

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.303
C.P.(IB)/275(AHM)2023

Proceedings under Section 9 IBC

IN THE MATTER OF:

Comet Performance Chemicals Private Limited
V/s
Aarvee Denims and Exports Limited

.....Applicant

.....Respondent

Order delivered on: 02/07/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

(Hybrid Mode)

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) No.275/AHM/2023

(An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the Matter of:

Comet Performance Chemicals Private Limited

(CIN: U24304GJ2016PTC094087)

Registered office at

Block B, Office No. 701, Mondeal Heights,

Nr. Panchratna Party Plot, S.G. Highway

Ahmedabad, Gujarat-380015.

...Applicant/Operational Creditor

VERSUS

Aarvee Denims And Exports Limited

(CIN: L17110GJ1988PLC010504)

Registered office at:

191 Shahwadi, Near Old Octroi Naka,

Narol Sarkhej Highway, Narol,

Ahmedabad, Gujarat-382405

...Respondent/Corporate Debtor

Order Pronounced On: 02.07.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Arjun Sheth, Advocate a/w. Mr. Rajiv Chawla, Advocate

For the Respondent : Mr. Navin Pahwa, Senior Adv. a/w. Mr. Ravi Pahwa, Advocate

ORDER

1. The Present Application is filed on 03.11.2023 by the Applicant - Comet Performance Chemicals Private Limited (hereinafter referred to as "**Operational Creditor**") against the Respondent - Aarvee Denims And Exports Limited (hereinafter referred to as "**Corporate Debtor**") under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**IBC, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "**IB (AAA) Rules, 2016**") for initiation of Corporate Insolvency Resolution Process (**CIRP**), to appoint Interim Resolution Professional (hereinafter referred to as "**IRP**") and declare

the moratorium for having defaulted in payment of the operational debt of **Rs.1,36,60,679/-** including interest. The date of default is stated to be **09.04.2021** as per Form C.

2. A perusal of Part-I of the Form-5 reveals that the Operational Creditor is one Comet Performance Chemicals Private Limited CIN No. U24304GJ2016PTC094087, having registered office at Block B, Office No. 701, Mondeal Heights, Nr. Panchratna Party Plot, S.G. Highway Ahmedabad GJ 380015. This application is filed through its Authorized signatory Mr. Jignesh Trvedi and to that effect the board resolution dated 21.08.2023 is attached with the petition.

3. On perusal of Part-II of the Form-5, it reveals that the Corporate Debtor is one Aarvee Denims And Exports Limited having CIN: L17110GJ1988PLC010504, having registered office at 191 Shahwadi, Near Old Octroi Naka, Narol Sarkhej Highway, Narol, Ahmedabad, Gujarat,

India- 382405. The Corporate Debtor was incorporated on 18.03.1988.

4. On perusal of Part-III of the Form-V it reveals that Operational Creditor has named Mr. Parag Seth having registration no. IBBI/IPA-002/IP-N00142/2017-18/10381 as IRP under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**).
5. Perusal of Part IV of the application, it is revealed that that the Operational Creditor herein has claimed an amount of Rs.1,36,30,679/- as operational debt, comprising of Principal Amount of Rs.60,44,800/- and interest thereon as Rs. 75,85,879/-.
6. It is stated that the Corporate Debtor has approached the OC in year 2018 onwards for supply of goods i.e. various types of chemicals for their textile business. The OC supplied goods from time to time to the CD which have been received by the CD and the invoices are raised for the same from time to time by the OC and the CD.

7. That at no point of time has the CD objected/Protested to such interest clause in the invoices and has accepted the goods with the invoices containing such interest clause.
8. That the CD defaulted in making the entire payments due to the OC for the goods sold and the invoices raised thereto, and was delay in making certain payment as well.
9. That on 01.05.2023, the OC filed summary suit for recovery before the Ld City Civil and Sessions Court Ahmedabad vide Comm CS no. 194 of 2023 on 01.05.2023. That the said suit is presently pending adjudication.
10. That as of 17.07.2023, the CD is liable to make payment of Rs.1,36,30,679 (Rs.60,44,800/- towards principal, Rs. 45,01,893/- towards interest (24% pa) on outstanding principal, Rs.30,83,986/- towards interest (24% pa) on delayed payment) to the OC.
11. That the OC has time and again called upon the CD to make payment of the outstanding dues. However, CD kept on

making false promises to make the payment and failed and neglected to do so.

