

In the National Company Law Tribunal
Mumbai Bench.

CP No.1294/I&BC/NCLT/MB/MAH/2017

Under Section 9 of Insolvency & Bankruptcy Code, 2016

In the matter of

Orissa Sales : Petitioner

V/s

Gammon India Limited : Respondent

Order delivered on: 01.02.2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : 1. Mr. G.K. Jain, Chartered Accountant.

For the Respondent(s): : 1. Mr. Shyam Kapadia, Counsel
2. Ms. Smruti Kanade, Advocate
3. Mr. Suraj Kaushik, Advocate
4. Mr. P.N. Dixit, Representative of GIL.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition filed by "**Operational Creditor**" under I&B Code on Form No.5 dated 10.08.2017 by invoking the provisions of section 9 claiming operational Debt of Rs.67,19,798/- and with Interest ₹1,27,94,914/-, claiming against the Operational Debtor M/s. Gammon India Limited.

An interesting question is to be answered in this Petition that whether on receiving the principal operational debt amount during the pendency of the Petition before NCLT, the Petitioner can press for the admission of the Petition only in respect of the Interest amount alleged to be outstanding, firstly without revising the claim of Outstanding Debt and secondly when the eligibility of Interest claim is challenged by the Operational Debtor ?

2. Petition was mentioned for Admission on 18.08.2017 and the Petitioner was directed to complete the requirement such as proposal of IRP. From the side of the Respondent Debtor, Learned Representative sought time to explore the possibility of

"Settlement". On the next date of hearing, held on 13.09.2017, an Affidavit has been filed from the side of the Respondent Debtor that the Petitioner has wrongly relied upon a Certificate of Confirmation of liability dated 20.11.2015 because the signatory of the said Balance Confirmation Letter was not an authorised person of the Company. In addition to this objection, the Petitioner is asked to furnish the details of the Invoices and the details of goods supplied. Likewise, the Respondent was also asked to furnish the Statement of Account of the Creditor in the Books of the Corporate Debtor. Thereafter, the matter was listed for hearing on 05.12.2017 and the Corporate Debtor was asked to inform the progress about the proposed Settlement. The Petition was then listed for hearing on 22.12.2017 and the Respondent Debtor has placed on record an information that the Principal amount of ₹67,19,798/- had already been paid on 19.12.2017 through RTGS and the said amount has duly been credited in the Bank Account of M/s. Orissa Sales (Operational Creditor).

3. Although the Principal Debt amount had admittedly been paid by the Debtor but the Creditor had demanded the payment of Interest, which according to the Learned Representative Mr. G.K. Jain is the part of the Operational Debt claimed as per the Petition. So, to settle the question of **eligibility of claim of Interest** under the facts and circumstances of the case, the case was fixed for hearing to decide the controversy of claim of Interest.
4. On the date of hearing from the side of the Petitioner Learned Representative Mr. Jain has drawn our attention on the synopsis of events and described that the Petitioner had supplied hardware and electric goods to Gammon India during the period of 01.04.2012 to 20.11.2015 at the site of Project. A reliance has also been placed on a Balance Confirmation Letter dated 20.11.2015. It has also been informed that under the Insolvency Code a Notice of Demand under section 8 was served on 17.07.2017. Learned Counsel has explained that the amount in question was not received as is also apparent from the Bank Statement of the Creditor as well as affirmed by a Certificate issued by the Bank. Even after several reminders the outstanding Debt was not paid hence the Petitioner has submitted the impugned

Petition under section 9 of The Code with the Prayer to initiate Insolvency Proceedings against the Corporate Debtor. He has emphasized that out of the total debt amount, which was inclusive of interest, only a part payment has been received during the progress of hearing hence the Petition deserves admission for rest of the claim of debt.

