

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

C.P. No. 1231/I&BP/2018

Under section 9 of the IBC, 2016

In the matter of

Deevya Shakti Paper Mills (P) Ltd.
Survey No. 252, Gaganpahad, Hyderabad-
500052, Telangana, India

....Petitioner

v/s.

Borkar Color Packs Private Limited
Alankar Building, Martaries Dias Road, Malbhat,
Margaon, Goa-403601.

....Respondent

Order delivered on: 01.11.2018

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)
Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Sheelang Shah a/w Mr. Manal Dhanani

For the Respondent: Mr. Shyam Kapadia a/w Mr. Rachit Thakar
for Rustamji & Ginwala

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Company Petition is filed by Deevya Shakti Paper Mills (P) Ltd. (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Borkar Color Packs Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment to the extent of Rs. 52,20,560/- including interest @ 24% p.a. by invoking the provisions of Section 9 of I&B Code (hereinafter called "Code") read with Rules 6 and 10 of Insolvency & Bankruptcy (AAA) Rules, 2016.
2. The Petition reveals that the Petitioner supplied Coated Duplex Paper Boxes to the Corporate Debtor and raised invoices till 10.07.2017. The Petitioner submitted that materials were supplied to the extent of Rs. 36,62,285/- and the Corporate Debtor deliberately withheld the payments, failed and neglected to pay the outstanding principal amount of Rs. 36,62,285/-. The Petitioner sent Demand notice to the Corporate Debtor in Form 3 on 07.03.2018 calling upon the Corporate Debtor to make the payment of Rs. 52,20,560/- which is inclusive of interest calculated @24%p.a. on all the delayed payments right from 31.01.2015. It was further submitted that the Petitioner has not received any reply from the Corporate Debtor

within 10 days denying or admitting the debt payable by the Corporate Debtor. However, it was submitted that the Petitioner has received a reply on 22.03.2018 seeking for production of original documents annexed to the notice but the reply failed to disclose any dispute with regard to the existence of the amount due and therefore the debt was not denied and no dispute was raised in respect of the debt due and payable. Even though the Petitioner disputed the right of the Corporate Debtor to seek production of original documents but permitted the counsel for the Corporate Debtor to take an inspection of the documents. The Petitioner further submits that they have not received payments for the invoices nor any dispute was raised by the Corporate Debtor. Hence this Petition.

3. The Corporate Debtor filed reply to the Petition stating that the Petition is liable to be dismissed with the exemplary cost on account of the blatant and mala-fide suppression of documents in a wholesale manner by the Petitioner.
4. The Corporate Debtor submits that Petitioner suppressed the following documents:
 - a. Email dated 22.02.2017, wherein the Petitioner demanded a sum of Rs. 34,06,509/- by enclosing the statement of account.
 - b. Email dated 20.11.2017 wherein the Petitioner demanded a sum of Rs. 28,34,124/-.
 - c. Email dated 30.11.2017.
 - d. Demand Notice dated 07.12.2017 demanding a sum of Rs. 37,09,739/- including interest to the extent of Rs. 4,48,772/- (this Demand Notice was issued by the Petitioner, prior to the Demand Notice dated 07.03.2018 on the basis of which the Petition was filed)
 - e. Reply of the Corporate Debtor dated 16.12.2017 to the above Demand Notice stating that the amount claimed is not correct and not in agreement with the actual transactions.
5. It was further contended by the Corporate Debtor that, even according to the Petitioner there is a confusion regarding the amount due. The Corporate Debtor further submits that the additional affidavit dated 30.05.2018 filed by the Petitioner attempted to improve and address some of the glaring loopholes in the Petition such as;
 - (a) introducing a new invoice bearing number 2151.
 - (b) amendments to certain invoice amounts that is invoice numbers 2152 and 2264.
 - (c) readjustment of the credit against payment by the Corporate Debtor.
 - (d) charging interest @18% per annum for invoice nos. 2152, 2263 & 2264, despite there is no contract for charge of interest.
 - (e) not disclosing amount already paid.
6. The Petitioner itself is not sure of the amount due from the Corporate Debtor and different amounts were claimed at different points of time. In the E-mail

dated 22.02.2017, the amount claimed was only the principal due of Rs. 34,06,509/- and no interest claim was made. The same is the case with the E-mail dated 30.11.2017 wherein the principal due of Rs. 24,61,816/- was claimed without any reference to any interest payable. In the first Demand Notice dated 07.12.2017a sum of Rs. 32,72,994/- was claimed as principal and a sum of Rs. 3,88,495/- was claimed as interest, thus totaling Rs. 37,09,739/- (here the total works out to Rs.36,61,489/- only but wrongly stated as Rs. 37,09,739/-). However, the latest demand notice dated 07.03.2018 claims a sum of Rs. 36,62,285/- as principal and Rs. 15,58,275/- as interest, in total for a sum of Rs.52,20,560/-. The Corporate Debtor further submits that the amount claimed in Form 5 is in variance not only to the previous correspondence but also to the invoices relied by the Petitioner. Even the additional affidavit filed by the Petitioner attempting to make various corrections were not in consonance with the documents and also to the prior correspondences. The Corporate Debtor contends that the supply through invoices nos. 2152 and 2264 were procured on advance payment basis, however payments were again claimed for those invoices in Form 5.