12. That the OC initiated recovery proceedings before the civil court against the CD for outstanding amounts, details of which are annexed to the present petition.
13. That since the CD had not adhered to the requests of the OC of paying the said outstanding dues, the OC issued demand notices under Form 3 and Form 4 dt. 23.08.2023 vide Speed Post (dispatched on 24.08.2023) and vide email dated 23.08.2023, as per and in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") seeking sum of Rs. 1,36,30,679 (Rs.60,44,800/- towards principal, Rs. 45,01,893/- towards interest (24% pa) on outstanding principal, Rs.30,83,986/- towards interest (24% pa) on delayed payment) as of 17.07.2023, alongwith annexures thereto which was delivered to the CD on 25.08.2023. It is stated that the interest component continues to accrue till actual date of payment.

14. That the CD vide letter dated 04.09.2023 replied to the said notices failing to substantiate any of the contentions raised therein, and a copy of which annexed to the present petition.
15. That the OC vide rejoinder letter dated 19.10.2023 dealt with the said reply of the OC a copy of which is annexed to the present petition.
16. That the CD has till date failed to make the payments of the said invoice to the extent set out herein and has committed a default of the operational debt due. It is submitted that there is no dispute qua the aforesaid outstanding.
17. On notice to the Corporate Debtor, a reply has been filed by the Corporate Debtor vide inward diary No. D-1221 dated 13.02.2024, which is duly affirmed by one Mr. Vinod Arora, Chairman and Managing Director of the Corporate Debtor.
18. In reply the brief of various issues raised by the Corporate Debtor are as under:-

i. It is submitted that as per the details of outstanding invoices submitted by the Applicant, there are total 24 unpaid / partly paid invoices and the first date of default as mentioned on the OC with regards to the first invoice is 26th September, 2019. Further, date of demand notice is 23d August, 2023 as mentioned in the form 3 submitted by the Applicant. Hence, there is gap of around 4 years between the date of default and the demand notice. The Applicant has miserably failed to address the issue of the period of limitation. Accordingly, on the grounds of limitation, the application is time barred and required to be rejected. Further, Reliance is also placed on the judgement of Hon'ble NCLT, New Delhi Bench M/s Gagan Fibers Private Limited Vs. M/s Innovative Textiles Limited dated 24.01.2024 in CP IB 447 (ND) of 2023 the relevant para is reproduced as under:

“In the present case, the Operational Creditor received Rs. 32,12,083) towards the pending invoices on 14.01.2019. Accordingly, the Limitation for filing the present Section 9 Application starts from the date of default i.e. 14.01.2019.

The Limitation Period of 3 (Three) years, if calculated from the date of default i.e. 14.01.2019, shall expire on 14.01.2022. Whereas the present Application under section 9 of the Code has been filed on 21.03.2022 which is beyond the period of limitation and hence, the Application filed under section 9 of the Code is barred by the Law of Limitation. Further, it is noted that the Operational Creditor/ Applicant has failed to explain the delay.

iv. Hence, in view of the above, we are of the considered view that the present Application under Section 9 of the Code is barred by the limitation and is not maintainable.”

- ii. It is stated that the debt less than 1 Crores - Interest not to be included while computing the threshold limit as per the Part IV of the Form 5 submitted by the Applicant herein, total amount of default is Rs. 1.36 crores which includes Rs. 60.45 lacs towards principal and Rs. 75.86 lacs towards interest.
- iii. The entire claim of interest by the OC herein is not sustainable because of the following facts.
 - a. The CD had issued the purchase orders and sent it to the OC wherein there was no mention of the interest.

The Copies of the purchase orders are attached herewith as Annexure - "B". Hence, purchase order which is accepted by the OC and based on these purchase orders, the OC has made supplies and issued the invoices. Further, mentioning of the interest component in the invoices which was not an agreed condition of the contract and subsequent action by the corporate debtor on these invoices would not mean a novation of Contract.

