

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

CP (IB) No.114/BB/2023
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

JANUS GBAC LIMITED

Springmead Farm, Priddles Lane,
 Combe St Nicholas, Somerset,
 United Kingdom – TA203HS
 Rep. by
 CS Hari Babu Thota
 41/1, 2ND Floor, 11th Cross, 8th Main
 2nd Block, Jayanagar, Bengaluru

... Petitioner/Operational Creditor

Versus

BELOORBAYIR BIOTECH LIMITED

4112, Utkarsha, K R Road
 Banashankari 2nd Stage, Bangalore- 560070

... Respondent/Corporate Debtor

Order delivered on: 04/10/2024

Coram:

Hon'ble Justice K. Biswal, Member (Judicial)
 Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri Atul Madhavan
 For the Respondent : Shri Pramond Nair, Sr Counsel
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O R D E R

Per: Manoj Kumar Dubey, Member (Technical)

1. The present Company petition is filed on 27/07/2023, under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity

IB Code), r/w. Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016, by JANUS GBAC LIMITED. (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against Beloorbayir Biotech Limited (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of USD 140,513.09 (US Dollars One Hundred and Forty Thousand Five Hundred and Thirteen and Nine Cents). In Part IV of Form No.5 filed with application, the following information is given:

1	Total amount of Debt, details of Transactions on account of which debt fell due and the date from which such debt fell due	Principal: USD 105,300.60 Interest: USD 35,212.49 Total Debt: 140,513.09 The above debt has occurred on account of supply of bottles made by the Operational Creditor herein to the Corporate Debtor and interest charged due to such non-payment as per the applicable law of the home country of the supplier. Date of Default: 15/03/2020
2	Amount claimed to be in Default and dates on which the Defaults occurred (Attach the workings for computation of amount and days of Default in Tabular Form)	Default Amount: USD 140,513.09(USD Dollars One Hundred and Forty Thousand Five Hundred and Thirteen and Nine Cents) Default in INR Rs. 1,14,98,186.15(Rupees One Crore Fourteen Lakh Ninety- Eight Thousand One hundred and Eighty- Six and Fifteen Paise) Conversion Rate: Rs 81.83 per Dollar on 24 th July 2023) Date of Default: 15/03/2020

- 2.** Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
- i) The present Petition is being filed by Janus GBAC Limited, Operational Creditor with the debt more than INR 1 Crore, against Beloorbayir Biotech Limited (Corporate Debtor) for initiation of CIRP under Section 9 of IBC, 2016 and Rules and Regulations made thereunder for revival of the Corporate Debtor.
 - ii) The petitioner company was supplier of goods to respondent company and an amount of USD 1,40,513.09 (One Hundred and Forty Thousand Five Hundred and Thirteen US Dollars and Nine Cents) which is roughly Rs. 1,14,98,186.15 (Rupees One Crore Fourteen Lakh Ninety-Eight Thousand One Hundred and Eighty Six and Fifteen Paise) at a conversion rate of INR 81.83 per US Dollar as on 24/07/2023.
 - iii) The present application has been preferred by the applicant company in order to revive the Corporate Debtor from its insolvency and for protection of interest of all stakeholders. A recourse to mediation under Section 12A of the Chapter III-A of Commercial Courts Act, 2015 was also taken in order to settle the matter amiably. However, the respondent company has been reluctant to co-operate and settle the matter, hence, the petitioner is left with no other recourse, but to file this petition.
- 3.** The Respondent filed its statement of objection, vide Diary No: 5690 dated 10/11/2023, and written submission vide Diary No: 5170, dated 04/09/2024, in which it is contented as under:
- i) The principal debt is below the threshold limit for initiating the Corporate Insolvency Resolution Process under Section 9 of the IBC Code. From the petition there it is clear that the default amount is only USD 1,05,300, which after conversion is only Rs 86,16,748.098/- which is below the threshold limit. The Operational Creditor's claim does not satisfy the 1Crore

threshold under Section 9 of the IBC. Even if interest is included, the lack of mutually agreed-upon rate renders the interest claim speculative. The NCLAT, in *Mr Prashant Agarwal v. Vikar Parasrampuria* 2022 SCC OnLine NCLT 3781, has acknowledged that the interest amount can be considered to meet threshold only when it is properly substantiated. Since the interest claim here is unsubstantiated, it cannot be included to satisfy the 1Crore requirement.

