, 2023

Coram:

Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)

Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner

: Shri Gagan Chhabra, Shri Roshan Geroge Jacob
And Mrs. Chanchal Chauhan, Advocates

For the Respondent

: Shri Vikas Dutta, Shri Pankaj Sharma and
And Ms. Divya D. Shetty, Advocates.

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 22.04.2022, under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016,

by M/s North West Carrying Company, LLP. (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s. Metro Cash and Carry India Pvt. Ltd (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 1,63,71,799/- (Rupees, One Crore Sixty-Three Lacs Seventy-One Thousand Seven Hundred and Ninety- Nine Only).

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
 - a. The Corporate Debtor entered into various Agreements with Operational Creditor under which the service of the Operational Creditor were availed for Re- Packing, Loading, Transportation and delivery of Goods from the different Warehouse of the Corporate Debtor Company to its Clients spread out at different Locations in the country.
 - b. It is submitted that the Petitioner and the Respondent executed various Agreements in respect of the Services to be provided by the Petitioner Company. These Agreements were renewed and extended from time to time. Further, as a matter of practice, the Petitioner Company was raising regular Bills/Invoices to the Respondent and the Respondent used to make payments against those Invoices/Bills. However, the invoices raised by the Operational Creditors were never paid in full and huge balance was outstanding by the Corporate Debtor.
 - c. It is submitted that serious disputes and difference arose between the parties, which led to the registration of FIR No. 564/2016 under Section 420/406/453/120B/506/380/34 of IPC against the Corporate Debtor and its Officials which is pending adjudications.
 - d. Further, as per records the payments have been made in part by the Corporate Debtor from time to time in acknowledgment of its debt/amount payable to the Petitioner. The last such payment is after deduction of Rs. 8110/- TDS and this is so reflected in the Books of Accounts of the Operational Creditor and in Form 26 as

on 31.03.2016. The Petitioner Company vide letter dated 17.11.2017 demanded its payment of Rs. 38,57,199/- and notified that in the event of non-payment interest will be charged at a rate of 24% per annum on the delayed payments. However, despite the receipt of letter, the respondent did not made any payments.

- e. In these circumstances petitioner issued Legal Notice dated 25.12.2018 to the respondent calling upon it to make the payment of its dues. The respondent has not cleared the dues of the Operational Creditor and instead sent a vague reply dated 07.01.2019.
- f. On 21.03.2019 the Petitioner filed petition CP (IB) No. 106/ 2019 under section 9 of the IBC, 2016 before this Tribunal against the corporate debtor. However, due to technical mistake made by the Petitioner in sending the Legal Notice to the Respondent, the said petition was withdrawn vide order dated 08.07.2019, while taking liberty from this Tribunal to file fresh Company Petition.
- g. The petitioner served fresh demand notice dated 29.07.2019 as per the prescribed format to the respondent. However, no payment was received even after the lapse of the Statutory Period of 10 days.
- h. The Petitioner once again filed Company petition bearing CP (IB) No. 394 of 2019 on 14.09.2019 and this Tribunal vide order dated 24.01.2020 passed a Consented Order directing the petitioner to submit its claim with all supporting tenable evidence to the respondent, and granting liberty to file to the petitioner to file fresh petition if aggrieved. Acting on the said consented order, the operational creditor submitted its claim along with all supporting documents to the corporate debtor. However, the respondent rejected the claim of the petitioner.
- i. Further, the respondent filed an Appeal against order dated 24.01.2020 passed by this Tribunal before the Hon'ble NCLAT which was allowed vide order dated 07.02.2022. it is submitted that the present petition is filed in consonance with the liberty granted by this Tribunal vide order dated 24.01.2020.

3. The Learned Counsel for the Respondent filed his objections vide diary No.4812 dated 10.11.2022 inter alia stating as under:
- a. The Respondent is a wholly owned subsidiary of the international wholesale giant, Metro Cash & Carry International GmbH, which has its headquarters in Germany. It is submitted that the Respondent had contractual relationship with the Applicant and its sister concern namely NWCC Supply Chain Solutions Private Limited, since 2011. However due to the acts and omissions of the Applicant, all relations with the Applicant and its sister concern were terminated in the year 2014.
 - b. It is submitted that the various agreements entered with the Petitioner provided for a method of payment, which stipulated that any invoice generated would be cleared by the respondent subject to the verification of the invoice duly supported by the documents. However, the respondent found several errors and fictitious invoices raised by the Applicant and repeatedly disputed the claims of the Applicant. The disputes raised by the Respondent were never properly addressed or resolved by the Applicant.
 - c. Further, the invoices produced by the petitioner along with the petition shows that all of these invoices were issued between 2011 and 2015, with the latest invoice dated 20.02.2015. The claim of the Petitioner based on the allegation of non-payment of these invoices is more than three years old. Further, the Agreements between the Applicant and the Respondent nor any of the invoices relied upon by the Applicant contains any provisions for payment of interest.
 - d. Moreover, on perusal of the account statement submitted by the petition as Annexure A17 shows that the Petition is filed claiming an alleged unpaid operational debt amounting to Rs. 1,63,71,799/- out of which the principal amount is only Rs. 12,46,204/- which is below the threshold limit of Rs 1 crore as provided under the proviso to Section 4 of the IBC. Apart from the alleged unpaid principal amount, other amounts as claimed by the petitioner i.e interest, legal charges, balance cost of amortization, notice period rent