- b. The OC herein has been supplying the goods to the CD since last several years and it was clearly decided not to change any interest on the supplies and in the past in invoices, where there were delay in payment, no interest was paid/ recovered by the OC. Thus, this was an agreed terms of not charging any interest between the parties and it was never paid by the CD to the OC at any time.
- c. The OC herein itself has shared outstanding report to the corporate debtor through various mails. In one of the mails the OC had given outstanding report and the

ledger account appearing in the books of the OC. From the pursual of this outstanding report and the ledger account, it can be clearly seen that there is no mention of interest anywhere in the report nor the ledger account which means that if the so called interest was actually receivable by the OC, then it was supposed to be mentioned in the ledger a/c and it is compulsory under the Accounting Standards (AS) or the Indian Accounting Standards (IND AS) prescribed under the Section 133 of the Companies Act, 2013 as the case may be. The fact that it was never recorded in the books of accounts of the OC substantiates that such interest is not to be receivable by the OC nor payable by the CD.

d. Further, there is no TDS certificate to show that the CD has actually paid the interest in the long history of the relationship between the parties and hence the claim of interest by the OC is bad in the eyes of the law.

- e. The claim of interest is unilateral and by the conduct of the CD it is clear that it had not accepted the interest component which therefore does not give rise to a proper conduct which is essential for a novation. A proper conduct necessarily means that any changes in the contract have to be communicated directly to the other party. This is clearly not the case. On this ground also, the application is required to be rejected.
- f. Thus, it is evident that since neither the Operational creditor has claimed any discreet amount towards the purported interest in the invoices, nor the CD acknowledged the provision thereof by its conduct or otherwise. Hence mere mentioning of a condition as a footnote without any causative or remedial ramifications cannot be considered to be a part of the agreement. And thus, interest charged by the OC is totally wrong and considering the principal amount it is lower than the threshold limit of Rs. 1 crore and on this ground also the application is required to be rejected.

- iv. It was submitted that as per section 4 of the IB Code, 2016, minimum amount of default is Rs. 1 crore. From the above, it is visible that adding interest to the total amount of default is nothing but a malafied tactic to make the total amount of default above the threshold limit of Rs. 1 crore. On the basis of the above submission, interest should not be taken into consideration while calculating the total amount of default and accordingly the application does not fulfil the section 4 of the IB Code, 2016.
- v. Further, the reliance is placed on the judgement of the Hon'ble NCLT Kolkata Bench dated 19th January, 2024 in the case of Chemico International Private Limited Vs. Cygnet Industries Limited in CP (IB) No. 307/KB/2022 [Case Citation: (2024) ibclaw.in 124 NCLT] (Attached herewith as Annexure - "E") wherein it was held that in spite of mention interest condition in the invoice, it cannot be clubbed to determine the threshold limit of Rs. 1 crore. The relevant extract of the judgement is as under:

“40..... Thus, it is evident that the Purchase Order clearly states that if there are any special conditions given by either side it has to be accepted in writing by the buyer (in this case the Corporate Debtor). Since the Purchase order was first accepted by the Operational Creditor, they agreed to this clause by sending the required goods. So, if they eventually gave any counter offer in their Tax Invoices, they too had to get it accepted clearly in writing by the Corporate Debtor. Since there was neither any exclusive writing about the 21% p. a interest which was accepted by the Corporate Debtor there is no question of Counter Offer.

41. In the light of the above precedents the amount claimed in the petition does not meet the threshold amount mentioned in Section 4 of the IBC and accordingly CP (IB) No. 307/KB/2022 is dismissed.”

- vi. Further, Reliance is also placed on the judgement of Hon'ble NCLAT in the case of Pavan Enterprises Vs. Gammon India Ltd. Company Appeal (AT) (Insolvency) No. 144 of 2018 dated 27.07.2018 (Attached herewith as Annexure - "F"), wherein the Hon'ble NCLAT held that:

“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 the debt will include interest, otherwise, the principal 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.”

vii. Is further submitted that the corporate debtor does not agree even with the principal amount of invoices and there are material gaps between the amount submitted and claim made by the applicant operational creditor herein and the ledger account of the applicant appearing in the books of the corporate debtor. Further, one commercial civil suit is also filed by the Applicant before the Hon’ble Commercial Court in City Civil Court at Ahmedabad bearing case number Commercial suit number 194 of 2023. Pending this suit, the Applicant has preferred this application before the Hon’ble National Company Law Tribunal (Hon’ble NCLT) and this on this ground the application is required to be rejected.

viii. The Corporate Debtor is a Solvent Company listed on the Bombay Stock Exchange ('BSE) and National Stock

Exchange (NSE) since year 2006 having positive net worth and Positive Cashflows from operating activities as per the audited balance sheet of the Company as at 31.03.2023.

