

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 812/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules 2016)

In the matter of

M/s Laxmi Mukund Enterprises Private Limited

No. 104/Wing B, DB Woods,

Goregaon, CTS No. 157/3,

Opposite Laxchandi Heights,

Mumbai, Maharashtra- 400063

.....Petitioner/Operational Creditor

Vs

M/s Yash Metalics Private Limited

Plot No.35-36, M.I.D.C.,

Shiroli, Kolhapur, Maharashtra-416122

.....Corporate Debtor

Order Dated: 05.07.2024

Coram:

Reeta Kohli, Hon'ble Member (Judicial)

Madhu Sinha, Hon'ble Member(Technical)

Appearances:

For the Petitioner/Operational Creditor: Pulkit Sharma (PH)

For the Corporate Debtor: Rohit Ravikiran Kulkarni (VC)

ORDER

This Company Petition is filed by **M/s Laxmi Mukund Enterprises Pvt. Ltd.** (hereinafter referred as “**the Petitioner/Operational Creditor**”) on **17.06.2022** seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) against **M/s Yash Metalics Pvt. Ltd.** (hereinafter called “**Corporate Debtor**”) by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “**the Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for committing default in payment of an Operational Debt of **Rs. 13,29,68,804/-** (Principal Amount of Rs. 4,45,65,007/- plus GST amounting to Rs. 80,21,703/- and interest of Rs. 8,03,82,094/- under ‘Micro, Small and Medium Enterprises Development Act, 2006) as per Demand Notice dated 04.10.2021. After deducting **Rs. 21,76,529** paid by the Corporate Debtor, the final amount now is reduced to **Rs. 13,07,92,275.**

Brief Facts and Submission by the Operational Creditor:-

1. The Operational Creditor and Corporate Debtor executed and signed the Returnable Packaging Agreement on 04.05.2016 for the supply of Pallets for facilitating easy & damage free movement of automative components from the Operational Creditor to Corporate Debtor at approved locations. These pallets were finally used by VE Commercial Vehicles Limited (“**VECV**”). Actually, it was at the instance of VEVC that the whole business arrangement to use these pallets began. It was a way to achieve compliance to ISO-14001.

2. The pallet manufacturing plant was put up at a huge capital outlay specifically for production of pallets to be supplied under this Agreement, hence the petitioner was under great financial strain.
3. Annexure A and B of the Agreement are integral parts of the Agreement. Annexure A clearly mentions the **Minimum Guaranteed Volume (“MGV”)** per month and Annexure B- Term 4 defines **payment terms** clearly stating that all payments made to petitioner under this Agreement shall be without deduction or set off and shall be paid to petitioner under this Agreement within 45 days from the date of petitioner’s invoice to Corporate Debtor. The Annexure B, in the Agreement, further stipulates that *“if Yash does not make payments in agreed payment due days for what so ever reason then else supply of packaging material will be controlled till payments get cleared.”* Though stipulated in the Agreement, the Operational Creditor did not invoke this clause to stop supply of pallets because of delayed payments.
4. The following bills (excluding taxes) raised by Operational Creditor remained unpaid by the Corporate Debtor
 - August 2016- Rs. 22,50,791/-
 - September 2016- Rs. 22,50,791/-
 - October 2016- Rs. 22,50,791/-

The remaining monthly invoices were issued from the period of November 2016 to July 2021.

5. The following payments were made by the Corporate Debtor:

Sr. No.	Date of Payment	Amt paid in figures
1.	17.07.2020	1,00,000/-
2.	03.08.2020	2,00,000/-

3.	05.08.2020	2,00,000/-
4.	21.08.2020	3,00,000/-
5.	13.11.2020	1,00,000/-
6.	01.02.2021	1,00,000/-
7.	29.05.2021	8,37,983/-
8.	28.06.2021	3,38,546/-
	Total-	
	21,76,529/-	

6. The Operational Creditor, thereafter, issued Demand Notice under section 8 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 of the Code on **04.10.2021** demanding the amount of Rs. was 13,29,68,804/- (Rupees Thirteen Crores Twenty Nine Lakhs Sixty Eight Thousand Eight Hundred and Four Only), but on reconciliation it was found that an amount of Rs. 21,76,529/- had been received by the Operational Creditor from the Corporate Debtor, and therefore, after making adjustments, now the amount stands at Rs. **13,07,92,275/-**. The Date of Default as per the Demand Notice is **28.06.2021**.
7. For operational continuity, Operational Creditor was pushed into taking a loan of Rs. 2,00,000/- @11.25% p.a. from L & T Financials to ensure continuation of its business of pallet supply to Corporate Debtor on the basis of the valuation of flat and personal guarantee of directors and other subsidiary companies.
8. On account of taking this loan, the figure of amount payable by Corporate Debtor has gone upwards. After invoking the applicable provisions of section 16 of MSME Act, 2006, the due now, works

out to Rs. 13,07,92,275/-. The above stated section is reproduced below:

