

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

CP 1727/IBC/NCLT/MAH/2017

Under Section 9 of the I&B Code, 2016

In the matter of

Govind Sales

....Operational Creditor

v/s

Gammon India Limited

.... Corporate Debtor

Order delivered on: 14.1.2019

**Coram: Hon'ble Shri V. P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)**

For the Petitioner: CS Komal Jain a/w Adv Rutuje Patil

**For the Respondent: Mr. Shyam Kapadia, Counsel a/w Ms. Smruti Kanade and
Mr. Vikrant Makhare, Advocates i/b Negandhi, Shah and
Himayatullah**

Per V. P. Singh, Member (Judicial)

ORDER

1. It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 by Operational Creditor, namely Govind Sales against Corporate Debtor, namely Gammon India Limited stating that the Corporate Debtor failed to make payment of Rs. 55,91,980/- comprising of principal amount of Rs. 33,72,579/- and interest of Rs. 22,19,401/- charged @18% from due date. The Company Petition has been filed on 13.12.2017 to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.
2. The background of the case is that the Petitioner is in business of Civil Contractor and carries assignments of supplying goods and services. The Operational Creditor was engaged by the Corporate Debtor for supplying goods and services as per work order no. 9101/82 dated 12.5.2014 for Rosa Power Plant at Shahjahanpur, Uttar Pradesh. The Operational Creditor provided goods and services worth Rs.

74,83,177/- till last invoice dated 28.2.2015. The Corporate Debtor made payment of Rs. 41,10,597/-. A total of six invoices from 30.9.2014 to 28.2.2015 are outstanding and remain unpaid by the Corporate Debtor. The total outstanding amount is Rs. 33,72,579/- alongwith interest of Rs. 22,19,401/ @ 18% per annum as per Section 15 and section 16 of the Micro, Small and Medium Enterprises Development Act (MSME Act). Further, the Corporate Debtor has deducted TDS against all invoices. The Operational Creditor has annexed 26AS Form for last TDS deduction made on 28.2.2015.

3. When the Operational Creditor ailed to realize its dues, demand notice dated 27.10.2017 under Section 8 of the IBC was issued demanding payment within 10 days from the date of receipt of notice. The Corporate Debtor sent a reply on 8.11.2017 raising following allegations:
 - a) The claim of Rs. 33,72,579/- along with the interest is untenable.
 - b) Substantial part of Petitioner's claim is time-barred i.e. invoice no. RA-3 dated 30.9.2014 of Rs. 23,34,245/- and invoice no. RA-4 dated 31.10.2014 of Rs. 11,98,519/-.
 - c) That the invoices/RA Bills annexed do not bear acknowledgment by the Respondent and therefore deny the claim in respect of claim.
 - d) The Respondent denies the application of MSME Act in respect of interest calculation on the outstanding amount.
4. The Operational Creditor has stated in its petition that it is an admitted fact that there are no instances of return of goods by the Corporate Debtor against the Operational Creditor's services and the Corporate Debtor has never in the past raised any such objections. Further, stated that **such dispute cannot be raised belatedly and in order to classify as a dispute under S. 8(2)(a) of the IBC, it needs to be pre-existing and cannot be raised once the demand notice has been served.**
5. The Operational Creditor has annexed attested copy of Bank statement along with the certificate issued by the Vijaya Bank, confirming that no payment was made by the Operational Creditor to the Corporate Debtor between 2.11.2017 till 26.11.2017.

