

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 54 of 2024

IN THE MATTER OF:

Sudarshan Paper & Board Private Limited

... Operational Creditor

Versus

Verges Properties LLP

... Corporate Debtor

Date of Pronouncement: September 02, 2024.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI. D. ARVIND, MEMBER (TECHNICAL)

APPEARANCE:

**Mr. Urmila Chakraborty, Adv.] For the Operational
Mr. Avishek Guha, Adv.] Creditor
Ms. Arunika Dutta, Adv.
Mr. Srijit Bose, Adv.**

**Mr. Vikas Baisya, Adv.] For the Corporate Debtor
Mr. Ritoban Sarkar, Adv.
Ms. Ranjana Seal, Adv.
Mr. Sourasish Das, Adv.**

ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through hybrid mode.
2. Heard Ld. Counsels for the parties.
3. This is a company petition filed by **Sudarshan Paper & Board Private Limited** (hereinafter referred as “**Applicant/Operational Creditor**”) against **Verges Properties LLP** (hereinafter referred as

“Corporate Debtor/Respondent”) seeking initiation of Corporate Insolvency Resolution Process under Section 9 of IBC.

Brief facts of the case:

4. The applicant herein has supplied goods to the respondent. The respondent committed default in paying the amounts. The applicant has provided details of invoices which are pending to be paid in Annexure “D” to the application at Page No. 126. The principal amount is due claimed as Rs. 91,49,171/-, interest claimed at the rate of 18% per annum from the date of default is Rs. 10,25,237/-. Together with interest and principal amount, the total due amount claimed Rs. 1,01,74,408/-. Since the respondent has defaulted payment in excess of threshold limit, this application according to the applicant is maintainable.

Ld. Counsel for Applicant:

5. Ld. Counsel for the applicant brought to our attention copies of invoices duly supported by purchase order and e-way bills evidencing supply of goods. The date of default claimed in Part 4 of the Form filed along with the application is 27.05.2023. Agreed to that Ld. Counsel submits that as per the terms and conditions of supply with reference to outstanding invoices, the default is continuing with the date of first invoice raised on 27.01.2023, which was supposed to be paid by the respondent within 120 days which falls on 27.05.2023 and that date is recorded as the date of default for the purpose of this application.
6. He brought to our attention the interest clause in the invoices payable at the rate of 18% per annum after the due date. He submits that Section 8 notice was issued in terms of Rule 5 of the Insolvency and Bankruptcy Code (application to the Adjudicating Authority

Rules 2016) in Form 3 on 13.11.2023, which is in Annexure “S” to the application. He submits that the applicant received no reply to the said notice, though the same was duly served.

7. He also relied on the record of financial information/record of default issued by National E-Governance Services Limited. However, we find that the record of default has not been authenticated by the respondent. He relied on 3 debit notes issued by the applicant on the respondent in Pages No. 12 to 17 of rejoinder along with covering e-mails, which exclusively cover interest charged by the applicant on the respondent.
8. Ld. Counsel also took us to the annual tax statement (26AS) to demonstrate that the respondent has deducted TDS on such interest claimed by the applicant under Section 194(A) of the Income Tax Act which deals with TDS on interest. He also relies on the account confirmation to demonstrate that the respondent has acknowledged its debt.

Ld. Counsel for Respondent:

9. Ld. Counsel for respondent submits that the interest claimed by the applicant is not as per the contract made between the applicant and the respondent. He relies on the purchase order executed to demonstrate that there is no interest clause in such document.
10. He submits that interest which was never accepted or required to be paid cannot be awarded merely based on the terms in invoice unless the applicant proves that such provision is based on the contract or agreement between supplier and purchaser to pay interest. He submits that this is because invoice is a unilateral demand for the

supplies made and is neither a bilateral agreement nor a promise by the purchaser to pay interest.

11. He submits that deduction of TDS is out of abundant caution as per the Indian Accounting Standard and the Income Tax Act and that has nothing to do with liability or obligation to pay any amount as interest which has not been agreed upon.