“16. Date from which and rate at which interest is payable.—*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 rates 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.”*

9. It is the further case of the Operational Creditor that even if Limitation Act were to apply the debt would reduce to Principle Amount of Rs. 3,75,06,661/-. Thus by all accounts, the undisputed debt at a minimum of Rs. 3,75,06,661/- is due to the Operational Creditor from Corporate Debtor.
10. The Operational Creditor also submitted that immediately after commencement of the agreement, the first invoices were submitted to Corporate Debtor based on MGV condition. Later on finding that the Corporate Debtor is stonewalling all the requests to release the amount due on account of MGV based invoices therefore, Invoices for part amounts were raised on account of liquidity constraints on the part of the Corporate Debtor. The invoices for the balance amount were raised on 03.05.2021. It is now the case of the

Operational Creditor that demand on the basis of MGV condition can be raised basis it's mention in the agreement and invoices are not required for the same. In order to substantiate this claim, the Operational Creditor relies on the following judgement:

- ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited [MANU/SC/0152/2022] in which the Hon'ble Supreme Court held as follows:***

“43....As such, presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by regulation 7(2)(b)(i) and (ii) of the CIRP Regulations, 2016 which provides an operational creditor seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the Corporate Debtor or an invoice demanding payment for the goods and services supplied to the Corporate Debtor.”

11. The Operational Creditor further submitted that there was no pre-existing dispute as Corporate Debtor maintained total silence on the detailed demand letters dated 20.05.2021 and 16.06.2021, written and duly served to Corporate Debtor after raising of invoices for the balance amount on 03.05.2021 which also serves as a clear admission of debt. Invoices for part amounts were raised earlier on account of liquidity constraints on the part of the Corporate Debtor.
12. In response to the legal notice dated 24.06.2021, a false claim of revocation of Agreement of 2016 without any basis whatsoever was

made. Interestingly, in the same reply, another contradictory false claim of relaxation of MGV condition is made. Thus an attempt was made to raise the presence of a fabricated pre-existing dispute only at a much later stage, that too, after making part payment towards the delivery of goods and hence is not acceptable. In order to substantiate this contention the Operational Creditor relies on the judgement in *B.V. Gautam v. Clarke Energy India Private Limited and Anr. (Company Appeal (AT) (CH) (Ins) No. 148/2022)*, where in the NCLAT held that that the arguments of the Corporate Debtor justifying the delay of 13 (thirteen) months for raising issues with respect to quality of the engine, on the grounds that engine efficiency could only have been ascertained after ‘*only after a lapse of sometime*’ and that the Memorandum of Understanding between the relevant parties did not provide for a specific time period within which any dispute was to be raised, were not acceptable, and held that the defenses raised by the corporate debtor were spurious, hypothetical and illusory and there were no pre-existing disputes.

13. No evidence, whatsoever, about the deficiency in service or any dispute, about the liability, was ever raised by the Corporate Debtor. There was no dispute raised even to Form 3 and Form 4 Notices till as late as 04.10.2021.
14. The Operational Creditor further submitted that this Hon’ble Tribunal is having a Summary Jurisdiction and should only satisfy itself regarding the presence of an undisputed debt of more than Rs. 1 crore and corresponding default. The Operational Creditor relies on the following judgements to substantiate this contention:-

- ***S.S. Engineers v. Hindustan Petroleum Corporation Ltd. [MANU/SC/1146/2022] in which the Hon’ble Supreme Court held as follows***

“32....On a reading of Sections 8 and 9 of the IBC, it is patently clear that an

Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an Operational Creditor is undisputed and the Operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor....”

- **Nandamuri Meenalatha v. Quality Steels & Wire Products [IA No. 23 of 2023 in Company Appeal (AT) (CH) (INS.) No. 11 of 2023] in which the Hon’ble NCLAT held as follows**

“85. It is to be remembered that the ‘Proceedings’, under the I & B Code, 2016 are summary in character and that an ‘Adjudicating Authority’, not being a ‘Recover Fora’ or ‘Court’ (no elaborate enquiry is conducted like that of a ‘Regular Trial’ of a ‘Civil’ case, and also, it does not determine, a ‘Money Claim’ or ‘Civil Suit”, this ‘Tribunal’, is of earnest opinion, that the ‘Controversy/Dispute Claim’, in respect of ‘Interest’ based on ‘Privity of contract’ or ‘otherwise’, has no relevance/significance, if the ‘Debt’, payable is more than the threshold limit of section 4 of I & B Code, 2016, considering the fact that the Principal outstanding as mentioned in Form 3 of the demand Notice dated 30.07.2021 was Rs.