6. The Operational Creditor states that it is registered under MSME Act and has calculated interest on the outstanding amount after deducting the maximum allowable credit period of 45 days.
7. The Professional appearing for the Operational Creditor stated that the Corporate Debtor released a payment of Rs. 33,72,579/- towards principal amount on 9.3.2018. Also, the Operational Creditor also approached the Corporate Debtor via email dated 6.3.2018 with the revised interest calculation reducing the rate of interest from 18% to 15% amounting to Rs. 20,43,663/- but the Corporate Debtor has ignored it. **The written submissions filed by the Operational Creditor states that as of now, the balance outstanding on the part of the Corporate Debtor is for an amount of Rs. 22,19,401/- against the interest portion.**
8. The Corporate Debtor has argued that the present petition is liable to be rejected on the following grounds:
 - a) Mr. Sanjay Kumar Ruia is not eligible to initiate and maintain the present application. The Vakaltnama claims "Sanjay Ruia & Associates" to be a firm of advocates when it is in fact a firm of Chartered Accountants. Further, disciplinary proceedings are pending against Mr. Sanjay Ruia. Therefore, the Memorandum of Appearance / Vakalatnama is not correct and the application filed and argued on behalf of the alleged Operational Creditor by persons not validly authorized to do so, ought not to be entertained by this Bench.
 - b) The proposed Interim Resolution Professional, Mrs. Bhavna Sanjay Ruia, is proposed to be paid exorbitant sums of money and is the wife of the professional representative of the Petitioner. Further, she has already been suspended by IBBI.
 - c) It is contended that the entire principal amount of the debt has been paid during pendency of the petition. The outstanding amount is only interest portion. The Operational Creditor has placed reliance on the MSME Act for claiming the statutory interest. In any event, the Operational Creditor has failed to establish how it is entitled to interest under the MSME Act.
 - d) Grave prejudice would be caused to the Corporate Debtor, a huge conglomerate on the basis of its present status. The Corporate Debtor was founded in 1922 and has

been continuously involved in various infrastructure projects. The present debt of the Corporate Debtor is approximately Rs. 14,000 crores. The lenders include IDBI Bank, Bank of Baroda, LIC of India, United India Insurance Company, Punjab National Bank and others. None of these institutions have initiated action against the Corporate Debtor under the IBC and in fact many lenders have converted a portion of their debt into equity and today 63.07% of the shareholding of the Corporate Debtor is held by the lenders. The Corporate Debtor employs around 2,000 persons and has approximately 60 ongoing projects. The Corporate Debtor has awards/ decrees of around Rs. 400 crores against the Central and State Government institutions.

9. The Counsel for Corporate Debtor argued that the invoices forming the basis for claim of the Operational Creditor annexed at page nos. 41 to 46 of the petition do not contain any provision for interest. Further submitted that admittedly, the entire principal amount has been paid and at present the claim is relatable to interest only.
10. The Counsel further argued that the present Section 9 application can be admitted if the alleged debt (i.e. interest) falls within the definition of 'Operational Debt' as construed under Section 5(21) of IBC. To substantiate its case that interest is not maintainable under the definition of 'operational debt' under the IBC, following argument has been raised:
 - a) Unlike the definition of 'financial debt' under S. 5(8) of the IBC, the definition of 'operational debt' does not include the words "*along with interest, if any*". It has been argued that absence of these words is of considerable importance and reflects the legislative intent that for an 'operational debt', interest cannot be the basis for an application under Section 9 of IBC.
 - b) Reliance has been placed on the order of NCLT, Chandigarh bench in the matter of *Wanbury Ltd. v. Panacea Biotech Ltd.*¹ :

"16. 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.

¹ CP No. 8/Chd/2016.

...

19. *The learned counsel for petitioner, however, vehemently contended that the interest can be determined by the Tribunal at the reasonable rate, as the petitioner is entitled to interest in accordance with Section 61 of the Sales of Goods Act and Section 3 of the Interest Act. I am of the considered view that it is never the intention of the legislature under the Code that the Tribunal should determine the rate of interest and grant time to the Company to pay the amount as per the directions. It is clearly intended that an application filed under Section 9 of the Act is either to be admitted or rejected within a period of 14 days of the receipt of the application. There is no scope of passing an interim order like the one suggested by the learned counsel of the applicant/ petitioner.*

20. *In view of the aforesaid discussion, I hold that the entire amount of debt as per the intention of the legislature under the Code having been paid by way of cheques, the instant petition is rejected. However, in case the cheques issued by the respondent are dishonoured, the petitioner would be at liberty to file fresh petition, if so advised or take other appropriate steps in accordance with the Law."*

