

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1014 of 2019

[Arising out of Impugned Order dated 23rd July 2019 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench, Mumbai in C.P. (IB) No. 843/MB/2019 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

M/s Steel India

Partnership registered under the Partnership Act, 1932

D/7, 40L Kunthunath Apt.

Nahur Road, Mulund (W)

Mumbai – 400080

...Appellant

Versus

Theme Developers Pvt. Ltd.

3AB Rajabhadur Mansion

20 Ambalal Doshi Marg

Fort, Mumbai – 400023

...Respondent

Present:

For Appellant: Mr Harsh Gokhale, Advocate

For Respondent: Ms Surekha Raman, Advocate

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This appeal emanates from the order passed by the Adjudicating Authority on the application filed U/S 9 of the Insolvency and Bankruptcy Code 2016 (for short '**I & B Code**') by the Appellant /applicant M/s Steel India to initiate Corporate Insolvency Resolution Process (CIRP) against the corporate debtor M/s Theme Developers Pvt. Ltd. The appellant contends that the '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 the ‘Operational Creditor’ to the ‘Corporate Debtor’. The Applicant states that it supplied the steel bars to the ‘Corporate Debtor’ for their construction activity, at their project sites and against these supplies various invoices have been raised. Details of invoices are given below:

<u>“S. No.</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”

It is further stated by the ‘Operational Creditor’ that as per the terms and conditions between the parties; it was aggrieved that in case the payment is delayed beyond 60 (sixty) days, 2% interest per month will be charged.

The Appellant/Operational Creditor further contends that amount due towards the ‘Corporate Debtor’ is of interest amounting to Rs.22,64,054/-., for delayed payment against the goods sold and delivered. The details of computation of outstanding amount, relating to the payment of interest for delayed payment is Rs.22,64,054/-, which is due and payable, against the ‘Corporate Debtor’.

The Adjudicating Authority rejected the petition, on the ground that outstanding amount is relating to the payment of interest-only, on account of the delayed payment, to the extent of Rs.22,64,054/-,i.e. for the period from 2015 to 2018.

The Adjudicating Authority rejected the petition, also on the ground that the 'Corporate Debtor' has raised the dispute on 10th January 2019, after receiving the first demand notice, stating that they are not liable to pay the amount, as claimed by the 'Operational Creditor'. The demand notice has been issued on 15th January 2019. The petition was rejected, on the ground of pre-existing dispute, covered under Section 5 sub Clause 6(a) of the I & B Code 2016.

The Learned Counsel for the Respondent, corporate debtor submits that the 'Operational Creditor' has filed the Application under Section 9 of the I & B Code, before the Adjudicating Authority, alleging its dues towards interest on loan alone, which is not maintainable, given the decision of this Appellate Tribunal in the cases of SBF Pharma V Gujarat Pharma caps Pvt. Ltd, Company Appeal (AT) (Insolvency) No. 883 of 2019 and Company Appeal (AT) (Insolvency) No. 1227 of 2019 in S.S. Polymers Versus Kanodia Technoplast Limited.

The Respondent/Corporate Debtor contends that interest alone on loan does not qualify the term 'Operational Debt', as defined under the 'I & B Code' 2016. The Respondent further submits that the Appellant has suppressed the fact that before issuance of demand notice dated 13th January 2019, it had issued the purported demand notice DT. 28th

December 2018 under the 'I & B Code' 2016, in Form-3 claiming a sum of Rs.36,00,006/-, which includes the principal amount Rs.13,35,952/- and interest to the tune of Rs.22,64,054/-. In response to the first demand notice dated 28th December 2019 the 'Corporate Debtor' made the payment of the principal amount of Rs.13,35,952/- via RTGS on 28th January 2019 and raised the dispute regarding the outstanding interest amount, i.e. Rs.22,64,054/- towards interest dues. The Respondent further submits that before the issuance of demand notice under Section 8 of the I & B Code, the 'Corporate Debtor' has raised the dispute about the outstanding interest, i.e. Rs.22,64,054/-, which is purported to be claimed as interest on account of delayed payment @ 2% per month.

We have heard the arguments of the Learned Counsel for the parties and perused the record.

Admittedly, the outstanding amount against the 'Corporate Debtor' is towards interest amount of Rs.22,64,054/-, for delayed payment against the goods sold and delivered. It is evident from the particulars of claims annexed with the Appeal as Annexure A2 (Page 16).

This Appellate Tribunal in the case of Company Appeal (AT) (Insolvency) No. 1227 of 2019 in S.S. Polymers Versus Kanodia Technoplast Limited held that:

*"5. Admittedly before the admission of an application under Section 9 of the I&B Code, the 'Corporate Debtor' paid the total debt. **The application was pursued for realisation of the interest amount, which, according to us is against the principal of the I&B Code,***

as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the ‘Corporate Debtor’ and which is barred in view of Section 65 of the I&B Code.”