neither forms part of any contractual arrangement nor can even be considered as an operational debt. The petitioner purposefully clubbed these amounts with the principal amount to arrive at the minimum threshold of Rs.1 crore for complying with the provisions of Section 4 of IBC, which cannot be done.

- e. Further, no agreement between the parties wherein the respondent has ever agreed to pay any interest, legal charges, balance cost of amortization and/or notice period rent.
- f. The respondent further contended that the Petition is barred by limitation and relied on the decision of Hon'ble Supreme Court in the case of "*Asset Reconstruction Company (India) Limited vs Tulip Star Hotels Limited & Ors, 2022 SCC Online SC 944* wherein it is held that the period of limitation for making an application under Section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default.
- g. It is submitted that the Agreements executed between the Applicant and respondent date back to the years 2012-to 2015 and all these Agreements were terminated in the year 2014 and the last invoice is dated 20.02.2015. Hence, these agreements and invoices raised thereunder do not fall within the period of limitation as the same stood expired on or before 20.02.2018.
- h. Moreover, both the earlier petitions, C.P (IB) No. 106/BB/2019 filed on 21.03.2019 and C.P (IB) No. 394/BB/2019 filed on 14.09.2019 were filed much after the last invoice was alleged issued and payment thereunder were allegedly due for payment and therefore, even the said petitions were barred by limitation. It is submitted that by way of order dated 24.01.2020, this Tribunal granted the petitioner the liberty to file fresh petition if aggrieved by the decision of the respondent which liberty was to be exercised in accordance with law meaning thereby that such liberty cannot bypass the law of limitation.

4. The Learned Counsel for the Petitioner filed his rejoinder vide diary No. 215 dated 11.01.2023 and the same is taken on record. In this

rejoinder, the Petitioner has asserted that TDS of Rs. 8110/- was deducted by the Corporate Debtor for an invoice of Rs. 4,05,424/- raised by the Petitioner; which is reflected in the Books of Account for 31.03.2016; and such TDS and also GST as and when applicable for the years 15.-16, 16-17 and 17-18. It is stated that payment of these taxes shows the continuity in the cause of action; and hence limitation has not expired.

5. Heard both the counsels and perused the records available.
6. On 29.11.2022 this Tribunal directed that the date of default and accordingly limitation issue needs clarification. And after availing substantial time the learned counsel for the petitioner on 16.03.2023 submits that the date of default is 15.01.2016. On 23.02.2023 this Tribunal directed the petitioner to file three page note on threshold aspect along with the copies of judgment on which they are placing reliance and the same is complied vide diary No. 1298 dated 06.03.2023. In this note, it has been explained that when the first petition was filed under CP (IB) No. 106/BB/2019 on 21.03.2019; the threshold limit was Rs. 1 lakhs only; and since liberty was granted by the Tribunal to the petitioner to file a fresh Company Petition, the same limit will apply.
7. The Primary issue for consideration is whether minimum threshold for filing Petition under section 9 is met or not. This tribunal on perusal of the documents available observes that amount claimed as unpaid operational debt is Rs. 1,63,71,799/-, wherein the Principal amount is only Rs. 12,46,204/-. Further, on perusal of the account statement dated 28.02.2022, it is seen that the petitioner has clubbed, Principal Amount of Rs. 12,46,204/-, Interest upto 28 Feb 2022 of Rs. 1,13,80,361/-, Legal charge of Rs. 21,49,925/-, Balance cost of Amortization of Rs. 1,77,727 and Notice Period Rent of Rs. 14,17,582/- to arrive at the total amount of Rs. 1,63,71,799/-.
8. The respondent in its objection submitted that there is no agreement between the parties wherein the respondent has ever agreed to pay any interest, legal charges, balance cost of amortization and/or notice period rent. It is seen that the Petitioner has not filed any documents

to show that respondent has agreed to club the above mentioned charges to the principal amount.