- c) It has also been submitted that the above-mentioned case of *Wanbury Ltd. v. Panacea Biotech Ltd* was taken in appeal before the Hon'ble NCLAT in Company appeals (AT) (Ins) No. 64 of 2017 and Hon'ble NCLAT was not pleased to interfere with the same and the matter was disposed of by consent of the parties.
- d) Reliance has also been placed on the orders of NCLT, Mumbai Bench in the cases of *Orissa Sales v. Gammon India Limited*², *Krishna Enterprises v. Gammon India Limited*³, *Pavan Enterprises v. Gammon India Limited*⁴, *Om Industrial Corporation v. Gammon India Limited*⁵, *Swastik Enterprises v. Gammon India Limited*⁶ which were dismissed. Appeals were preferred before the Hon'ble NCLAT against these dismissal orders. The Hon'ble NCLAT *vide* a common order dated 27.7.2018⁷ dismissed the appeals.
- e) Reliance has also been placed on the order of NCLT, Delhi Bench in the case of "*Teknow Consultants & Engineers Pvt. Ltd. v Bharat Heavy Electricals Limited*"⁸ to submit that interest cannot form the basis of a claim u/s 9 of IBC, even when the Applicant was an entity registered under the MSME Act.

² CP 1294/MB/2017

³ CP 1299/MB/2017

⁴ CP 1296/MB/2017

⁵ CP 1298/MB/2017

⁶ CP 1297/MB/2017

⁷ Company Appeal (AT) (Insolvency) No. 144 of 2018

⁸ CP 269/ND/2017

11. With regards to the claim interest under the MSME Act, the Corporate Debtor has argued

a) that the interest claimed by the Operational Creditor under the MSME Act cannot be entertained before this Tribunal and under the IBC. It is argued that IBC has over-riding effect by virtue of Section 238 thereof. Therefore, being the subsequent provision and particularly in proceedings initiated under it, the provisions of IBC will override the effect of any other law. Further the Counsel for the Corporate Debtor disputed the liability to pay interest under the MSME Act and argued that such a dispute can only be adjudicated under by the Facilitation Council, the dispute resolution mechanism provided under the MSME Act.

b) that the Operational Creditor has not produced any document to show that it is registered under the MSME Act. The only document relied upon by the Operational Creditor is a Form/ Memorandum downloaded by it from the website of the Directorate under the MSME Act, which does not establish the registration.

c) That an acknowledgment is to allotted to an Entrepreneur as per the procedure of the MSME Act and until that acknowledgment is allotted, the Entrepreneur cannot be said to be MSME registered.

d) The Corporate Debtor further states under the provision of Section 22 of the MSME Act, the Operational Creditor is required to show the unpaid amount along with interest due in its Statement of Accounts at the end of each accounting year to claim the interest under the provisions of Section 16 of MSME Act.

12. The Professional appearing for Operational Creditor stated that the Petitioner is MSME registered and the certificate is duly annexed at page 53A of the petition. Further stated, that the Operational Creditor is entitled to claim compound interest at three times the bank rate under Section 16 of the MSME Act and hence the demand for interest amounting to Rs. 26,82,515/- as on date at the revised rate of interest of 15% is justified. Section 16 of MSME Act is reproduced below:

“16. Where any buyer fails to make payment of the amount to the supplier, as required under section 15, 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."

