

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1878 of 2024

**Arising out of the Order dated July 02, 2024 passed by the
'Adjudicating Authority' (National Company Law Tribunal,
Ahmedabad) in CP (IB) No. 275(AHM)/2023**

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

...Appellant

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

Present:

For Appellant : Mr. Arjun Sheth, Mr. Aalay Shah, Ms. Kriti Kothari,
Ms. Henna George, Advocates

For Respondent : Mr. Palash S. Singhai, Mr. Harshal Sareen,
Advocates

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This is an Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, against the Order dated 02.07.2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad) in CP (IB) No. 275(AHM)/2023, which dismisses the Section 9 Petition against the

Respondent on the ground that debt claimed is below the threshold limit and the interest amount is disputed. Being aggrieved by the Impugned Order, the present Appeal is being filed.

Submissions of the Appellant

2. The Appellant is Comet Performance Chemicals Private Limited and is engaged in the business of manufacturing and selling construction chemicals, water treatment chemicals and textile chemicals. Aarvee Denims and Exports Limited i.e. Corporate Debtor had approached the Appellant around 2018 for the supply of the good which includes various types of the chemicals for their textile business. The Appellant from time to time has supplied the required materials to the Corporate Debtor and the same was accepted by the Corporate Debtor without any demur. For the material supplied by the Appellant, the Appellant had raised the invoices from time to time from 2019 to 2021 upon the Corporate Debtor. All the invoices were accepted by the Corporate Debtor, along with the conditions mentioned therein. All the invoices received by the Corporate Debtor contain the clause for interest amount on the delayed payment after the due date, i.e. the interest @24% per annum will be charged after the due date which is the outer limit for considering the interest component. The Corporate Debtor had paid a certain amount to the Appellant but failed to perform its duty by paying all invoices in timely manner. Thereby, the Corporate Debtor defaulted in making the payment to the Appellant. Thereafter, the Appellant filed the summary suit for the recovery before the Hon'ble City Civil and Sessions Court Ahmedabad vide Commercial Civil Suit No. 194 of 2023 on

01.05.2023 and it is pending before the Hon'ble City Civil and Sessions Court Ahmedabad. As on 17.07.2023, the Corporate Debtor was liable to make payment of Rs 1,36,30,679 (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only), Rs 60,44,800/- (rupees sixty lakhs, forty-four thousand and eight hundred only) towards principal, Rs 45,01,893/- (rupees forty-five lakhs, one thousand, eight hundred and ninety-three only) towards interest @24% on outstanding principal amount and Rs 30,83,986/- (rupees thirty lakhs, eighty-three thousand, nine hundred and eighty-six only) towards interest @24% per annum on delayed payment made to the Appellant. After various reminders, the Corporate Debtor made false promises to the Appellant for payment, however, failed to pay the outstanding dues.

3. Due to non-payment of the outstanding amount to the Appellant, the Appellant issued Demand Notice under Form-3 and Form-4 of the IBC vide Demand Notice dated 23.08.2023 and dispatched on 24.08.2023 for the outstanding amount of Rs 1,36,30,679 (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only) Rs 60,44,800/- (rupees sixty lakhs, forty-four thousand and eight hundred only) towards principal, Rs 45,01,893/- (rupees forty-five lakhs, one thousand, eight hundred and ninety-three only) towards interest @24% on outstanding principal amount and Rs 30,83,986/- (rupees thirty lakhs, eighty-three thousand, nine hundred and eighty-six only) towards interest @24% per annum on delayed payment as of 17.07.2023 along with the relevant annexure and the same

was delivered on 25.08.2023. The Appellant contends that interest continues to accrue till actual date of payment.