19. A rejoinder has been filed by the Operational Creditor vide inward diary No. D-2708 dated 01.04.2024. The relevant para of the rejoinder has been reproduced as under:-

i. It is humbly stated and submitted that the present petition is not barred by limitation. That the Hon'ble Supreme Court had suspended limitation in all matters across India due to the outbreak of covid and the difficulties being faced by litigants, and further reliance is placed upon the orders dated 23.03.2020, 27.04.2021 and 10.01.2022 passed by the Hon'ble Supreme Court in the case of Suo Motu Writ Petition (Civil) No(s).3/2020 suspending limitation all judicial proceedings due to covid. That the Hon'ble Supreme Court in the said order dated 10.01.2022 further orders as follows:

“5(iv) It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in

computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

Hereto annexed and marked colly. as Annexure [A 1 are copies of the orders dated 23.03.2020, 27.04.2021 and 10.01.2022 passed by the Hon'ble Supreme Court in the case of *Suo Motu Writ Petition (Civil) No(s).3/2020* suspending limitation all judicial proceedings due to covid. Claim will include both principal debt amount as well as interest on delayed payment which is stipulated in the invoice.

- ii. It is humbly stated and submitted that the invoices raised by the Applicant herein clearly stipulated provision of

interest on delayed payment. Further, the Corporate Debtor ("CD") has not raised any dispute on this clause.

iii. That since interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for "right to payment" as per section 3(6) of the Insolvency and Bankruptcy Code, 2016 ("IB Code" / "Code") and therefore will form part of the debt as per section 3(11) of IB Code.

iv. That it is a trite position of law that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which is clearly stipulated in the invoice itself.

v. It is humbly stated and submitted that if the ledger account of the CD in the books of accounts of the Applicant reflects that interest amount is pending, then the Applicant has to pay tax on the said amount even though the said amount has not been paid by the CD, therefore, the ledger account of the CD in the books of accounts of the Applicant does not reflect interest amount.

- vi. Further, the liability of payment of interest in law culminates from the contract between the parties and not based on books of accounts. In the event, the liability were to culminate only if reflected in books of accounts, then debtors would stop showing their liabilities in their books of accounts and run scot free.
- vii. That, the CD has not placed a single document on record showing that they had raised any dispute qua the outstanding amount or even the principal amount of the invoices.
- viii. It is stated and submitted that the Operational Creditor has filed the commercial suit against the CD towards the outstanding dues of the CD. That there is no prohibition in initiating insolvency proceedings even if recovery proceedings are filed in the past. Further, recovery proceedings are different from insolvency proceedings and the present is an insolvency proceeding. Therefore, the present insolvency petition should not be rejected based on

pendency of the commercial suit which has been filed by the Applicant/ Operational Creditor herein.

- ix. It is further stated and submitted that the CD is a loss-making company. That, on perusal of the statement of profit and loss for the year ended on 31.03.2023 (Pg. No. 316 of the captioned petition), the total comprehensive loss for the year, net of tax in the year ended on 31.03.2022 is Rs. 4,129.69 Lakhs and for the year ended on 31.03.2023 it is Rs. 6,493.40 Lakhs.
20. The operational creditor has filed additional affidavit to place on record revised chart of Invoices on 11.12.2023 vide inward dairy no. D5047 and the same was taken on record vide order dated 23.01.2024.
21. We have heard the both Counsels and perused the records. We have also considered the written submissions as well as the judgements filed by both sides.
22. During the hearing, Learned Counsel for the Corporate Debtor has drawn our attention to the purchase orders

issued by the Corporate Debtor, which are placed on page Nos. 17 to 41 of the reply which were not attached by the Applicant and the Counsel for the Applicant have not objected to the Purchase orders.

23. Ld. Senior Counsel for the corporate debtor stated that the some of the invoices are within 10-A period and excluding the same the debt falls below the threshold limit.
24. The Purchase does specify the payment period which is in some cases 120 days and others 180 days from the receipt of Goods.
25. In reply, the Counsel for the Operational Creditor drew attention to the various invoices, and stated that the invoices are due within 180 days from the date of the invoice and if the payment is made within the due date than the interest at the rate of 24% PA will be levied upon the Corporate Debtor.
26. In view of the above, we have no hesitation to hold that the question of interest, which is not mentioned in the purchase

orders, is claimed by way of an invoice by the Operational Creditor, who is acting upon the purchase orders which have no stipulation for interest. On the other hand the claim of interest is objected to by the Corporate Debtor. Hence, the issue becomes disputed. As such, we hold that the entire issue relating to the interest amounting to Rs. 75,85,879/- is a disputed question before us. The principal claim in the present application is Rs. 60,44,800/-.