9. Hence it is evident that the Petitioner has intentionally clubbed these amounts with the principal amount to arrive at the minimum threshold of Rs. 1 Crore for complying with the provisions of Section 4 of IBC.
10. The Hon'ble NCLAT in the matter of “ *Prashat Agarwal v. Vikash Parasrampuria, Company Appeal (AT)(Ins) No. 690 of 2022 dated 15.07.2022*, held that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment in case the same was stipulated in the invoice. In other decisions it has been decided that only if interest was to be levied in accordance with some agreement between the two parties, can it be considered for inclusion for the purpose of Section 9 of the Code.
11. It is clear from the legal position in this regard that in order to club other charges with the principal amount express stipulation has to be incorporated specifically in the agreement, the purchase order or the invoice and in the absence of the same, neither interest nor any other charges can be clubbed with the principal amount. Therefore this Tribunal observes that the threshold limit stipulated under section 4 of the Code is not met in this case. The contention that old limit of Rs 1 Lakh should apply to this petition because of the liberty is not tenable. The order granting liberty dated 24.01.2020 stated as under; “*The Petitioner, if aggrieved by the order, is at liberty to file a fresh Company Petition, in accordance with law*”. The fresh company petition was filed on 22.04.2022; and the law as it exists on this case prescribed the minimum threshold of Rs. 1 crore. Therefore, the petitioner's contention in this regard is devoid of merit.
12. The Next contention that came up for this Tribunal is regarding limitation. On perusal of the documents produced it is seen that all the agreements executed between the petition and respondent dates back to years 2011 to 2014. Further, all these agreements were terminated in the year 2014. Moreover, the Learned Counsel for the Petitioner on 16.03.2023 submitted that the Date of Default is on 15.01.2016. Accordingly the same stood expired on 14.01.2019.

13. It is seen that the first petition filed by the Petitioner being C.P (IB) No. 106 /BB/2019 filed on 21.03.2019 was subsequently withdrawn due to mistake made by the Petitioner in sending legal notice, and liberty was granted to file fresh petition. Further, the Petitioner filed CP (IB) No. 394/BB/2019 on 14.09.2019 and vide order dated 24.01.2020 this Tribunal directed the parties to resolve their disputes, and again granted liberty to file fresh petition in accordance with law, if aggrieved.
14. It is seen that the date of default is 15.01.2016 and the same expired on 14.01.2019 and the company petition CP (IB) No. 106/BB/2019 filed on 21.03.2019 fell outside the purview of Limitation. And subsequently the petition was withdrawn with the liberty to file fresh petition duly following the provisions of the Code. Hence at the initial stage itself the petition was barred by limitation and liberty in filing fresh petition was to be exercised in accordance with law. It is noticed that the issue of limitation was raised in the proceedings in CP (IB) No. 394/BB/2019; along with the matter of pre-existing disputes, but the petition was decided with directions to the parties to resolve the matter.
15. Accordingly, this Tribunal is of the considered opinion that this petition is not a fit case for admission, since the threshold as stipulated u/s 4 of the Code is not met. As discussed above, the Principal amount in this case was only Rs. 12,46,204/- which only is to be considered for determining the fulfilment of requirement of threshold u/s 4 of IBC, 2016. Therefore, the petition CP(IB) No. 133 of 2022 is hereby **dismissed**. However, this order shall not preclude the petitioner from pursuing other remedies in accordance with law, if so advised. No order as to costs.

I.A No. 120 of 2023

1. The instant application is filed on 11.01.2023 by the M/s North West Carrying Company LLP, Petitioner in the present Company Petition interalia seeking to Direct the Corporate Debtor, M/s Metro Cash and Carry to place on record all the Record/Documents pertaining to the Acquisition of the Respondent by M/s Reliance Retail Ventures Limited, Agreement/Agreement, which have been signed or Agreement which may be proposed to be signed between the said two parties.

2. However, this Tribunal in the order passed today in CP (IB) No. 133/BB/2022 above has dismissed the said petition for want of minimum threshold required for filing the petition. Hence the present I.A for directing the respondent to place on record documents related to its acquisition becomes infructuous.

3. Hence I.A 120 of 2023 is disposed of as infructuous.

I.A No. 125 of 2023

1. The instant application is filed on 20.02.2023 by M/s North West Carrying Company, LLP, for condonation of delay of 67 days by the petitioner in filing the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016, Originally numbered as “ CP (IB) No. 106/BB/2019 titled as “North West Carrying Company, LLP v Metro Cash & Carry India Pvt. Ltd”. Later on, filed with the leave of the court and renumbered as “CP (IB) No. 394/BB/2019 and subsequently, filed with the leave of the Tribunal and renumbered as CP(IB) No. 133/BB/2022 by the petitioner.

2. This application has been filed for condonation of delay in filing Company Petition CP (IB) No. 106 of 2019 on 21.03.2019. This Petition was withdrawn and disposed of by this Adjudicating Authority vide order dated 08.07.2019. Therefore, this I.A No. 125 of 2023 for condonation of delay of an application which is already disposed of cannot be decided now as it has become infructuous.

Hence I.A 125/2023 is disposed of as infructuous.

-Sd-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd-

**(T.KRISHNAVALLI)
MEMBER (JUDICIAL)**