4. The Corporate Debtor vide letter dated 04.09.2023 replied to the Demand Notice in which the Corporate Debtor failed to justify the reasons for the default. The Appellant vide rejoinder letter dated 19.10.2023 dealt with the said letter of the Corporate Debtor. Due to the intentional default on the part of the Corporate debtor to make the payment to the Appellant, the Appellant initiated the Corporate Insolvency Resolution Process under IBC by filing Section 9 Application being CP (IB) No. 275 of 2023 before the National Company Law Tribunal, Ahmedabad. The Adjudicating Authority vide order dated 21.11.2023 had asked to submit the chart of the invoices, mentioning the date of the invoices as well as the due dates of the payment of each invoices, which were filed by an Affidavit dated 09.12.2023. The Ld. NCLT passed Impugned Order dated 02.07.2024 by which it dismissed the CP (IB) No. 275 of 2023 on the ground that (i) debt claimed is below the threshold limit specified under the Section 4 of the IBC (ii) interest amount is disputed. The Ld. NCLT has erred in not considering the interest amount on the delayed payment which is clearly mentioned in the invoices that interest will be charged on the delayed payment at the interest rate of the 24%. All the invoices were sent by the Appellant to the Respondent and the same was accepted by the Respondent without any demur. Further, the Ld. NCLT erred in considering that the invoices fall within Section 10 A of the

IBC. Being aggrieved by the Impugned Order dated 02.07.2024, the present Appeal is being filed.

Submissions of the Respondent

5. Briefly, the Respondent submits that the Appeal is without merit and barred by law. The Appellant is attempting to misuse the IBC framework as a recovery mechanism, which is an abuse of the process. The Appellant is trying to arm-twist the Respondent despite the latter being a solvent company with a turnover exceeding Rs 250 crores. The Appeal is primarily based on false and frivolous submissions, which do not hold legal ground and should be dismissed with exemplary cost.

6. The Respondent submits that in 2018, the Appellant approached the Respondent for the supply of certain goods, including chemicals, for the Respondent's textile business. Both parties negotiated the terms and conditions for the supply of goods and the corresponding payments. The Respondent issued Purchase Orders from 2018 onwards, upon receiving which the Appellant supplied goods and raised invoices. The Purchase Orders, which are part of the agreement between the parties, stipulated that payment was due within 120 days of the receipt of goods. There was no clause in the Purchase Orders for charging interest on delayed payments. The Appellant did not charge interest for delayed payments during 2018-2020, as reflected in the documents provided (pg 119 of the Appeal). The Respondent submits that the Purchase Orders did not contain any provision for charging interest on delayed payments. The Appellant did not charge any interest for delayed payments between 2018 and 2020, and no agreement was made

between the parties to include such a clause. The Appellant, however, unilaterally added a 24% interest rate on the invoices. This was not mutually agreed upon by the parties and is therefore illegal. Such unilateral amendments to the terms of the Purchase Orders without the Respondent's consent violate basic principles of contract law. The Respondent submits that the Appellant is attempting to inflate the amount of the claim by adding interest, which was never part of the original agreement. Section 5(21) of IBC only allows claims towards goods and services and does not include interest unless there is an express agreement between the parties. This Hon'ble Appellate Tribunal in the case of ***Rishabh Infra Through Hari Mohan Gupta vs Sadbhav Engineering Ltd [Company Appeal (AT) (Insolvency) No. 1881 of 2024]*** has held that invoices with interest clauses, which were not part of the formal agreement, are unenforceable.

7. The invoices raised between 13.11.2019 and 07.02.2020 [a total of Rs 36,46,200/- (rupees thirty-six lakhs, forty-six thousand and two hundred only)] clearly fall under Section 10 A of the IBC. Section 10 A bars the initiation of insolvency proceedings for default in repayment of dues that occurred during the restricted period. Therefore, the default amount for these invoices cannot be claimed under Section 9 of the IBC. Even after excluding the default amount related to the invoices during the 10 A period, the total outstanding dues worth Rs 23,98,600 (rupees twenty-three lakhs, ninety-eight thousand and six hundred only) still do not meet the threshold required for initiating insolvency proceedings. Furthermore, when considering the total

default amount of Rs 1,36,30,679/- (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only) (principal plus alleged interest), after excluding the Rs 36,46,200/- (rupees thirty-six lakhs, forty-six thousand and two hundred only) default during the 10 A period, the remaining default amount is Rs 99,84,479/- (rupees ninety-nine lakhs, eighty-four thousand, four hundred and seventy-nine only) which is again below the IBC threshold.