- ii) The default date has been falsely made out without any basis, the date of default has been given of the last invoice being raised, and the same does not constitute any true nature for the default made by the Respondent Company. Further, the Sl.No.10 of the Annexure-3 of the Petition filed by the Operational Creditor has clearly mentioned that the due date of the Last invoice raised by the Operational Creditor was 14/04/2020, which is to be considered as the default date because it is clearly mentioned for due date for the payment of the last invoice that the Operational Creditor has raised. It is seen from Annexure-5 of the Petition. The said application was made by the Operational Creditor on 22/06/2023 just to take an umbrella and escape from the threshold limit for the pecuniary limits.
- iii) The claims made by the Operational Creditor, particularly with respect to interest, do not establish the existence of a clear “operational debt.” As per the IBC, an operational debt must relate to the provision of goods and services, and any associated interest must be contractually agreed upon. The absence of such agreement or evidence means that no operational debt exists in this case.
- iv) Moreover, neither the Agreement nor the invoices contain any clause that binds the party that if payment is delayed, excessive penalties or any at all will be imposed upon either of the parties. The Agreement dated 12/12/2014 merely

provides the business understanding agreed between the parties for the promotion and trading of the Respondent's company. Further, neither the Agreement nor the invoices contain any clause that binds the party that if the payment is delayed, excessive penalties or any at all will be imposed upon the either of the parties. The Operational has been seeking penal interest without any justification or grounds, which was never agreed upon by the parties to pay out in the event of any delay in the payment. There is no clause that makes the parties liable to pay any delay in payment. Further, nor any such penalty was specified in the invoices issued to the Respondent. Instead of modifying the agreement or obtaining the Respondent's assent, the penal interest was imposed arbitrarily and without any logical justification. Reliance is placed on the judgement of

A. *Tushar Harshadrai Mehta v. Samarth Softech Solutions Pvt Ltd.*, CP(IB) No. 311/MB/2023.

B. *Swastik Enterprises v. Gammon India Ltd.* 2018 SCC OnLine NCLT 9730.

C. *Steel India v. Theme Developers Pvt Ltd.*

- v) It is to be taken into account that the Operational Creditor has approached this Hon'ble Tribunal by concealing the material facts; the Operational Creditor was solely responsible for collecting payment from the customers who had business transactions with the Respondent Company. However, the Operational Creditor failed to collect such payment, and the payment is yet to be made to the Respondent Company by few of the customers of the Operation Creditor. It is submitted that the material placed on record would clarify fortify this position. In any case, the material placed on record and from the email transactions produced as Annexure-2 on record and reply thereto, clearly showed that there was an "existence of

dispute” and as such, this Hon’ble Tribunal may be pleased to dismiss the Petition.

4. It is observed that this Tribunal on 27/02/2024 had directed the Petitioner herein to explain the issue on limitation. Pursuant to the same the Counsel for Petitioner has filed Memo vide Diary No. 1660, dated 13/03/2024 and the same is taken on record. The Ld Counsel for the Petitioner have filed Rejoinder vide Diary No 780, dated 05/02/2024 and the same is taken on record.
5. We have heard the learned counsel for both the parties and have perused the material available on record.
6. The first issue to be considered in this petition is whether the present Petition is filed satisfies the Threshold as provisioned under Section 4 of the IBC. As per the Part IV Form 5 of the Petition, the default amount mentioned is USD 140,513.09(US Dollars One Hundred and Forty Thousand Five Hundred and Thirteen and Nine Cents), which is inclusive of interest of USD 35,212 (US Dollars Thirty Five Thousand Two hundred and Twelve). However, when the interest factor added is removed from the default amount, the principal amount is USD, 105,300, i.e, Rs 86,16,699/- (Rupees Eighty Six Lakhs Sixteen Thousand Six Hundred and Ninety Nine) which clearly does not satisfy the requirement of Threshold as per Section 4 of the IBC. The cursory issue that arises in the present case is whether interest amount can be clubbed with the principal when there is no express agreement or clause in the invoice showing the same.
7. Keeping in view the decisions laid by the Hon’ble NCLAT in *Mr. Prashat Agarwal v. Vikash Parasrampur & Ors* [vide Order dated: 15/07/2022 Company Appeal (AT) (Ins) No. 690 of 2022] and *Krishna Enterprises v/s. Gammon India Ltd.* [vide Order dated 27.07.2018 in Company Appeal (AT)(Insolvency) No.144 of 2018] also the principle

