

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B) No. 17 /9/NCLT/AHM/2018

Coram: **Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 01.03.2019**

Name of the Company: Trinity Services (India) Pvt Ltd.
V/s.
TBEA Energy (India) Pvt. Ltd.

Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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1.

2.

ORDER

None present for the parties.

The Order is pronounced in the open court, vide separate sheet.


MANORAMA KUMARI
MEMBER JUDICIAL
Dated this the 1st day of March, 2019


HARIHAR PRAKASH CHATURVEDI
MEMBER JUDICIAL

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH**

C.P. No.(IB) 17/9/NCLT/AHM/2018

In the matter of:

M/s. Trinity Services (India) Private Limited

GD-05, Suyog Industrial Estate

LBS Marg

Vikhroli West

Mumbai - 400 083

:

Applicant

[Operational Creditor]

Versus

M/s. TBEA Energy (India) Private Limited

National Highway No. 8

Village Miyagam Karjan

VADODARA 391 440, Gujarat :

Respondent

[Corporate Debtor]

Order delivered on 01st March, 2019.

**Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (J)
Hon'ble Ms. Manorama Kumari, Member (J)**

Appearance:

Advocate Mr. R.S. Krishnakumar & Advocate Mr. Jayneel Parikh are present for operational creditor/petitioner
Advocate Mr. Mihir Pathak is present for respondent.

ORDER

(Per: Hon'ble Ms. Manorama Kumari, Member (J))

1. M/s. Trinity Services (India) Private Limited, through its Director, filed this Application with a prayer for initiation of corporate insolvency resolution process against M/s. TBEA Green Energy (India) Private Ltd., under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"].
2. That, the applicant/operational creditor is a private limited company incorporated under the Companies Act, 1956, having identification number U51500MH2001PTC133917

Chaturvedi

and having its registered office at Suyog Industrial Estate, Vikhroli West, Mumbai 400 083, engaged in the business of carrying out single point turnkey solutions for customers requiring heating systems such as boilers/heaters for process application which is used in manufacturing process.

3. That, the respondent/corporate debtor is a private limited company registered under the Companies Act, 1956, incorporated on 07.07.2010 at Delhi and subsequently shifted to Gujarat on 05.09.2012, having identification No. U40104GJ2010PTC071817 and having office at "tbea Green Energy Park", Vill. Miyagam, Karjan, Dist. Vadodara 391 440, Gujarat State. Nominal share capital of the respondent company is 932,99,68,000/- and paid up share capital is Rs. 9,24,34,31,170/-.
4. It is submitted by the applicant that, the Respondent company had approached the applicant for the purpose of setting up of their plant and had entered into series of contracts for supply of materials as well as setting up of the said systems into their power plant from time to time between January 2012 to January 2014. That the respondent has not raised any dispute or demur with respect to quality of the materials supplied or the work performed by the applicant. Since the work was performed inside the respondent company plant there was constant vigil both by the applicant as well as the officials of the respondent company. That, the applicant used to maintain a running account for the goods supplied and the services rendered to the respondent company from time to time.



5. That for the supplies and services made between the duration of January 2012 to January 2014 the respondent company has released payment amounting to Rs. 1,80,52,711/-. That, the fact that part payment was released fortifies the case of the applicant that the dues are admitted one and there is no dispute with respect to the same. That despite there being a part payment, an amount of Rs. 25,42,163.31 admittedly remains outstanding as on the date of filing the application and payable by the respondent to the applicant. That, an amount of Rs. 25,99,121/- was set as demand in the statutory notice dated 20.10.2017 factoring the TDS which was hand delivered to the respondent's registered office on 23.10.2017 and delivered by registered post on 27.10.2017. That since the respondent company has uploaded the said TDS in the following financial year, an amount of Rs. 25,42,163.31 remains the actual dues unpaid from the respondent company. It is also submitted that there was a specific clause in each invoices whereby applicant company was entitled to claim interest in case of delay in payment of invoice beyond the due date, at the rates mentioned in the respective invoices.
6. It is further submitted by the applicant that, the respondent company had assured and agreed to release payment towards the invoices as per the terms and conditions contained therein from time to time. That, it was assured that all the payments will be made in timely manner, however, respondent company has miserably failed to clear the undisputed amount. That, even after last payment on



27th January, 2014 of Rs. 76,500/-, principal amount of Rs. 25,42,163.31 and interest thereon to the tune of Rs. 32,32,356/- remains outstanding as payable by the respondent company. That, despite repeated follow up calls over phone and assurance from respondent company, it failed to release outstanding payments even after acknowledgement and acceptance of outstanding debt.