7. The Corporate Debtor further submits that they are remitting 100% advance against purchase orders and as per their records no payment is pending.
8. Petitioner filed rejoinder stating that the amount claimed of Rs. 34,06,509/- in the E-mail dated 22.02.2017 was as per the ledger balance dated 31.03.2016, the amount of Rs. 28,34,124/- claimed in the E-mail of 20.11.2017 was as per the ledger balance dated 31.03.2017 including interest calculated from 01.04.2018 to 20.11.2017, in all Rs.24,61,816/-. It was further submitted that in the demand notice dated 07.12.2017, the amount due was not calculated correctly and since the Corporate Debtor itself had stated that the demand notice is not as per the prescribed format of the Code and hence the Corporate Debtor cannot rely upon the previous demand notice. It is further submitted that the Corporate Debtor has not raised any dispute as regards the liability except stating that the Petitioner has manipulated the accounts, the Corporate Debtor has not produced any document to show that they have paid the unpaid invoices.
9. The Corporate Debtor filed sur-rejoinder disputing the allegations, contentions and averments etc. of the rejoinder dated 11.07.2018. It was further submitted that even after the meeting held between parties to reconcile the accounts and to settle the dues, settlement has not fructified. It was further contended that the Petitioner's claim in the Petition is based on invoices and not on ledger accounts. The Corporate Debtor vehemently denied and disputed the Ledger account and submits that the Petitioner cannot seek to alter the foundation of claim in the rejoinder which is wholly different and distinct as sought in the Petition. The Corporate Debtor submits that invoice no. 2151 dated 06.07.2017

for Rs. 99,910/- which was not included in the demand notice as well as in the Form 5 has been additionally brought up as a claim in additional Affidavit dated 30.05.2018 and the same is nothing more than an after thought and an attempt to make further false and frivolous claims. It was further submitted that the interest calculated @24% p.a. was not agreed and the payments were dishonestly adjusted towards interest, after which a sum of Rs. 36,62,285/- was shown as outstanding but the Ledger accounts shows a balance of Rs. 32,61,785/- despite non-charging of interest to the Ledger account and hence the calculations are false, fabricated, misconceived and inaccurate. It was also pointed out that sales return to the extent of Rs. 9,52,729/- were accounted on 26.02.2016 for purported invoices of 22.02.2016 but those invoices were not reflected in the same ledger and are actually for the goods supplied under the disputed invoices of 2015. It was submitted that this sales return pertains to goods supplied in 2014 for which credit was given 2 years later. It was further contended that the Petitioner claimed for 6 unpaid invoices from 31.01.2015 to 29.11.2015 aggregating to Rs.28,62,316/- and the Petitioner's Ledger records payments by the Corporate Debtor to the extent of Rs.1,08,20,000/- in the year 2016 which would clear the alleged outstanding of Rs.28,62,316/-. It was further submitted that sales made to M/s. Lunker Agencies Pvt. Ltd. for Rs. 9,52,729/- on 15.03.2016 was charged on the Corporate Debtor for which the Corporate Debtor is no way liable.

10. The Petitioner filed an Additional Affidavit dated 30.05.2018 stating that in the Annexure 1 to the Form 5 the following inadvertent errors have crept in.
- a. *Invoice no. 2151 dated 06.07.2017 was not mentioned in earlier Annexure 1, which has now been rectified and mentioned at serial no. 10 in corrected Annexure 1. The said invoice is hereto annexed and marked as Exhibit 1.*
 - b. *Invoice amount of Invoice no. 2152 was mentioned as Rs. 4,07,763/- instead of 7,42,853. The same has now been rectified and mentioned at serial no. 11 in corrected Annexure 1.*
 - c. *Amount of Rs. 4,35,000/- received from Corporate Debtor was not given credit in earlier calculation. The same has now been rectified and adjusted towards serial no. 10 and 11 corrected in Annexure 1.*
 - d. *Invoice no. 2264 dated 10.07.2017 was mentioned as Rs. 3,44,418/- instead of Rs. 3,55,627/- which has now been rectified and mentioned at serial no. 13 in corrected Annexure 1.*
 - e. *An amount of 11,209/- being an excess amount received was not given credit in earlier calculation. The same has now been rectified and adjusted towards serial no. 13 in corrected Annexure 1.*
 - f. *Earlier calculation for Invoice number 2152, 2263 and 2264 interest was not contractually stipulated @ 24% p.a. However, was included in the calculation. The same has been changed to a reasonable rate of interest since it is a commercial transaction, i.e. 18%.*

11. Petitioner filed rejoinder inter alia among other things enclosing the statement of account which were addressed to the corporate debtor seeking confirmation of Balance and the following was the balance outstanding as per the statement;
 - a. Balance as on 31.3.2016 -Rs. 34,06,509
 - b. Balance as on 31.3.2017 -Rs. 24,61,816
 - c. Balance as on 31.3.2018 - Rs. 32,01,785

12. When we go through the different Demand Notices issued by the Petitioner, the Additional Affidavit dated 30.05.2018 filed by the Petitioner, it is very clear at each stage there is immense confusion and uncertainty in respect of the amount due. The Petitioner has not claimed the exact amount due.