followed by the Co-ordinate benches of Mumbai Bench in *Tushar Harshadrai Mehta v. Samarth Softech Solution Pvt Ltd* (vide Order dated 22/03/2024, in CP(IB) 311/MB/2023) and Kolkata Bench in *Gandhar Oil Refinery (India) Ltd. Vs. City Oil Pvt. Ltd* (vide Order dated 10/04/2023, in C.P. (IB) No. 150/KB/2021), wherein it was explicitly held that for any creditor to claim the interest in the default amount the same should be reflected in either the agreement or the invoices raised against the Corporate Debtor. The interest cannot be raised unilaterally in the Insolvency petition, without prior intimation to the Respondent.

It is observed in the present matter that there were continuous Invoices raised from early as 21/11/2018 and till 15/03/2020, however no interest component is mentioned in any of the said invoices nor agreement. Moreover, the Operational Creditor herein has been in constant communication with the Respondent, however in neither of the invoices or said email communication was there any mentioning of Interest to be added on the default amount. Further, the Petitioner has failed to produce any document/proof to substantiate their cause of levying interest on the Respondent. It is also the contention of the Respondent that the interest is levied as per the applicable law of home country which is not acceptable. Hence it is clear that the interest is only levied to meet the threshold requirements as per Section 4 of the IBC Code. If the interest amount is excluded, then the principal amount of alleged default is not sufficient enough to maintain this petition u/s 4 of the Code and hence, on this ground alone, the instant Petition is liable to be dismissed.

8. Additionally, on perusal of the Petition it is observed that the last invoice was raised on 15/03/2020 for a payment of USD 14,064.30, which as per the agreement becomes due after 7 days, hence as on the date of default mentioned, the said invoice was not 'due' to be paid, so there is no question of any default for this invoice.

Considering the above facts, the said amount of USD 14,064.30 is required to be excluded from the principal amount which would render the impugned amount to be further below the threshold.

9. Accordingly, this Tribunal is of consideration opinion that this petition is not a fit case for admission, since it has failed to meet the minimum threshold of INR 1,00,00,000/- (Rupees One Crore) as required u/s 4 of the Code to initiate Corporate Insolvency Resolution Process of the Corporate Debtor.
10. Without prejudice to the above, in so far as the limitation is concerned, since the date of default has been stated to be 15.03.2020, the limitation is available on up to 14.03.2023. However, the Petitioner has relied upon the judgment of Hon'ble Supreme Court of India dated 10.01.2022 in M. A. Nos.21 of 2022/665 of 2021 in *suo motu* Writ Petition (c) No.3 of 2020 and claimed that the period between 15.03.2020 to 28.02.2022 should be excluded, thus granting them an exclusion of 715 days from the limitation period. Accordingly, the Petitioner has claimed that the limitation period was existing up to 27.02.2025.
11. However, para III of the judgment of the Hon'ble Apex Court dated 10.01.2022 mentioned above states as under:

III. In cases where the limitation would have expired during the period between 15/03/2020 till 28/02/2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01/03/2022. In the event the actual balance period of limitation remaining, with effect from 01/03/2022 is greater than 90 days, that longer period shall apply."

This case of the Petitioner squarely falls under the scope of the direction of the Hon'ble Apex Court in the above mentioned para III, since, as on 01.03.2022, the balance period of limitation available in the case of the Petitioner is 379 days from 01.03.2022 up to 14.03.2023, which is more than 90 days. Accordingly, the actual balance period of limitation of 379

days is the entitlement of the Petitioner from 01.03.2022 in accordance with the direction of the Hon'ble Apex Court in the above referred para III of the order dated 10.01.2022. Thus the limitation in this case was available up to on 14.03.2023 only, whereas the Petition is filed on 27.07.2023; hence, the same is barred by limitation.

- 12.** Accordingly, the Petition is not maintainable in view of the required threshold limit of Rs.1 crore in accordance with Section 4 of the Code, having not been fulfilled, and also since the limitation has expired. Hence, the instant Company Petition bearing **C.P.(IB)No.114/BB/2023 is hereby dismissed.**

Sd/-

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-

(K.BSWAL)
MEMBER (JUDICIAL)