7. It is further submitted by the learned counsel appearing on behalf of the applicant that on 20th October, 2017, applicant was compelled to issue demand notice under Section 8 of Insolvency and Bankruptcy Code read with Rule 5 of the Insolvency and Bankruptcy Regulations, 2016 calling upon the respondent company to pay aggregate amount of Rs. 25,42,163/- with further running interest @ 24% per annum from the date of receipt of notice and till the actual payment and/or realisation, within ten days of the receipt of notice and filing of Form No. 5. That, the said notice was served upon the respondent on 23.10.2017. However, the respondent company had not bothered to reply the said notice. That only after receiving the notice under this Code, senior officials of the respondent company arranged a meeting in Vadodara and promised to release the principal dues soon, but failed again to discharge the admitted liability.

8. It is further submitted by the applicant that to the knowledge of the applicant, the respondent company owes huge amounts of money not only to the applicant but to various other financial and operational creditors also. That,

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the respondent company has been making huge losses and is not in a stable position to clear its debts and liabilities.

9. It is further submitted by the applicant that the applicant used to maintain a running account for the goods supplied and the services rendered to the respondent company from time to time. That for the supplies and services made between the period from January 2012 to January 2014 the respondent company has released payment amounting to Rs. 1,80,52,711/- (One crore eighty lacs fifty-two thousand seven hundred eleven only). That, part payment was released fortifies the case of the applicant that the dues are admitted one and there is no dispute with respect to the same. It is further submitted that, there is a specific clause in each of the invoices, whereby, the applicant company is entitled to claim interest in case of delay in payment of invoice beyond the due date, at the rate of 20% p.a. in the respective invoices. That, because there is a gross and admitted delay in making payment for each of the invoices, interest at the rate of 24% p.a. amounting to Rs. 32,32,356/- (Thirty-two lacs thirty-two thousand three hundred fifty-six only) on delayed payment of invoices is included in the present application as on 30.11.2017. That, this is further explained and amplified with the support of the decisions rendered by the Hon'ble Supreme Court and High Courts. That the claim amount includes both the principal as well as interest for the delayed payment till the date of filing the instant application. It is submitted that the Insolvency and Bankruptcy Code does not prohibit the element of interest to be forming part of the claim/dues

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receivables, the Code does not distinguish the interest from the principal amounts due as claimed in the application and the interest on delayed payment as permissible under law is legitimately raised and shown in the application. That, at the time of filing of the application the amounts representing the entire dues along with interest can be raised; forming both principal and interest representing damages for the delayed payments, being crystalized into a single due.

10. That, the applicant has placed reliance upon the decision of the Hon'ble Supreme Court in the case of ***Oil and Natural Gas Commission v. M.C. Clelland Engineers*** reported in ***S.A. (1999) 4 SCC 327*** wherein the Apex Court has held that the interest claimed on delayed payment stood crystallized and has become the part of the principal at the time of filing the claim before any court. In addition, the Hon'ble Court amplified the point by including the amount of interest with claim that is to say interest on damages or compensation for delayed payment stood merged with that of the principal.
11. The applicant has further submitted that the applicant has claimed interest @ 24% on the delayed payment of the amount raised in the invoices from the respondent. That the applicant suffered many loses due to non-realisation of the payments of the invoices raised against the respondent, compelling the applicant to borrow money from banks and outside agencies to run its business at heavy rate of interest and costs. That, the applicant, therefore, as a measure to soften its financial burden resulting from the non-payment on the part of the respondent justifiably claimed the interest



@ 24% on delayed payment. That, the respondent paid only principal amount as per invoice after filing of the present application under IBC and refused to pay the amount representing interest/damages for the delay of over four years in settling the dues. That, the invoices (contract) envisaged interest @ 20% on delayed payments among its terms and conditions and the same was accepted by the respondent without any dispute at the time of delivery of goods and services. That, therefore, the respondent is bound by those terms of the invoice which is legally considered as written contract between the parties. In this context applicant has placed reliance upon the decision of the Bombay High Court in the case of **Jatin Koticha v. VFC Industries P. Ltd.** reported in **(2008) 2 Bom. C.R. 155** wherein it is held that the invoices must be treated as a written contract and all the terms and conditions including the interest element in the invoices would be binding between the parties. Further, the High Court of Bombay held that once the invoices in question are considered as written contract then the rate of interest stipulated on overdue payments in the invoices are liable to be paid by the respondent.