8. The Respondent cites the case of ***Decor Paper Mills Ltd vs Mahashakti Plasto Pvt Ltd [Company Appeal (AT) (Insolvency) No. 2022 of 2024]***, which establishes that invoices falling within the 10 A period must be excluded from default claims. Therefore, the Application filed by the Appellant under Section 9 is not maintainable, as the default amount is below the statutory threshold.

9. Additionally, the Appellant's claim that the Respondent failed to dispute the date of default during the 10 A period is irrelevant. Section 10 A operates automatically by law to bar proceedings during the restricted period, and it is the duty of the Ld. AA to scrutinise this bar, even in the absence of a defence.

10. The Respondent further submits that the Application under Section 9 of IBC is barred by Section 8 of IBC. A commercial suit was filed between the same parties for the same amount on 01.05.2023, prior to the issuance of the Demand Notice on 23.08.2023 (pg 99 of the Appeal). The Respondent raised the issue of the pendency of the suit in response to the Demand Notice and

informed the Appellant that the notice was illegal due to the pendency of the suit. The Ld. AA rightly considered this issue and correctly concluded that the Application under Section 9 of IBC is not maintainable, given the pendency of the commercial suit. The Appellant cannot file a separate Insolvency Application under Section 9 while a commercial suit is pending on the same subject matter.

11. The Respondent submits that the Impugned is well-reasoned and does not suffer from any legal infirmity. The Application filed by the Appellant under Section 9 of IBC is not maintainable for the following reasons:

- The default amount is below the threshold required under IBC.
- The default amount in invoices falling within the 10 A period must be excluded.
- There was no agreement to charge interest on delayed payments.
- The pendency of the commercial suit bars the Application under Section 9.

In view of the above, the Respondent prays that this Hon'ble Appellate Tribunal dismiss the Appeal with exemplary cost, as it is an abuse of process and a misuse of the IBC framework. The Respondent respectfully submits that the Ld. AA's decision is correct, and the Appeal should be dismissed with appropriate costs.

Appraisal:

12. Heard counsels for both sides and perused materials placed on record.

13. The Appeal under Section 61 challenges the Order dated 02.07.2024, passed by the Adjudicating Authority which dismissed the Section 9 Petition

filed by the Appellant/Operational Creditor/Comet Performance Chemicals Private Limited against the Respondent/Corporate Debtor/Aarvee Denims and Exports Limited, primarily on the grounds that the debt claimed was below the statutory threshold limit of rupees one crore as specified under Section 4 of the IBC and that the interest amount claimed was disputed. It is claimed that the Corporate Debtor was liable to make payment of Rs 1,36,30,679 (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only), [Rs 60,44,800/- (rupees sixty lakhs, forty-four thousand and eight hundred only) towards principal, Rs 45,01,893/- (rupees forty-five lakhs, one thousand, eight hundred and ninety-three only) towards interest @ 24% on outstanding principal amount and Rs 30,83,986/- (rupees thirty lakhs, eighty-three thousand, nine hundred and eighty-six only) towards interest @ 24% per annum on delayed payment made]. It also claims that there is a clause for the payment of interest @ 24% in all the invoices received by the Corporate Debtor.

14. Per contra, the Respondent/Corporate Debtor contends that Purchase Orders between them never stipulated any provision for interest on delayed payment. It is also contended by the Respondent that the Appellant had never charged any interest on delayed payment and it had also never paid any interest on delayed payment. Therefore, inclusion of interest component is just to cross the hurdle of the threshold of rupees one crore limit to initiate CIR proceedings against the Respondent. Also, the Appellant has unilaterally mentioned interest @ 24% on the invoices. The Appellant has charged interest

on the principal without any provision in the contract (which in this case is a Purchase Order) and also interest on the delayed payment without any provision. Respondent also contended that Operational Creditors cannot claim interest without prior agreement with the Corporate Debtor as Section 5 (21) of the Code only stipulates claims on goods and services and the same does not include interest unless there is an express agreement between the parties. If that be the position the total outstanding would be below the threshold of rupees one crore.

