

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : C-IV**

CP(IB)-764/MB/2022

Under Section 9 of the IBC, 2016

In the matter of

TLG India Private Limited

...Operational Creditor

v/s.

Puranik Builders Limited

...Corporate Debtor

Order Pronounced on: **17.03.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner: Mr. Prasad Sheno a/w Mr. Parag Sharma Aditi Phatak,
Kirti Ojha, Advocates

For the Respondent: Mr. Rajmani V., Advocate.

ORDER

Per: Kishore Vemulapalli, Member(Technical)

1. This is a Company Petition filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by **TLG India Private Limited**, ("the Operational Creditor") through its division Leo Burnett, Mumbai on 22.04.2021 seeking initiation of Corporate Insolvency Resolution Process

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(CIRP) against **Puranik Builders Limited** [CIN: U99999MH1990PTC056451] (“the Corporate Debtor”) for the amount payable to the Operational Creditor.

- 1.1. The Corporate Debtor is a company incorporated on 08.05.1990 under the Companies Act, 1956, as a private company limited by shares with the Registrar of Companies, Maharashtra, Mumbai having its registered office at Puranik One, Near Kanchanpushpa Complex, Opp. Suraj Water Park, Kavesar, Ghodbundar Road, Thane (W) – 400 615, Maharashtra. This Bench has jurisdiction to deal with the present petition.
2. The present petition is filed by the Operational Creditor before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹86,46,617/- (Rupees Eighty-six lakh forty-six thousand six hundred and seventeen only) along with interest of ₹38,55,554/- (Rupees Thirty-six lakh fifty-five thousand five hundred and fifty-four only) totalling to a sum of ₹1,25,02,171/- (Rupees One crore twenty-five lakh two thousand one hundred and seventy-one only). The date of default is not stated in Part-IV of the Application. However, after considering the pleading therein and details of the invoices annexed to the application, the date of default is determined as 25.10.2019 i.e. 30 days from the date of last invoice.
 - 2.1. The Operational Creditor is a company engaged in the business of rendering services related to advertising, marketing and other related services to various parties. In 2016, the Corporate Debtor approached the Operational Creditor for availing of advertising services in connection to

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the execution of their activity. Thereafter, the Operational Creditor rendered services to the Corporate Debtor and raised invoices accordingly.

- 2.2. The Operational Creditor has attached copy of 16 invoices issued from February 2019 to September 2019 together with a computation chart giving total outstanding including the interest up to 05.04.2021 totalling to an amount of ₹1,25,02,170/-. Out of 16 invoices, four (4) invoices bearing Nos. 110170408 to 110170411 dated 25.09.2019 are having 10 days credit and rest of the invoices are with 30 days credit issued on various dates from 08.02.2019 to 25.09.2019, the last invoice fallen due on 25.10.2019.
- 2.3. It further submits that since there were many invoices remained unpaid, the Operational Creditor sent a notice to the Corporate Debtor on 02.11.2020 asking to pay the outstanding amount of ₹86,46,617/- along with interest of ₹27,99,411/-. However, the Corporate Debtor neither replied to the notice nor made any payment. Thereafter several requests made by the Operational Creditor but to no avail.
- 2.4. The Operational Creditor further submits that since no payment is forthcoming, it sent Demand Notice on 23.02.2021 demanding to pay ₹86,46,617 along with interest of ₹36,16,765/-. Para 3 of the demand notice is reproduced below:

“3. In the circumstances LB now serve PBL with this notice and call upon PBL to pay the outstanding principal amount of INR 86,46,617/- (Rupees Eighty Six Lakhs Forty Six Thousand Six Hundred and Seventeen) plus

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with an interest amounting to INR 27,99,411/- (Rupees Twenty Seven Lakhs Ninety Nine Thousand Four Hundred and Eleven) calculated @ 24% per annum as per the details furnished in the Exhibit-1 enclosed herewith, within 5 days of the date of this notice. Further interest @24% per annum plus shall be payable form the date of receipt of this notice by PBL till the date of payment”.

2.5. Upon receipt of the Demand Notice, the Corporate Debtor replied on 16.03.2021 in which the Corporate Debtor denied the debt payable to the Operational Creditor. Therefore, the Operational Creditor decided to initiate CIRP of the Corporate Debtor to recover its dues and filed the application under Section 9 of the Code.

3. Reply of the Corporate Debtor:

3.1. The Corporate Debtor in its reply dated 16.11.2022 submitted that the Corporate Debtor did not enter into any agreement with the Operational Creditor and merely printing interest on the invoice is not valid. Therefore, the claim of interest @24% by the Operational Creditor is not legally acceptable. Without considering the interest portion, the principal amount is much below the threshold limit. Therefore, the Petition is not maintainable under IBC.

3.2. The Corporate Debtor further submits that the principal amount is also in question as there were various disputes raised by the Corporate Debtor during the course of the project and referred to few e-mail communications seeking certain notifications in the work, which are of the routine nature. It further states that the contract was discontinued

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the arrangement of retainership by the Corporate Debtor vide email dated 27.06.2019.