13. In all the above statement of accounts, which were sent by the Petitioner to the corporate debtor, the Petitioner has not charged interest even though Petitioner submitted that interest has been charged for the year ending 31.03.2017. The ledger account produced by the Petitioner does not contain any entry regarding charging of interest. It is be noted that in the Demand Notice the Petitioner has listed the invoices from 31.01.2015, charged interest for the delayed payments at the rate of 24% per annum and added the interest to the principal, deducted the payments from the amount due which is inclusive of interest and then shown the balance and repeated the same process whenever a payment is received. This calculation is made for the first time when the demand notice is sent on 7/3/18 and no interest was claimed in the previous demand notices sent on 22.02.2017 and 20.11.2017 by email.

14. It is to be noted that the charging of interest for the delayed payment was informed to the corporate debtor only at the time when the demand notice was sent on 07.12.2017 and the demand notice under Section 8 of the Code on 07.03.2018. As far as the demand notice dated 07.12.2017 is concerned, the Corporate Debtor disputed the liability saying that the principal amount due is not correct and the figures are not in agreement with the actual transactions. The Petitioner itself does not want to rely on the demand notice dated 07.12.2017 and subsequently issued another demand notice dated 07.03.2018, listing the invoices and appropriating the payments towards principal and interest and claimed the balance of Rs.52,20,560/- which is inclusive of interest claim of Rs. 15,58,275/-. Till the receipt of demand notice dated 07.03.2018 based on which this petition is filed, the Corporate Debtor was not aware of the charging of interest by the Petitioner for the past 3 years. In fact charging of interest for 3 years at one go at the time of sending demand notice, even though the invoices were raised for the past 3 years, appropriating a portion of the payment made by the corporate debtor towards the interest portion is a surprise to the corporate debtor. It is true that the corporate debtor is liable to pay interest at the rate of 24% per annum excluding few invoices where interest is

not provided in the invoices but that does not mean that the Petitioner can charge interest after keeping quiet for 3 financial years and then imposing interest charges as surprise to the Corporate Debtor at the time of sending Demand notice.

15. It is to be noted that supplies were made by the Petitioner to the Corporate Debtor for last several years without charging any interest. Now the Petitioner all on a sudden charged the interest for the delayed payments of the invoices right from 31.01.2015 at the time of issuing Demand Notice u/s 8 of the Code. If the Petitioner charged interest then and there the Corporate Debtor might have prepared for the payment of interest or made the payment in time. The Demand Notice dated 07.03.2018 imposed an unexpected financial liability on the Corporate Debtor. Further, nobody prevented the Petitioner from charging interest then and there immediately after the payment is due but that has not been done. Further, in the previous Demand Notices sent by email the Petitioner has not claimed interest, the ledger accounts sent by the Petitioner to the Corporate Debtor for the confirmation of the balance due is not inclusive of interest and in view of these facts it has to be construed that the Petitioner waived its right to charge interest when the payment for the invoice was accepted without any protest or demur at the time of receiving the payment and after 3 years the Petitioner cannot take a 360 degree turn and ask for interest.
16. If this kind of practice is allowed many of the Industries in India will face this kind of a piquant situation where they may not be in a position to survive in the market. Further, this kind of unexpected sudden interest charges will affect the profitability, financial stability and the very existence of the industry itself which will give hardship to the economy as a whole.
17. The Petitioner itself has stated that there was no agreement for payment of interest in respect of three invoices, however the Petitioner has claimed the interest of 24% in the demand notice and in the petition, now in the revised claim scaled down the rate of interest to 18% even though the Petitioner is not entitled to charge any interest. In view of this also the claim made by the Petitioner is not correct. The Hon'ble NCLAT in its order dated 27.07.2018 in the case of Krishna Enterprises Vs. Gammon India Ltd. in CA No. 144/2018 held as below:-

"5. In the present appeals, as we find that the principal amount has already been paid and as per agreement no interest was payable, the applications under Section 9 on the basis of claims for entitlement of interest, were not maintainable. If for delayed payment the Appellant(s)' claim any interest, it will be open to them to move before a court of competent jurisdiction, but initiation of Corporate Insolvency Resolution Process is not the answer."

18. We are not coming to the conclusion that there is no debt due, definitely substantial amount is due, but Petitioner has not come up with a proper claim. The efforts made by this bench to settle this matter amicably after reconciling the accounts also failed. Even though we are rejecting the contention of the Corporate Debtor that there is no due, the disputes raised by the Corporate Debtor in respect of some specific invoices and about charging of interest in a cavalier manner cannot be termed as spurious and hence we hold that there is a dispute in relation to the debt.

19. In view of the above discussions, the petition is dismissed with the liberty to the Petitioner to proceed in accordance with law.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)