15. After examining the submissions and materials on record, the short issue which emerges is whether in the facts of the case the Application filed by the Appellant under Section 9 of IBC is maintainable or not.

16. First, we look into the claims and counter claims of the threshold limit under Section 4 of the IBC. The Appellant's claims aggregates Rs 1,36,30,679/- (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only) including interest. Section 5 (21)¹ of the IBC restricts claims to those arising from goods or services, and interest is recoverable only when expressly agreed upon by the parties. In the absence of such agreement, the interest component cannot be considered part of the operational debt. Consequently, without interest the outstanding principal

¹ **Section 5(21) of IBC Code** provides that: operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the ⁴[payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

amount alone is Rs 60,44,800/- (rupees sixty lakhs, forty-four thousand and eight hundred only) and is well below the threshold of Rs 1 crore specified under Section 4 of the IBC.

17. The Respondent relies upon ***Rishabh Infra Through Hari Mohan Gupta vs Versus Sadbhav Engineering Ltd [Company Appeal (AT) (Insolvency) No. 1881 of 2024]*** wherein it has been held that invoices with interest clauses, which were not part of the formal agreement, are unenforceable. This judgment supports the case of the Respondent.

18. Accordingly, we agree with the submissions of the Respondent and also the findings of the Adjudicating Authority that no interest can be charged against the supply of goods and services for delayed payments until and unless there is an express agreement between the parties. We find justification in the claim of the Respondent that the interest claim was unilaterally imposed and lacked any contractual basis.

19. Next we look into the exclusion of Claims falling within the Section 10 A period. The invoices dated between 29.11.2019 and 07.02.2020, amounting to Rs 36,46,200/- (rupees thirty-six lakhs, forty-six thousand and two hundred only) fall within the restricted period under Section 10 A of the IBC. As such, defaults related to these invoices cannot form the basis of an Insolvency Application. Deducting this amount from the total alleged outstanding of Rs 1,36,30,679/- (rupees one crore, thirty-six lakhs, thirty thousand, six hundred and seventy-nine only) reduces the admissible claim

to Rs 99,84,479/- (rupees ninety-nine lakhs, eighty-four thousand, four hundred and seventy-nine only) which remains below the statutory threshold of rupees one crore. It is to be noted that this gets further reduced on deduction of the claims of interest.

20. The Respondent has also placed his reliance on the judgment of this Tribunal in ***Decor Paper Mills Ltd vs Mahashakti Plasto Pvt Ltd in Company Appeal (AT) (Insolvency) No. 2022 of 2024*** which establishes that invoices falling within the 10 A period must be excluded from default claims. Therefore, the Application filed by the Appellant under Section 9 is not maintainable on this count also, as the default amount is below the statutory threshold.

21. Furthermore, it is to be noted that even if the dispute relating to invoices falling within 10 A period is not raised by the Respondent, as is being argued by the Appellant, it is not a bar as it is the duty of the Adjudicating Authority to scrutinise whether the invoices are barred by law or not.

22. Lastly, we also delve into the issue of the pendency of Commercial Suit between the parties. The Appellant filed a Commercial Suit for the same claim on 01.05.2023, prior to issuing the Demand Notice on 23.08.2023. The Corporate Debtor had in his reply to the demand notice had clearly brought out the existence of pre-existing dispute as well as the pendency of this suit. Due to a pre-existing dispute between the parties, such a petition cannot be

entertained under Section 8 of the Code. Therefore, the Appeal is not maintainable on this count also.

Order:

23. In the above background we find that the Section 9 Petition is not maintainable on multiple counts. Therefore, the Impugned Order dated 02.07.2024 rejecting dismissal of the petition does not suffer from any legal infirmity. The Appeal lacks merit and is accordingly dismissed without any costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**New Delhi.
January 13, 2025.**
pawan