5. On the other hand, from the side of the Respondent Debtor, Learned Representative Mr. Sham Kapadia along with Mr. P.N. Dixit, Representative of Gammon India Limited are present. On Merits the argument is that the impugned confirmation letter dated 20.11.2015 is not a valid document on the basis of which the Creditor is claiming the Debt. Only on placing strong reliance on one document, which is controversial, the Creditor has filed this Petition which should not be admitted. It is pleaded that factually the Petitioner has neither submitted all the Invoices in support of the claim of Debt, nor furnished Statement of Account in its Ledger but simply furnished Statements which according to Learned A.R. are not admissible evidences. Learned Counsel has vehemently pleaded that in spite of the fact that the Debt in question was highly controversial and full of dispute but to avoid the litigation the Debtor Company had decided to "Settle" the Debt amount, hence already paid the Principal Debt which has duly been accepted by the Operational Creditor. He has further pleaded that it is unfair and unjustifiable to raise demand for payment of Interest specially under the circumstances when the Principal amount itself is full of doubt. Arguments were concluded by making a statement that no evidence is placed on record that the interest was ever agreed to be charged in case of delay hence the petition do not survive after the payment of the principal amount with raising the controversy.

- 5.1 On the question of Interest, it is pleaded that there was no agreement for payment of Interest. Answering the argument of Learned Counsel of the Petitioner, Mr. Kapadia has submitted that although it is correct that as per the Purchase Order issued by Gammon India Limited, there was a "Payment Term" of 60 days' credit, but there was no clause of payment of Interest and specially there was no agreement about the rate of Interest. He has further pleaded that all the Invoices have not been

placed for scrutiny, however, only one sample Invoice was placed as an evidence, that too was a unilateral evidence having no importance in the eyes of Law. Further advancing his arguments it is informed that there was no proof placed on record to establish that the work assigned was completed and thereafter a Completion Certificate was obtained. The Petitioner had not fulfilled his commitment, hence on principle the Company is not under any obligation even to pay the Principal Debt amount. Importantly drawing our attention on the Statement of Account of Gammon India in the Books of Orissa Sales it is pointed out that there was no charging of Interest, hence the outstanding Debt as per the said statement for amount of ₹67,19,798/- was paid bona fide with an expectation that the Creditor shall not unnecessarily raise the issue of claim of Interest. Reliance was placed on a decision of **NCLT, Chandigarh, Order dated 18.04.2017 (CP No.8/2016(RT No.9/Chd/PB/2017)) in the case of M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd., affirmed by NCLAT Order dated 11.08.2017 (Company Appeals (AT) (Ins) No. 64 of 2017).**

6. **FINDINGS : -** Heard both the sides at length in the light of the records available for our perusal. The Petition for our adjudication is submitted by the 'Operational Creditor' by invoking the provisions of section 9 of the Insolvency Code. As per Form No.5 submitted under Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 vide Part-IV the total Debt amount referred as ₹1,27,94,914/- (inclusive of Interest). However, as per Column 2, the amount claimed to be in default was referred as ₹67,19,798/-. At this juncture it is worth to mention that the Petitioner had submitted two Statements, one was a Statement of Account of the Debtor in the Book of the Creditor. Second, a calculation- statement of Interest has also been annexed, but it was not a reproduction of the entries made in the Books of Accounts of the Creditor, rather it is a plain calculation sheet.

- 6.1 Before we examine the Merits of this case it is expected to deal with the definition "**Claim**" prescribed under Section 3 of **Definitions** of The Code wherein vide Sub-section (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;

(b) right to remedy for breach of contract under any law for the time being in force, if 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;"

6.2 On careful reading of this definition the main ingredient of a **claim** is that it should be an enforceable right to be executed due to breach of contract under any Law. Due to the breach it gives rise a legal right to claim for the payment. It can be secured or it can be unsecured but must be either in 'existence' or may 'accrue' in future. Further, if we read this definition along with the definition of **"Actionable Claim"** as prescribed under The Transfer of Property Act a conclusion can be drawn that the **claim must be definite, it must be actual, it must be constructive and recognizable under the Civil Court or any other Court of Law**. It must not be a doubtful claim. A Debtor must be under strict legal obligation to pay the agreed Debt without any ambiguity. For the sake of clarification, it is further elaborated by adding few more words that an unascertained sum of money, for e.g. *Mesne Profit* do not fall under the definition of Actionable claim.