4. The Operational Creditor has filed rejoinder dated 07.02.2023 to submit that its invoice(s) contained specific stipulation as to levy of interest @24% p.a. from the period the amount continued to be outstanding and has relied upon NCLAT judgment in the case of *“Mr. Prashat Agarwal vs. Vikash Parasrampuriah and Santanu T. Ray”* [Company Appeal (AT) (Ins) No. 690 of 2022]. The relevant part of the judgment is reproduced hereunder:

“We have perused 9 invoices issued by OC raised against CD at Page No. 47 to 55 of the Memo of Appeal, Volume I and noticed that it has clearly been mentioned under terms and condition “ interest will be charged @ 18% plus GST P.A after due date of the bill” unlike in cited judgment of NCLAT ‘Steel India vs. Theme Developers Pvt. Ltd.’ (Supra) where there was no mention of interest in delayed payment at all vis-à-vis specific mention of interest on delayed payment in all nine invoices in present case before this Tribunal. Hence, the cited case by Learned Counsel is not exactly and directly relevant.

(c) The case of ‘CBRE South Asia Private Limited v. United Concept and Solutions Private Limited’ cited by Counsel for Appellant is from NCLT, Delhi, hence, no comment given.

Incidentally, we have noted that divergent views have been taken by various NCLT with respect to treatment of interest on delayed payment to treat such component of interest as operational debt.

(iv) We have also noted that Adjudicating Authority has also referred one Judgment of this Tribunal i.e Pavan Enterprises v. Gammon India while allowing interest on delayed payment to be part of total debt for calculation of minimum threshold limit for Section 4 of IBC in the Impugned Order itself (at Page – 22 of the ‘Memo of Appeal’, Volume-I).

“(f).....

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judgement dated 27th July 2018 in Company Appeal No.148 of 2018 in Pavan Enterprises v. Gammon India, wherein the NCLAT has held that "If in terms of any agreement interest is payable to the Operational of Financial Creditor then the debt will include interest".

In this context, as discussed above, all 9 invoices clearly stipulated provision of Interest on delayed payment. It is also observed that payments of three invoices has been made in full and for one invoice in part against said invoices by CD and no dispute on this clause was ever raised as noted from record available before us.

(v) Before coming to any conclusion, it will also be pertinent to go through legal definition of debt. The definition of debt as per section 3(11) of IBC is as under:-

3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt."

Since, the word "claim" is mention in definition of debt in Section 3(11) we need to refer to definition of claim under Section 3(6) of IBC which is as follows:-

"3.(6) "claim" means

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

right to remedy for breach of contract under any law for the time being in force, if

(b) such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for "right to payment" (Section 3(6) IBC) and therefore will form part of "debt" (Section 3(11) IBC)"

5. We have perused the material on record and heard both Counsel.

- 5.1. On perusal of the reply of the Corporate Debtor it is seen that the email communications do not reveal any substantive dispute as to the rendition of services by the Operational Creditor in relation to invoices claimed to be due and payable. We also noticed that the Corporate Debtor had discontinued retainership services with effect from end of August vide email dated 27.06.2019 stating that "Going forward we would like to employ model which is variable in nature rather than committing to a fix fee every month (We have realised that we do not get much value out of such fixed retainer fee arrangement)". It is further stated therein that *"Although we are discontinuing our retainer fee model, we would like to continue working with you on project to project basis"*. Further, Corporate Debtor vide email dated 09.07.2019 stated that *"he is definitely willing to give more opportunities to LB under 'project fee' arrangement where we would like to evaluate your 'business solution approach' and 'strategic input' on our business"*. These communications also validate our findings that the dispute as to satisfactory services has no substance and merely a moon-shine defence.
- 5.2. In view of this finding, we feel that there exists a debt of ₹86,46,617/- being amount due under the invoices and there is a default in payment thereof. As regards claim of interest @24% on account of delayed payment we find that there is a specific stipulation at the bottom of each invoice to this effect. Accordingly, following the decision of NCLAT in the case of Mr. Prashat Agarwal (supra) wherein interest was held to be part of debt amount, we feel that any interest of ₹38,55,554/- is also

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inclusive in the amount of debt in default. Hence, the total debt in default aggregate to ₹1,25,02,171/- which is more than ₹1crore, the threshold limit stipulated under Section 4 of the Code.

6. In view of the facts narrated as above, this Bench is of the opinion that the Petition deserves to be admitted under Section 9 of the Code.
7. The Operational Creditor has not proposed any Resolution Professional. Therefore, this Tribunal is to appoint any Resolution Professional from the panel approved by the IBBI.
8. It is, accordingly, hereby ordered as follows: -
 - (a) The petition bearing **CP(IB)-764/MB/2022** filed by **TLG India Private Limited**, the Operational Creditor, under Section 9 of the IBC read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Puranik Builders Limited [CIN: U99999MH1990PTC056451]**, the Corporate Debtor, is hereby **admitted**.
 - (b) There shall be a moratorium under Section 14 of the IBC, in regard to the following:
 - (i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium-
- (i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order

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for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) Mr. Vikram Bhatnagar, having registration No. IBBI/IPA-003/IP-N000183/2018-2019/12197, (email: vikrambhatnagar2002@yahoo.com mob.: 9617084912), is hereby appointed as Interim Resolution Professional to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Operational Creditor shall deposit a sum of ₹5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of

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issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- (i) The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/

PRABHAT KUMAR
MEMBER (TECHNICAL)

17.03.2023/pvs

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)