

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

C.P. (IB)-843/MB/2019

Under section 9 of the IBC, 2016

In the matter of

Steel India,
D/7, 401, Kunthuanath Apartment,
Nahur Road, Mulund,
Mumbai-400080

.... Petitioner

v/s.

M/s. Theme Developers Pvt Ltd,
3AB Rajbahadur Mansion, 20 Ambalal Doshi
Marg, Mumbai-400023

....Corporate Debtor

Order delivered on: 23.07.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)
Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner: Naushar Kohli i/b Ashish Singh

For the Respondent: Mr. Rashmin Khandehar a/w Mr. MA
Kamdar i/b Kanga & Co.

*Per: **Hon'ble Bhaskara Pantula Mohan, Member (Judicial)***

ORDER

1. This Company Petition is filed by Steel India (hereinafter called "Petitioner") against Theme Developers Pvt. Ltd. (hereinafter called "Corporate Debtor") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor alleging that Corporate Debtor committed default in making payment to the extent of Rs. 22,64,054/- which is inclusive of interest calculated @2% on the delayed payments against goods sold and delivered by Petitioner to the Corporate Debtor, by invoking the provisions of Section 9 of I & B Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (AAA) Rules, 2016.

Facts as per the Petition

2. The Petition reveals that the Petitioner supplied the Corporate Debtor with Steel Bars for their construction activity at its project sites. For these supplies various invoices have been raised by the Petitioner. Following is a list of invoices consisting of relevant details, that have been raised by the Petitioner for the year 2015:

<u>Sno.</u>	<u>Buyer</u>	<u>Invoice No.</u>	<u>Amount</u>	<u>Date</u>
1.	Theme Developers Private Ltd.	S1/086/2015-16	4,16,805.00	30.07.2015
2.	Theme Developers Private Ltd.	S1/100/2015-16	2,94,487.00	30.07.2015

3.	Theme Developers Private Ltd.	S1/101/2015- 16	3,16,060.00	30.07.2015
4.	Theme Developers Private Ltd.	S1/102/2015- 16	2,19,805.00	30.07.2015
TOTAL			12,47,157	

3. Furthermore, the Petitioner goes on to make his case by drawing our attention to Email Communications between him and the Corporate Debtor and Ledger (Exhibit – 4, at page 18-26). Also, email dated 05.09.2015 consisting the terms and conditions of the agreement between the parties wherein it was stated that in case payment is not made 'within 60 days 2% interest per month will be charged' by the Petitioner (Exhibit 5, Page 27).
4. The Petitioner as on 29th September 2015 has sent a reminder email to the Corporate Debtor, wherein he has asked him to clear the outstanding dues as soon as possible. Also, based on the Debit Notes which have been annexed in the Petition we get to know that the interest payable by the Corporate Debtor amounts to be Rs. 22,64,054/-.
5. Since, the Corporate Debtor failed to repay the aforesaid dues even after several reminders, the Petitioner issued Demand Notice in Form-3 under Section 8 of the Code on 15.01.2019 demanding for repayment of unpaid interest of Rs. 22,64,054/-. The Petitioner submits that despite receipt of

Demand Notice, the Corporate Debtor neither replied to the said demand notice nor repaid the outstanding dues.

6. The Petitioner filed an Affidavit as required under section 9(3)(b) of the Code stating that they have not received any notice of dispute regarding the unpaid operational debt. Hence this Petition.

Contentions of the Corporate Debtor

7. The Corporate Debtor filed its reply and denied all the claims, submissions, allegations made by the Petitioner. The Corporate Debtor submits that the present Petition is not maintainable in law or in fact. Further, the Corporate Debtor contends that the Petitioner has not come to court with clean hands and has not set out the true and correct facts in the matter. Furthermore, it is also submitted by the Corporate Debtor that the present Petition has been filed by the Petitioner to extort money from the Respondent and the Tribunal has no jurisdiction to entertain this Application.
8. The Corporate Debtor contends that he procured Steel bars from the Petitioner in the year 2015-16 to the tune of Rs. 48,42,784/-. He also points out that the total outstanding of Rs. 48, 42,784/- has already been paid by him to the Petitioner before filing of the Petition.
9. It is further pointed out by the Respondent that wherein he had paid Rs. 14,79,242/- in F.Y. 2015-16 itself, from the month of March to May, the Corporate Debtor handed over Cheques worth of Rs. 30,87,650/- to the Petitioner. However,

the Petitioner for the reasons best known to them held on the said cheques and never presented them for clearance with the bank. It is only upon expiry of these cheques, Corporate Debtor cancelled them. Thereafter, the Corporate Debtor again issued various new cheques amounting to Rs. 20,00,000/- in January 2018, which were cleared.

10. The Corporate Debtor has also annexed copy of the first Demand Notice in Form 3 dated 28th December 2018, that was issued by the Petitioner to the Corporate Debtor demanding a total sum of Rs. 36,00,006/-. This total outstanding included the principal amount of Rs. 13, 35,952/- and interest to tune of Rs. 22,64,054/-. The Corporate Debtor further denied receiving any information from the Petitioner with regards to the claim made by them prior to the issue of Demand Notice. It is further submitted that the invoices issued by the Petitioner do not have any interest provision.