27. On the point of due date of the invoices which are due in the period from 25.03.2020 to 28.02.2022 limitation period will be extended as per the order of the Hon'ble Supreme Court but due date (date of default) will not get any extension.

28. There are invoices which pertains to the 10 A period the list of Invoices is reproduced as under :

S. No.	Date of Invoice	Invoice no.	Amount	payment Received	Due Date
1	26.09.2019	CPC19-20/ 26399	1,21,540	98,516	24.01.2020
2	28.09.2019	CPC19-20/ 26419	1,21,540	0	26.01.2020
3	05.10.2019	CPC19-20/ 26479	3,03,850	0	02.02.2020
4	05.10.2019	CPC19-20/ 26480	3,03,850	0	02.02.2020

5	13.11.2019	CPC19-20/ 26812	3,03,850	0	12.03.2020
6	13.11.2019	CPC19-20/ 26813	3,03,850	0	12.03.2020
7	19.11.2019	CPC19-20/ 26873	3,03,850	0	18.03.2020
8	29.11.2019	CPC19-20/ 26982	3,03,850	0	28.03.2020
9	05.12.2019	CPC19-20/ 27054	3,03,850	0	03.04.2020
10	05.12.2019	CPC19-20/ 27053	6,07,700	0	03.04.2020
11	23.12.2019	CPC19-20/ 27241	3,03,850	0	21.04.2020
12	23.12.2019	CPC19-20/ 27244	3,03,850	0	21.04.2020
13	01.01.2020	CPC19-20/ 27368	3,03,850	0	30.04.2020
14	01.01.2020	CPC19-20/ 27367	3,03,850	0	30.04.2020
15	16.01.2020	CPC19-20/ 27580	3,03,850	0	15.05.2020
16	31.01.2020	CPC19-20/ 27752	3,03,850	0	30.05.2020
17	07.02.2020	CPC19-20/ 27854	6,07,700	0	06.06.2020
Total			54,08,530	98,516	

29. There are other invoices which are not falling under the 10-

A period the list of Invoices is reproduced as under :

S. No.	Date of Invoice	Invoice no.	Amount	payment Received	Due Date
1	06.01.2021	CPC20- 21/27590	1,07,380	0	05.07.2021
2	06.01.2021	CPC20- 21/27589	11,682	0	05.07.2021
3	12.01.2021	CPC20- 21/27680	85,904	0	11.07.2021

4	06.02.2021	CPC20-21/27871	10,030	0	05.08.2021
5	10.03.2021	CPC20-21/28054	2,54,880	0	06.09.2021
6	09.04.2021	CPC21-22/225	50,150	0	06.10.2021
7	09.04.2021	CPC21-22/225	2,14,760	0	06.10.2021
Total			7,34,786	0	

30. From the above table, it is clear that the sum of Rs. 48,00,830/- qua the invoices raised with effect from September 2019 to February 2020 is covered within the exempted period of Section 10 (A) of the IBC. The applicant's Counsel was unable to satisfy this Bench as to how the applicant is able to escape the said Provisions of the Code.

31. However, as per Section 10-A of IBC, 2016, any default occurred between the periods 25.03.2020 to 25.03.2021 is exempted and no IBC proceedings shall ever be initiated against the Corporate Debtor for the default which occurred during the period from "25th March, 2020 to 25th March, 2021. The focus of the law which was brought by Section 10-A was that when the Corporate Debtor suffers default on account of Covid-19, they should be protected from the

filing of any Insolvency Application in the default committed during the said period.

32. In this aspect we rely upon the judgment of Hon'ble Supreme Court in the matter of **Ramesh Kymal vs. M/s Siemens Gamesa Renewable Power Pvt Ltd.**, Civil Appeal No.4050 of 2020.

33. In view of the above discussions as the debt claimed is below the threshold specified under Section 4 of the IBC and on as there is dispute regarding the interest, the present application, **CP (IB) 275 of 2023**, is hereby dismissed. No order as to cost.

34. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-

**SAMEER KAKAR
MEMBER (TECHNICAL)**

-Sd-

**SHAMMI KHAN
MEMBER (JUDICIAL)**

SP