12. Further the applicant has placed reliance in the case of **Dongreen Resins & Chemicals Pvt. Ltd. v. Balaji Fibre Reinforce P. Ltd.** reported in **2013(5) Bom. C.R. 338** wherein it is held that the due and payable principal amounts raised in the invoices has been admitted by the defendant once without any dispute; the defendant cannot take this stand that he is not liable to pay any interest amount which was the part of

the terms and conditions of the invoices. That, it is therefore held if the invoices are raised on the defendants with the interest element in case of delay in the payments and the same was never objected by the defendants then the defendant is obliged to pay the interest to the plaintiff once the entire principal amount has been admitted by the defendant.

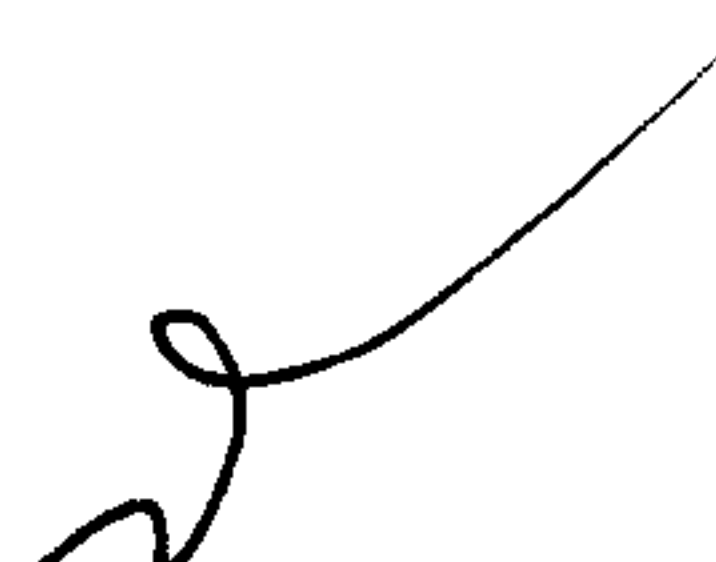
13. That, the applicant has further submitted that once the principal has been admitted and paid by the respondent, the respondent is legally obliged to pay the interest on delayed payments as per the terms and rate specified in the invoices because that very interest stood crystallized and became the part of the principal. That therefore, the respondent cannot separate the principal and interest and run away from his liability to pay the interest to the applicant. That it is now settled law that invoices are considered as contract and parties are bound by its terms and conditions of these invoices. That, therefore, once the respondent has admitted amounts due and payable to the applicant in the bills; he can't wash his hands from paying the amounts with interest stipulated in the invoices.

14. Further, it is submitted by the applicant that, on 20th October, 2017 applicant issued demand notice under Section 8 of Insolvency and Bankruptcy Code read with Rule 5 of the Insolvency and Bankruptcy Regulations, 2016 calling upon the respondent company to pay aggregate amount of Rs. 25,42,163/- (Rupees twenty-five lacs forty-two thousand one hundred sixty-three only) with further

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running interest @ 24% per annum from the date of receipt of notice and till the actual payment, within ten days of the receipt of the notice. That, total amount of debt including interest @ 24% per annum amounts to Rs. 57,74,519/- (Rupees fifty-seven lacs seventy-four thousand five hundred nineteen only). That, the said notice was served upon the respondent on 23rd October, 2017 by hand delivery and by Registered Post on 27th October, 2017. That, the respondent chose to release the payments only after filing of the present application, inspite admitting their liability. That the instant application came to be filed on 21.12.2017, nearly about two months later. That, the respondent released the first payment of Rs. 22,57,434/- on 11.01.2018 and the second amount of Rs. 3,00,000/- (Rupees three lacs only) on 12.04.2018.

15. Applicant also filed copies of Invoices as well as delivery challans, copy of account statement and copy of demand notice dated 20.10.2017.
16. That, on receipt of notice on filing the application, the respondent appeared and filed his reply.
17. That, the learned lawyer of respondent submitted that the allegations made by the applicant with regard to financial stability of the respondent company is baseless. It is further submitted that the applicant has wrongly initiated Insolvency Process against the respondent company, there are/were no outstanding as claimed by the petitioner under the series of contract executed by the parties since 2012 to



2014 till today and the applicant has not come with clean hands and has suppressed the material facts. It is also submitted that had there been any financial crisis, then the respondent would not have been able to make the first payment of Rs. 22,57,434/- on 11.01.2018 and second payment of Rs. 3,00,000/- on 12.04.2018 making total payment of Rs. 25,57,434/- (Rupees twenty-five lacs fifty-seven thousand four hundred thirty-four only) towards principal outstanding to the applicant.