1,53,16,611/- , which is more than 1 crore, to be paid by the Corporate Debtor.

86. Also that, the Dispute relating to Violation of Agreement/Contract between the Inter se Parties in the instant Appeal, before this Tribunal does not constitute pre-existing dispute, qua the Sum payable in Law.

87. it must be borne in mind that an Exact sum of claim of an Operational Creditor is not relevant for an admission of an Application of course during the course of CIRP, the exact Claim Amount can be determined by an Interim Resolution Professional/Resolution Professional and in the instant case, Parties are free to approach the Interim Resolution Professional/Resolution Professional in the course of CIRP...”

Submissions by the Corporate Debtor/Respondent

15. The Corporate Debtor submitted that since Corporate Debtor had longstanding engagement with VEVIC therefore, on the recommendation of VEVIC, the Corporate Debtor agreed to procure pallets from the petitioners without any due diligence of the petitioner.
16. The Corporate Debtor stated that the petitioner raised bills based on MGV value as decided in the Agreement dated 4th May, 2016. However, the Corporate Debtor clearly mentioned to the petitioner that as the material was not as per quality specifications given by the Corporate Debtor (such specifications were in turn given to

Corporate Debtor by VEVC) and therefore not only did the petitioner agree to supply quality material as per specifications but also accepted to raise the bills basis the actual quantity delivered. Thus the MGV condition was evidently relaxed on mutual agreement between both the parties. The petitioner is thus demanding payment for the goods which were actually never delivered to the Corporate Debtor. The Corporate Debtor placed on record emails dated 09.04.2019 and 18.04.2019 which are reproduced below, respectively:-

*Sub: Engine Material input supply trolleys/ stand condition very poor
Please clean pallets immediately. Pallets are very dirty & dusty.
Need cleansing with water & Air clean of all pallets. Please do the
needful urgently.*

*Sub: Engine Material input supply trolleys/ stand condition very poor
Request you to stop to supply material with dirty input stands inside
of engine line. There is a major engine hygienic contribution of these
types of stands and input trolleys.*

17. It is required to be noted that the Petitioner is seeking the amount based on MGV mentioned in the agreement, however the same is incorrect. Clause 4 of the Agreement clearly states that the agreement does not constitute an undertaking by the Corporate Debtor to take the pallets from the Operational Creditor. The same is reproduced below:-

Clause 4-Order- *both the parties (implied Petitioner and the Respondent) that this agreement does not constitute an undertaking by Respondent Metalics to take pallets from Petitioner.*

18. **Annexure B- Term 4** defines payment terms clearly stating that all payments made to petitioner under this Agreement shall be without

deduction or set off and shall be paid to petitioner under this Agreement within 45 days from the date of petitioner's invoice to Corporate Debtor. **Annexure B-Term 5** clarifies that petitioner shall raise the bill and submit the invoice in receipt of the parts supplied by Respondent on monthly basis to its customer. The petitioner never submitted any invoice basis MGCV condition and suddenly submitted all the invoices as per their whims and fancies on 02.05.2021 which were pertaining to years 2016-2017, 2017-2018 & 2018-2019. This was done solely, with an ill intent, to bring the present petition within limitation. It is further required to be taken into consideration that bills raised in the years 2016, 2017 and 2018 are time barred.

19. It is thus respectfully submitted that the present case is related to interpretation of clauses in the Agreement which do not form part of jurisdiction of this Hon'ble Tribunal.
20. Furthermore, the petitioner had not even invoked the Arbitration Clause (Clause 23) in the Agreement before approaching this Hon'ble Tribunal which is gross violation of the Agreement. The above sated Clause is reproduced here in under:-

In the event of any dispute or difference arising anytime between the parties hereto as to the construction, meaning or effect of this agreement or any clause or thing contained herein or the rights, duties, liabilities and obligations of the parties hereto in relation to the terms of this Agreement the same shall be referred to a single arbitrator, in case the parties can agree upon one (1), within thirty days upon being called by a party to do so and failing such agreement to three (3) arbitrators one

each to be appointed by Respondent and Petitioner and the third to be appointed by two arbitrators so appointed.

21. The Corporate Debtor also stated that delivery of goods is a mandatory ingredient for charging of interest as per Section 17 of MSME Act. The above stated Section is reproduced here in under:-

Recovery of amount due for any good supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

Thus in the absence of actual delivery of goods on part of Operational Creditor, the right to charge interest is not bestowed.