11. In Response to the demand notice dated 28th December 2018, the Corporate Debtor vide his letter dated 9th January, 2019 stated that since the final purchase invoice did not have any provision for payment of interest there the interest claimed was incorrect. Thereafter, principal outstanding amount of Rs. 13, 35.952/- was also cleared by the Corporate Debtor vide RTGS.

12. The Corporate Debtor claims to have never agreed to pay interest to the Petitioner. The Corporate Debtor further submits that, before receiving the Second Demand Notice dated 15.01.2019, he had already raised a dispute with regards to the interest claimed by the Petitioner vide his letter

dated 9.01.2019. Therefore, he submits that since there is existence of a dispute between the parties.

13. It is worth to mention the Written Submissions of the Corporate Debtor, wherein he has denied the claims and sought dismissal of the Petition on the following grounds:

- a. The Corporate Debtor, relying on the judgement of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018 1 SCC 353)* case has submitted that keeping in mind that there was a prior dispute with respect to subject matter pertaining to demand notice, thus rendering this claim under section of the Code as not maintainable.
- b. In addition, the Corporate Debtor also claims, that since it was the Petitioner who failed to clear the cheques within reasonable time, the Corporate Debtor cannot be penalised by claiming interest of delayed payment.
- c. The Corporate Debtor further submits that the claim of Interest by the Petitioner is not tenable for the reason that the same was never documented and agreed upon by both the parties. He has also relied on *Swastik Enterprises Vs Gammom India Limited* and *Wanbury Ltd. Vs Panacea Biotech Ltd.*, submitting that since the invoices issued by the Petitioner do not mention any interest payable, claim of interest cannot be enforced before this Tribunal.
- d. Also, relying on the judgment of the Bombay High Court in *S.P. Brothers Vs. Biren Ramesh Kadakia*, the Corporate Debtor submits that it is a well

settled law that TDS Certificate by themselves are not an acknowledgement of liability.

- e. Finally, the Corporate Debtor submits that insolvency proceedings cannot be used as a substitute forum for debt recovery, especially when there is a dispute as to the amount of debt.

Contentions raised by Petitioner vide Rejoinder and W.S.

14. The Petitioner in his Rejoinder has pointed out that the fact that TDS has been deducted on the interest component is a proof of debt. Further, they have relied on the Corporate Debtor's balance sheet for the year 2015-16, annexed by him in his Reply, according to which interest of delayed payment has been mentioned the Corporate Debtor's Audited Financial Statements.

Findings –

15. We have carefully gone through the pleadings on record and pursued the submissions made by the counsels for both the sides. On careful perusal of the documents it is noticed that the Corporate Debtor has already paid the entire Principal amount to the Petitioner, which the Petitioner has accepted in his submissions. Therefore, it can be said that the Demand Notice dated 15.01.2019 was sent with the sole purpose of demanding payment of remaining amount of Rs. 22, 64,054/-, which *in toto* is interest payable, on the principal amount.

16. This Petition is based on the second Demand Notice issued by the Petitioner under Section 8 of the Code. The Petitioner purposefully screened the first Demand Notice dated 28 December 2018 and the reply of the Corporate Debtor to the said Demand Notice.
17. The invoices enclosed to the Petition were perused by the Bench and there is no provision of charging of interest by the Petitioner. Hence, the claim of interest by the Petitioner is devoid of merit.
18. The Contention of the Petitioner that TDS was deducted by the Corporate Debtor on account of payment of interest does not hold water in view of the fact that the said TDS is under section 194C of the Income Tax Act, 1961 which deals with TDS on payment by a Contractor for carrying out any work. In fact, if the TDS is under Section 194A, which deals with TDS on interest payment, the counsel for the Corporate Debtor maybe right to some extent. Hence this contention also fails.
19. Another contention of the Corporate Debtor is that, the Balance Sheet of the Corporate Debtor for 2015-16 at pg. 231 of the Reply shows that the Corporate Debtor factored interest on delayed payment. However, an ordinary scanning of the Pg. 221, there is an item showing as interest on delayed payment to the extent of Rs. 2,90,459/- but that cannot be relatable to interest claim of the Petitioner which is to the extent of Rs. 22,64,054/- for 2015-2018. It is also to be noted that the interest on delayed payment for the year ending 31.03.2015 was shown as *Nil*. Hence, this contention of the Petitioner also fails.

20. The above discussion clearly reveals that the dispute raised by the Corporate Debtor that they are not liable to pay interest as claimed by the Petitioner, which was categorically informed to the petitioner when reply was given to the first Demand Notice, as early as on 10.01.2019, whereas the second Demand Notice based on which this petition is filed was sent only on 15.01.2019, this is a clear dispute in existence as defined under Section 5(6)(a) of the Code.

21. In view of the above discussion, the Petition is dismissed.

Sd/-

V. Nallasenapathy
Member (Technical)

Sd/-

Bhaskara Pantula Mohan
Member (Judicial)