Analysis and Findings:

12. We find that there is no dispute about default of principal amount to the tune of Rs. 91,49,171/-. The respondent has not replied to the notice issued under Section 8 of IBC by the applicant which itself proves that there is no pre-existing dispute with regard to the payment of principal amount. However, the principal amount here is less than the threshold limit of INR 1 crore prescribed under IBC for entertaining any application/petition for initiating Corporate Insolvency Resolution Process of a corporate debtor.
13. Therefore, we need to examine whether interest element can be added under the facts and circumstances of the case so that the limit prescribed under IBC is crossed for entertaining this company petition. There is no agreement nor any clause in the purchase order executed by the parties for payment of interest. It is only in the invoices; the interest clause has been mentioned.
14. The Hon'ble High Court at Karnataka in *Jyothi Limited Vs Boving Fouress Limited* reported in (2020) SCC Online Kar 832 has categorically held that interest clause in invoice is a unilateral demand by the suppliers and is neither a bilateral agreement nor a promise by the purchaser to pay interest. Therefore, interest cannot be awarded merely on the basis of a provision in the invoice.

15. We also wish to rely on the Hon'ble NCLAT judgment in ***Steel India Vs. Theme Developers Pvt. Ltd.*** in **Company Appeal (AT) (Ins) No. 1014 of 2019**, wherein it has been held that *charging of interest, ought to be an actionable of claim, enforceable under law provided.* It was probably agreed upon between the parties. In this case, we find no such agreement in place.
16. We would further refer to the decision passed by this Adjudicating Authority to strengthen the view in the case of ***Mr. Sanjay Sharma, Partner of M/s. Ma Jagadamba Enterprise V. M/s. Super Iron Foundry Private Limited*** in **Company Petition (IB) No. 314/KB/2022** dated 30.11.2023 as under:
- 15. [...] Further mere mention in invoices about the interest component is not sufficient to hold that interest is payable by the Corporate Debtor [...]*
- (emphasis added)*
17. In ***Pavan Enterprises Vs. Gammon India*** in **Company Appeal (AT) (Ins) No. 148 of 2018** the Hon'ble NCLAT held that *if interest is payable to the Operational of Financial Creditor as per an agreement, then it has been included as debt.*
18. In this case, there is no such agreement made between the parties with regard to payment of interest and therefore, relying on this judgment we are of the view that interest cannot be clubbed along with the debt. We have held similar view in our own judgment in ***Gandhar Oil Refinery (India) Limited Vs. City Oil Private Limited*** to conclude our view that interest clause in invoice is not good enough and has to be supported with agreement by the respondent/buyers for payment of such interest. Debits notes
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issued on Interest are unilateral and the Respondent has never agreed to pay.

19. We also note the respondent has deducted TDS on such interest claimed by the applicant under Section 194(A) of the Income Tax Act which deals with TDS on interest. We would refer to the judgment rendered by the Hon'ble NCLAT in ***P.M. Cold Storage Pvt. Ltd. Through Interim Resolution Professional Vs. Goouksheer Farm Fresh Pvt. Ltd.*** reported in **(2022) ibclaw.in 705 NCLAT** wherein in it has been held that:

"20. The fact that the corporate debtor has paid TDS on interest payable cannot be considered as acknowledgment in writing of the liability by the corporate debtor and therefore, such TDS payment will not have any effect of being an acknowledgment of said debt."

(Emphasis Added)

20. Further in ***R S Infra v. R P Infraventure Pvt. Ltd.*** reported in **(2023) ibclaw.in 793 NCLAT**, it is laid down that:

"13. [...] We are also inclined to agree with the Corporate Debtor that TDS deduction does not imply acknowledgment of any liability as outstanding qua the Operational Creditor. We therefore hold that the Adjudicating Authority committed no error in relying on these clauses of the Work Order Agreement to come to the conclusion that the Operational Creditor has failed to establish default on part of the Corporate Debtor in payment of the operational debt."

(Emphasis Added)

21. In view of above, we would infer that TDS deduction on the interest payable does not constitute any acknowledgment of liability as outstanding claimed to be in default.

22. In view of above, we find that the undisputed principal amount is only Rs. 91,49,171/- which is less than the threshold limit and therefore, do not qualify for admission as it is less than the threshold limit prescribed under IBC.
23. Accordingly, this **Company Petition (IB) No. 54 of 2024 is dismissed.**
24. Certified copy of this order, if applied for with the Registry be supplied to the parties in compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Signed on this, the 02nd Day of September, 2024.

PH[PS]/ Bose, R. K. [LRA]