22. It is the further case of the Corporate Debtor that the petitioner invoking MGV is an act exploiting the provisions of Specific Performance under the Indian Contract Act and this Hon'ble Tribunal has no jurisdiction on the same as the remedies can be sought only in Civil Courts.

Findings

1. It is the case of the Operational Creditor that initially bills were raised as per MGV clause under the Returnable Packaging Agreement dated 04.05.2016. The monthly invoices were however raised only for partial amount for the years' 2016-2017, 2017-2018 & 2018-2019 on account of liquidity constraints of Corporate Debtor. The invoices for the remaining amounts, for the above mentioned years, were submitted altogether on 02.05.2021. The Corporate Debtor had made payments totalling to **Rs. 21,76,529/-** and the default amount now stands at **Rs. 13,07,92,275/-**. However, the Operational Creditor himself admits that on account

of application of Limitation Act, the debt would reduce to Principle Amount of **Rs. 3,75,06,661/-**.

2. On the other hand, it is the case of the Corporate Debtor that goods were not actually delivered to it by the Operational Creditor as per MGV condition because the same was relaxed mutually between both the parties, as there was dispute qua quality. The Corporate Debtor also submitted that as per Clause 4 of the Agreement, there was no undertaking by the Corporate Debtor to take goods from the Operational Creditor. Hence, the monthly invoices were raised not according to the MGV condition but according to the actual quantity of the goods supplied. Furthermore, this Hon'ble Tribunal also does not have the jurisdiction to entertain the present petition as it deals with interpretation of contractual clauses and contains an arbitration agreement.
3. At the outset we find it appropriate to deal with the contention whether an arbitration clause would result in ousting the jurisdiction of this Hon'ble Tribunal. We are of the considered opinion that if the subject matter involved pertains to insolvency then the Insolvency and Bankruptcy Code, 2016 would override the Arbitration and Conciliation Act, 1996 as provided in Section 238 of the Code. This view is substantiated by the following judgments:-
 - **Indus Biotech v. Kotak India Venture (Offshore) Fund (2021) 6 SCC 436** a 3-judge bench of the Supreme Court had concluded that if there is default and the debt is payable, the bogey of arbitration to delay the process would not arise.
 - **Gujarat Urja v. Amit Gupta (2021) 7 SCC 209** the Supreme Court held that though a power purchase agreement that had an arbitration clause was involved, it was

decided that the NCLT had jurisdiction over those disputes which arose in the context of insolvency proceedings.

Therefore, this contention of the Corporate Debtor stands negated that an arbitration agreement entered into between both the parties bars the Operational Creditor from approaching this Hon'ble Tribunal to invoke its legal remedies.

4. The second contention of the Corporate Debtor is that goods up to the minimum stipulated value were not delivered and those delivered are not as per quality specifications. This contention of the Corporate Debtor is substantiated by the emails placed on record of this Hon'ble Tribunal, dated 09.04.2019 and 18.04.2019 which are already reproduced earlier. These emails clearly prove the existence of a pre-existing dispute (present much before the Demand notice dated 04.10.2021) between the parties qua the quality of the goods. This contention of the Corporate Debtor is further substantiated by the fact that monthly invoices raised by the Operational Creditor were not according to the MGV condition. Invoices for the remaining amount pertaining for the year 2016 onwards were raised only in May 2021.
5. It is also pertinent to note that this petition was filed on **17.06.2022**, however, the bills in the present case pertain to the years 2016, 2017, 2018 thereby falling outside the mandatory limitation period of 3 years.
6. Furthermore, we also deem it important to mention that the interest in the present petition is not legally charged, as Section 17 of MSME Act, reproduced in Para 21 above, categorically demands the supply of goods as a prerequisite for charging of such interest. In the present case since goods were actually not delivered as per MGV condition therefore, the question of applicability of interest does not arise.

7. Furthermore, Annexure B of the Agreement clearly contains the MGV/month table and further mentions that invoices are to be raised on monthly basis. Thus as per the Agreement, raising of monthly invoices based on MGV was the obligation of the Operational Creditor which it failed to comply with, thereby proving relaxation of MGV condition.
8. Hence, in view of the above observations this present petition is not admitted due to presence of a pre-existing dispute and being barred by limitation.
9. **In conclusion, CP 812/MB/2022 stands rejected.**

Sd/-

MADHU SINHA

MEMBER (TECHNICAL)

//VLM//

Sd/-

REETA KOHLI

MEMBER (JUDICIAL)