6.3 The next definition is the definition of **"Debt"** as defined under section 3(11) of The Code wherein the term "Claim" is also used. This definition reads as under :-

" "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. "

Undisputedly, a Debt is a Property. It is assignable and ought to be an Actionable claim. A Debt is an obligation to pay certain sum of money by a Debtor to the Creditor. It is legally due and owed by the Debtor. Even if not in existence the **accrual** must be definite and ascertainable, therefore, accepted legal position is that a Debt may be due in present or may be payable in future. But the fundamental position of Law is that even if the right of claim may fall in future it must exist at present. As a consequence, there must be an instrument in writing presently in existence so that on the basis of the documented obligation the claim can be enforceable in future. In other words, it can further be explained in simple language

that an Actionable Claim being an enforceable right under a Law must be duly supported by a cogent evidence in existence.

6.4 Next is the definition of "**Operational Debt**". As defined under Section 5(21)

"Operational Debt" means "*a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment 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,*"

This definition has used both the terminologies i.e. "**Claim**" and "**Debt**", as discussed above. Meaning thereby, an "Operational Debt" is an ascertainable **claim** to be held as a **Debt** recoverable in the eyes of Law. To consider a Petition of an "Operational Creditor", these basic ingredients are first required to be ascertained. If these basic ingredients are missing in a Petition the same is liable to be dismissed. Facts of each case are therefore the guiding factor to examine such basic ingredients to arrive at a conclusion that whether under the surrounding circumstances an 'Operational Debt' is a rightful claim which can be treated as a recoverable Debt.

6.5 We have examined the facts of this case in the light of the legal position discussed hereinabove. As already observed, the charging of Interest on an outstanding Debt ought to be an Actionable Claim so that admissible under the eyes of Law. Claim of Interest is therefore within the ambits of an Actionable Claim which is enforceable under Law. At the cost of repetition, a claim is enforceable under Law if it is supported by cogent admissible evidence, therefore, as far as the question of present controversy related to charging of Interest is concerned, the same is enforceable if it is properly documented and agreed upon. It is also necessary that the rate of Interest should also be agreed upon between the Parties. In the present case, these basic requirements appear to be missing. Rather, the Petitioner had not established to the hilt the eligibility of claim of Interest. Merely a filing of a calculation sheet, that too a computer generated statement, is in our humble opinion, a **self-serving document** and not a cogent evidence admissible under the Law. The absence of a written instrument acknowledging the Liability of Interest payment as also

acknowledging the Liability of the rate at which Interest was to be charged, definitely affect adversely the Claim of the Petitioner.

6.6 One more important fact is brought to our notice that the Petitioner has not submitted a copy of the Ledger Account of the Respondent Company as appearing in its Books of Accounts to demonstrate that the Interest amount has actually been accounted for in that Account. Bona fide of the Petitioner could be established by placing on record such corroborative evidence that the Interest on **accrual** basis has been accounted for in the Books of Accounts of the Petitioner and in good faith duly declared as **income** before the Tax Authorities. Therefore, in that situation an argument could be raised that on one hand the Petitioner had paid the Tax on the claimed Interest but on the other hand now the Respondent Company is not paying the Interest causing double jeopardy to the Petitioner. Since this is not the defence of the Petitioner to support the claim of Interest, hence remained unfounded.

7. Having held as above, it is hereby concluded that under the facts and circumstances when the Principal amount of Debt had admittedly been paid and duly accepted by the Petitioner and the claim of Interest remained unsubstantiated in the absence of cogent evidence, the "Operational Debt" in question remained unascertainable, as a consequence, the Petition under section 9 of The Code is not maintainable. Dismissed. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN

Member (Judicial)

Date : 01.02.2018

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Sd/-

M.K. SHRAWAT

Member (Judicial)