13. The Professional appearing for Operational Creditor stated that the reliance on *Wanbury Ltd. v. Panacea Biotech Ltd* is misleading. It is stated that the Bench is of the opinion that in situation where there is no specific provision with respect to interest, it is more prudent to rely on the documents on record or agreements between the parties, if any. Further stated that in the present case since the Petitioner is registered under the MSME Act, Section 16 of MSME Act is applicable.
14. Further, the Operational Creditor stated the cases of *Orissa Sales v. Gammon India Limited*, *Krishna Enterprises v. Gammon India Limited*, *Pavan Enterprises v. Gammon India Limited*, *Om Industrial Corporation v. Gammon India Limited*, *Swastik Enterprises v. Gammon India Limited* also differ from the case in hand. In these judgments, the Petitioners did not establish their eligibility to claim interest and hence they were not entitled to the same and petitions were dismissed.
15. The Operational Creditor rebutted the reliance of '*Teknow Consultants & Engineers Pvt. Ltd. v Bharat Heavy Electricals Limited*'. The Professional appearing for the Operational Creditor submitted that this case can be differentiated on two grounds, (1) in this case the work orders were executed prior to the registration of the Company as a MSME; (2) the agreement between the parties had an express clause for non-payment of interest. Further stated that in the case in hand, (1) the Operational Creditor was registered as MSME even before the issue of the letter of intent as evidenced from the page 53A of the petition; (2) there is no clause specifically denying the payment of interest to the Operational Creditor.
16. The Operational Creditor has also placed reliance on the order of NCLT, Hyderabad Bench in the case of '*Shri Shrikrishna Rail Engineers Private Limited v. Madhucon Projects Limited*'⁹, the claim of the Petitioner therein for interest under MSME was allowed without referring the same to Micro & Small Enterprises Facilitation Council.
17. With regards to the allotment of acknowledgment as MSME, the Operational Creditor has stated that it is MSME registered and the registration certificate viz.

⁹ CP 305/HDB/2017

Udyog Aadhar Memorandum, bearing Unique Acknowledgment Number (UAN): UP68E0001020 is already annexed at page 53A of the petition. Further stated that the allotment of UAN itself proves that all the necessary compliances for registration have been done.

18. With regards to the defense of Corporate Debtor that as per Section 22 of the MSME Act, the Operational Creditor is to show the unpaid amount along with the interest due in its Audited Financial Statement, the Operational Creditor has stated that the section has been misread by the Corporate Debtor. It is further stated that Section 22 of MSME Act requires the buyer to do so and not the seller. In the present case, buyer being the Corporate Debtor, the compliance was to be done by it and not by the Operational Creditor who is the seller. Attention was also drawn to the definition of 'buyer' under the MSME Act.
19. With respect to the relationship of the professional representative and the proposed Interim Resolution Professional, the Operational Creditor states that same cannot form a ground for dismissal of the petition. Further stated that recusal affidavit dated 8.6.2018 of the proposed Interim Resolution Professional, Ms. Bhavna Sanjay Ruia has already been filed.
20. With respect to the defect in the Vakalatnama, the Operational Creditor has stated that this mistake cannot be a ground for dismissal of the petition.
21. With regards to the maintainability of the present petition, the Operational Creditor has submitted that the Petitioner has duly signed Letter of Authority in favour of Professionals and Vakalatnama in favour of Advocates, giving them authority to represent on its behalf.
22. We have heard the parties and perused the records.
23. Admittedly, the entire principal amount has been paid by the Corporate Debtor to the Operational Creditor during the pendency of the present petition. The Operational Creditor vehemently argued that the statutory interest provided for by the MSME Act on the delayed payments is still pending and the present petition should be admitted.

24. The interest arising from the MSME Act has been disputed by the Corporate Debtor. The Counsel for the Corporate Debtor vehemently argued that the Operational Creditor has not produced any document to show that it is registered under the MSME Act. Further argued, that the only document relied upon by the Operational Creditor is a Form/ Memorandum downloaded by it from the website of the Directorate under the MSME Act, which does not establish the registration. The Counsel further argued that such a dispute can only be adjudicated by the dispute resolution mechanism provided under the MSME Act.
25. The following has come to our notice from the website of the Ministry of Micro, Small and Medium Enterprises:

Udyog Aadhaar				
E	Type of Enterprise	Micro	Small	Medium
	Manufacturing	A	B	C
	Services	D	E	F
	UAN	UP68E0001020		