18. It is further submitted by the respondent that, the applicant has not produced on record those e-mails wherein the respondent made payment through RTGS, the applicant has not given whole facts and conveniently placed on record only those facts which are in favour of the applicant showing imaginary grounds.
19. That, it is also submitted by the learned counsel appearing on behalf of the respondent that during pendency of the petition the respondent has already made payment of Rs. 25,57,434/- (Rupees twenty-five lacs fifty-seven thousand four hundred thirty-four only), therefore, total outstanding principal amount has been paid by the respondent. That, the tax invoices filed along with the application contains the clause of payment of 20% per annum towards interest in case the payment is not made within fifteen days, but in the present application the applicant has sought interest @ 24% p.a. That, the tax invoices do not bear the signature of the representative of the respondent company, therefore, the respondent is not liable to pay interest as per tax

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invoice (s). It is further submitted that there was no clause of payment of interest between the parties, therefore, the present application for recovery of interest portion is not maintainable and even otherwise also this Tribunal does not have authority to give interest to the operational creditor under the IB Code.

20. It is further submitted by the respondent that, the applicant had issued demand notice on 20.10.2017, thereafter applicant moved before this Tribunal, but before effective hearing of the matter, respondent had already made payment of principal amount of Rs. 22,57,434/- (Rupees twenty-two lacs fifty-seven thousand four hundred thirty-four only) to the applicant on 11.01.2018 and this fact has been suppressed by the applicant in the present application. That, on 30.01.2018, when the matter came up for hearing before this Tribunal, the applicant knew that they have received payment of outstanding principal amount on 11.01.2018, but did not declare before this Tribunal regarding receipt of the outstanding amount. That, the respondent was under the impression that they have made payment of full principal amount as on 11.01.2018, but during audit having transpired that sum of Rs 3,00,000/- (Rupees three lacs only) which was paid on 26.06.2015 were not actually credited to the applicant's account. That, knowing the said fact, an amount of Rs. 3,00,000/- lacs (Rupees three lacs only) were again paid on 12.04.2018 by the respondent to show his bona fides and credibility and thus the respondent has made payment of Rs. 22,57,434/- (Rupees twenty-two lacs fifty-seven thousand four hundred



thirty-four only) on 11.01.2018 and Rs. 3,00,000/- (Rupees three lacs only) on 12.04.2018 thus making a total payment of Rs. 25,57,434/- (Rupees twenty-five lacs fifty-seven thousand four hundred thirty-four only) which is even more than the claim amount. That, therefore, the present application is now allegedly filed for recovery of interest amount when the principal amount has already been paid by the respondent. That, in view of the aforesaid circumstances, the entire amount of debt as per the intention of the legislature under the Code having been paid by the respondent, the present petition for recovery of interest on the principal amount is not maintainable.

21. Heard the arguments of the learned counsel appearing for the applicant as well as respondent and perused the documents attached to the application.
22. That, at page No. 249 of the application the applicant has given copy of computation arrived at for the amount raised in the application which is reproduced here below: -

Principal amount	25,421,63.31			
Date of last invoice	07.02.2014			
Payment due since	07.02.2014			
Interest charged	24% p.a.			
		Yearly interest	Interest	Total Interest
07.02.14 to 07.02.15		6,10,119.19	6,10,119.19	31,51,282.50
07.02.15 to 07.02.16		7,56,547.80	13,66,667.00	39,08,830.31
07.02.16 to 07.02.17		93,38,119.27	23,04,786.27	48,46,949.57
07.02.17 to 07.11.17			8,48,588.58	56,95,538.15
07.11.17 to 30.11.17			78,980.86	57,74,519.01

23. On perusal of the material available on record it is noticed that only three tax invoices dated 26.02.2013, 04.05.2013 and 15.06.2013 totally amounting to Rs. 44.18 lacs, contains the clause that "interest at 20% will be charged if

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payment is not made within 15 days of the bill". Hence imposing 24% interest on all the bills is contrary to the statement made by the petitioner. It is also an admitted fact that the applicant used to maintain a running account for the goods supplied and the services rendered to the respondent company from time to time and for the supplies and services made between the duration of January 2012 to January 2014 the respondent company has released payment amounting to Rs. 1,80,52,711/- (Rupees one crore eighty lacs fifty-two thousand seven hundred eleven only). Further, the computation so filed by the applicant in the petition shows that an amount of Rs. 25,421,63.31 is outstanding towards principal and interest @ 24% has been levied which was never agreed upon. Hence the computation given by the applicant misrepresents the facts. It is admitted by the applicant that the respondent made last payment of Rs. 76,500/- on 27th January, 2014. Perusal of the records goes on to show that the demand notice issued by applicant on 20th October, 2017 was served upon the respondent on 23.10.2017. That, the instant application was filed on 21st December, 2017 and during pendency of the application, respondent made payment of Rs. 22,57,434/- (Rupees twenty-two lacs fifty-seven thousand four hundred thirty-four only) through RTGS on 11.01.2018. That, the said fact has never been revealed during the course of argument by the petitioner. It is pertinent to mention here that, during the course arguments, learned counsel appearing on behalf of the applicant had not brought it to the notice of the Adjudicating Authority about the payment made by the respondent on 11.01.2018. At