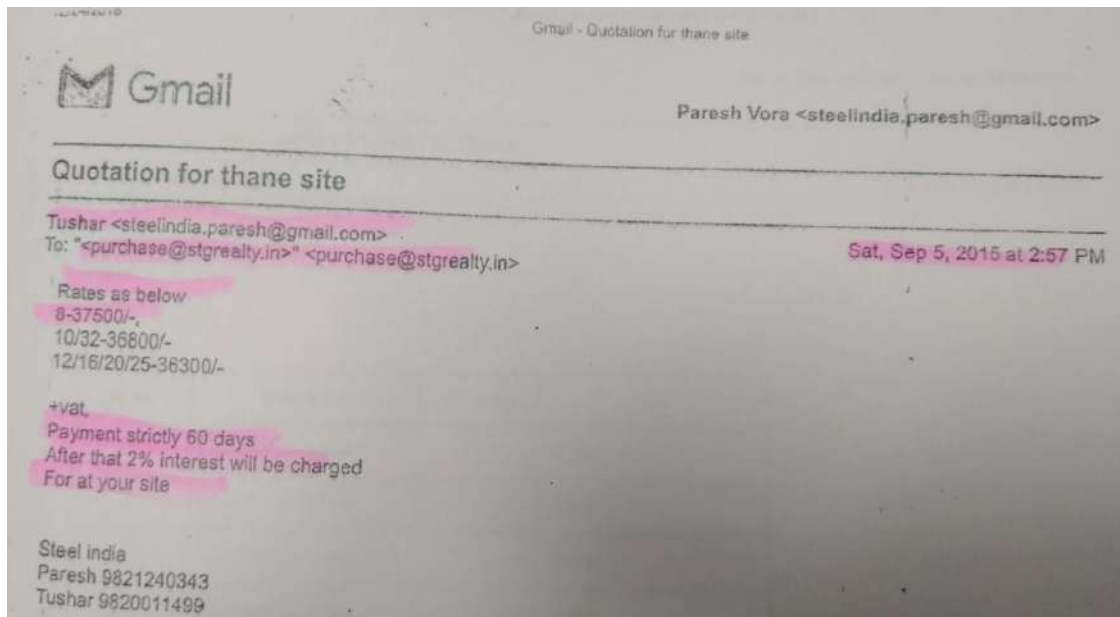
(Quoted verbatim)

Similarly, in case of Company Appeal (AT) (Insolvency) No. 883 of 2019 in SBF Pharma Versus Gujarat Liqui Pharmacaps Pvt. Ltd., this Appellate Tribunal rejected the Petition for the realization of only interest amount, on the ground that the Petition is filed for other than for the Resolution of Insolvency or liquidation. This Appellate Tribunal observed that:

“7. In the present case, we find that the Respondent-‘Corporate Debtor’ is not insolvent and viable and feasible to pay the claim amount. Only for recovery of the interest, the Appellant is pursuing the Insolvency Resolution Process which, according to us, is malicious intent for any purpose other than for the resolution of insolvency, or liquidation.”

(Quoted verbatim)

The respondent further contends that, the claim of interest alone on loan, does not clarify as an ‘Operational Debt’ under the ‘I & B Code’. It is settled that the charging of interest, ought to be an actionable claim, enforceable under law, provided it was properly agreed upon between the parties. In this case, Learned Counsel for the Appellant submits that the email dated 05th September 2015, relates to the quotation only. The scanned copy of the email is as under:



The Appellant contends that as per agreed terms @ 2% interest was payable if the payment is delayed for more than 60 days. In this case, undisputedly, payment was delayed. Therefore the 'Corporate Debtor' is liable to pay interest amount as per agreed terms and conditions.

The 'Operational Creditor' has placed reliance on the email dated 05th September 2015, which shows that 'Operational Creditor' quoted the rate to the 'Corporate Debtor' wherein, it was mentioned that if payment was delayed for more than 60 days, then interest@ 2% per month will be charged. The 'Operational Creditor'/Appellant has not filed any document to show that the 'corporate debtor ever agreed to pay the interest on delayed payment. Based on an email dated 05th September 2015, it is apparent that the 'Operational Creditor' quoted the rate, which contains the clause of charging interest on delayed payment if payment is not made within 60 days. But the copy of supply order is not filed by the operational creditor to prove that interest @2% per month is chargeable if payment is not made

within 60 days. It was mentioned that on delayed payment interest @ 2% per month will be charged. But no document is placed before us to show that the said term of charging 2% interest on delayed payment was accepted by the 'Corporate Debtor'. The Copies of the invoices, which are annexed with the Appeal does not contain the said term that interest is to be paid @ 2% per month, if the payment is delayed for more than 60 days.

It is pertinent to mention that 'Operational Creditor' issued first demand notice on 28th December 2018. Based on this first demand notice. The 'Corporate Debtor' made the payment of the principal amount, and only an interest amount of Rs.22,64,054/- remained outstanding towards interest, for which the 'Corporate Debtor' raised the dispute. After that, the 'Operational Creditor' issued the demand notice on 15th January 2019 Application for initiation of corporate insolvency resolution process under Section 9 of the I & B Code was filed before the Adjudicating Authority. Before the issuance of the second demand notice, the dispute relating to the payment of interest was existing. Therefore, the Adjudicating Authority rejected the Application by the Impugned Order.

It is also pertinent to allege that the outstanding amount is towards interest on the delayed payments, for which there was a pre-existing dispute, before issuance of demand notice. The alleged claim amount, towards interest on loan alone, cannot be termed as an 'Operational Debt'. For the reasons aforesaid, we are not inclined to interfere with the order passed by the Learned Adjudicating Authority.

The Appeal is dismissed. No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
11th FEBRUARY, 2020

pks/md