Udyog Aadhaar Memorandum - Online Verification

Name of Enterprise: GOVIND SALES
 Major Activity: Services
 Social Category: General
 Location of Plant Details

SN	Flat/Door/Block No.	Name of Premises/Building Village	Road/Street/ Lane	Area/Locality	City	Pin	State	District
1	LAKDI MANDI	CHAMKANI	SHAHJAHANPUR	SHAHJAHANPUR	SHAHJAHANPUR	242001	UTTAR PRADESH	SHAHJAHANPUR

Enterprise Type: Small
 National Industry Classification Code

SN	NIC 2 Digit	NIC 4 Digit	NIC 5 Digit Code	Activity Type	Added On
1	81-Services to buildings and landscape activities	8110-Combined facilities support activities	81100-Combined facilities support activities	Services	05/10/2017

Date of commencement: 28/05/2002
 DIC Name: SHAHJAHANPUR
 State: UTTAR PRADESH
 Applied Date: 05/10/2017
 Modified Date: N/A

26. The above reproduced Udyog Aadhaar of the Operational Creditor reflects the 'Applied Date: 05/10/2017'.
27. In the present case, the Operational Creditor was engaged by the Corporate Debtor for supplying goods and services as per work order no. 9101/82 dated 12.5.2014. In the above reproduced Udyog Aadhaar Number the 'applied date' and 'added on' date is reflected as 5/10/2017.

28. It is pertinent to note that other than the certificate annexed to the petition on page no. 53A of the petition which shows the commencement date as 28.5.2002, there is no other document to show the registration of the Operational Creditor as a MSME. Therefore, it is in dispute whether the Operational Creditor was MSME registered when the parties entered into contract.
29. In the case of *"Teknow Consultants & Engineers Pvt. Ltd. v Bharat Heavy Electricals Limited"*¹⁰, the Operational Creditor was not registered as MSME at the time of the placement of job orders. The agreement inter-se parties provided for non-payment of interest and an arbitral award was in appeal under S. 37 of the Arbitration and Conciliation Act. During the pendency of the petition, the entire principal amount was paid. The Ld. NCLT, Delhi Bench held that disputed interest arising from MSME Act could only be referred to the Micro and Small Enterprises Facilitation Council.
30. The Hon'ble Supreme Court in the case of *'Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd.'*¹¹ noted,

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)[ii](d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

31. In this case undisputedly the principal amount has been paid off during the pendency of the petition. Dispute that has been raised is relating to the interest amount which is being claimed on the basis of the MSME Act. The contention of the Operational Creditor is based on the fact that as per the statutory provision of the MSME Act, Petitioner is entitled for interest even without any prior agreement. The

¹⁰ CP 269/ND/2017

¹¹ Civil Appeal No. 9405 of 2017.

Corporate Debtor has raised the dispute regarding the registration of the Operational Creditor as a MSME unit. There is a plausible contention in the argument raised by the Corporate Debtor which requires further investigation and it appears that the dispute raised by the Corporate Debtor is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

32. In view of the law laid down by the Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. (supra)*, in case of an existing dispute, the application under Section 9, IBC is to be dismissed.
33. The Adjudicating Authority does not have powers of a civil court to adjudicate upon the entitlement of the Operational Creditor to the benefits accruing from the MSME Act.
34. On the basis of our discussion, we are of the considered view that the petition does not deserve to be admitted. In this scenario, the objections raised by the Corporate Debtor regarding the eligibility of Mr. Sanjay Kumar Ruia to initiate and maintain the present application and the question of appointment of the proposed Interim Resolution Professional, who has later on recused from the assignment have no significance.
35. In view of the above discussion, this Petition is dismissed.
36. The Registry is hereby directed to immediately communicate this order to the Operational Creditor and the Corporate Debtor by speed post/ email/ whatsapp.

Sd/-

Ravikumar Duraisamy
Member (Technical)

Sd/-

V. P. Singh
Member (Judicial)

DT. 14.1.2019