the same time, claim of the applicant that it suffered loss due to non-realisation of the payment of the invoices raised against the respondent compelled the applicant to borrow money from banks and outside agencies to run its business at heavy rate of interest and costs; as a measure to soften its financial burden resulting from the non-payment on the part of the respondent justifiably claimed the interest @ 24% on delayed payments is exorbitant and unreasonable, more so when such statement is not supported by any authentic documents. Further, when the respondent company had given sizable business and had released payment of around Rs. 2.00 crores during the period January 2012 to January 2014, levying 24% interest is unfair. At the same time argument of the respondent is that the tax invoices do not bear the signature of the representative of the respondent company, therefore, the respondent is not liable to pay interest as per tax invoice; there was no clause of payment of interest between the parties, therefore, the present application for recovery of interest portion is not maintainable.

24. We have gone through the facts of the case and heard submissions made by the parties and perused the relevant provisions and the records. At this juncture, it is pertinent to refer to sub-section 21 of Section 5 of Insolvency & Bankruptcy Code, 2016 which reads as under: -

"Operational debt" means a claim in respect of the provision of goods or service including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the

Chatterjee

Central Government, any State Government or any local authority;

25. To decide the issue, it is desirable to refer to the decision of Hon'ble NCLAT in the matter of Binani Industries Limited vs. Bank of Baroda & Anr. in Company Appeal (AT) (Insolvency) No. 82 of 2018 dated 14th November, 2018 which reads as under: -

"17. To decide the issue, it will be desirable to notice the object of the I & B Code; object of 'Resolution' and what is expected from the Committee of Creditors; as summarized below:

1. The Objective of the I & B Code

As evident from the long title of the I & B Code, it is for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit, and balance the interest of all stakeholders. The recent ordinance explicitly aims to promote resolution over liquidation.

2. *The objective of the I & B Code is **Resolution**. The purpose of Resolution is for maximisation of value of assets of the Corporate Debtor and thereby for all creditors. It is not maximisation of value for a stakeholder or a set of stakeholders, such as creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is "resolution". The second order objective is "maximisation of value of assets of the corporate debtor and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objective is sacrosanct.*

26. On perusal of the material available on record it is found that only in three tax invoices stipulation of 20% interest has been made, whereas, the applicant has claimed interest @ 24% on all the bills. To decide the issue, it is desirable to refer para 4 & 5 of the order dated 27.07.2018 passed by

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the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 144, 145, 146, 147 & 148 of 2018 in the matter of Gammon India Ltd. v/s. 1) M/s. Krishna Enterprises 2) M/s. Om Industrial Corporation 3) M/s. Swastik Enterprises 4) Orissa Sales & 5) M/s. Pavan Enterprises which is reproduced below: -

*"4. It is submitted that the debt includes the interest, but such submission cannot be accepted in deciding all claims. **If in terms of any agreement interest is payable to the operational or financial creditor, then debt will include interest, otherwise, the principle amount is to be treated as the debt which is the liability in respect of the claim which can be made from the corporate debtor**".*

*"5. In the present appeals, as we find that the principle 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 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**".*

27. In the instant appeal, admittedly, the principle amount has been paid before effective hearing of the petition. Especially when the applicant has not entered into any agreement regarding payment of interest, claim of the applicant for 24% interest per annum does not hold valid ground to file the instant application.
28. By following the above stated judicial precedents, we are of the considered view that the present IB petition deserves to be dismissed. In the result, IBC Application No. CP (IB) 17 of 2018 preferred by M/s. Trinity Services (India) Private Limited is dismissed.

Chandra

29. This Petition stands disposed of accordingly with no order as to costs.
30. Communicate a copy of this order to Operational Creditor and to the Corporate Debtor.



Ms. Manorama Kumari
Adjudicating Authority
Member (J)



Harihar Prakash Chaturvedi
Adjudicating Authority
Member (J)

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